

Missouri Attorney General's Opinions - 1941

Opinion	Date	Topic	Summary
1-41	Jan 23	ELECTIONS. COMMISSIONERS. SPECIAL ROAD DISTRICTS.	Mode of conducting elections and powers of Commissioners at Special Road District Commissioners' Election.
1-41	Mar 20	COUNTY COURT. SPECIAL ROAD DISTRICTS. BONDS.	Special Road District unauthorized to vote bonds to retire road district notes held by a bank as security for a loan to the Special Road District.
1-41	June 16	CONSERVATION COMMISSION. FISH AND GAME.	Construing Section 8900, R. S. Mo. 1939.
2-41	Feb 28	SCHOOLS.	Voters of consolidated school district cannot authorize additional levy of ten cents in excess of One Dollar for repairing and furnishing colored school.
3-41	July 17	BOARD OF HEALTH.	Commissioner of Health is under no statutory duty to post bond before entering upon the duties of his office.
3-41	Nov 6	GOVERNOR.	The clause "during the recess", as used in Section 12859, R. S. Mo. 1939, means after the final adjournment of the General Assembly and when it is not in session. (b) General Assembly is now in recess. (c) The expression "without delay" means without unreasonable and unnecessary delay. (d) Writ of election issued under Section 12859, R. S. Mo. 1939, for election in March or April, 1942, may be unreasonable and unnecessary delay. Governor cannot be compelled to issue election because can not be mandamused.
3-41	Dec 20	SHERIFFS.	Deputies employed as private watchmen.
4-41	Feb 10	COUNTY CLERK OF JASPER COUNTY SALARY.	Preparation of financial statement.
4-41	July 19	Mr. Ralph E. Bailey	WITHDRAWN
5-41	Apr 28	TAXATION. SALES TAX. LIQUOR SALES.	Sales Tax Act applies to retail sales of intoxicating liquors and non-intoxicating beverages.
6-41	Apr 12	BONDS. STATE TREASURER.	Bonds deposited in banks and trust companies do not have to be inspected by Governor, Attorney-General and State Treasurer

			personally, but such duty may be delegated.
6-41	Aug 29	FUND COMMISSIONERS.	No authority to transfer funds from general revenue funds to unemployment compensation administration fund; said transfer may be made by State Auditor and State Treasurer.
6-41	Oct 31	Hon. Wilson Bell	WITHDRAWN
7-41	Aug 25	ROADS AND BRIDGES.	County may finance the improvement of roads in common road districts out of surplus road funds.
7-41	Nov 12	TAXATION.	Certificate holder, his heirs or assigns must procure a deed to property and have the same recorded within four years from date of issuance of such certificate.
9-41	Oct 14	COUNTY TREASURER. COMPENSATION.	Committee Substitute for House Bill No. 255 by implication repeals last clause of Section 10400, R. S. Mo. 1939, authorizing compensation for disbursing school monies.
9-41	Dec 9	OFFICERS. COUNTY SURVEYOR.	It is mandatory that a county surveyor in a county of not less than 20,000 nor more than 50,000 must be ex officio highway engineer.
9-41	Dec 10	BOUNDARIES. BANK OF RIVER.	Tax meaning of the term "by west bank of Mississippi River" in description of special road district boundary.
10-41	Feb 28	STATE CONSERVATION COMMISSION.	Sections 15387 to 15390, inclusive, R. S. Mo. 1939, are valid and existing statutes and do not conflict with the authority of the State Park Board.
10-41	July 9	CRIMINAL COSTS.	Where two defendants are tried jointly on murder and one was convicted and one acquitted the state must pay witness fees of defense witness on acquittal but not on a conviction.
10-41	Sept 5	Mr. Charles R. Bohrer	WITHDRAWN
10-41	Sept 19	BOARD OF PHARMACY.	It is illegal to use the words "Drug Sundries" as a sign without licensed pharmacists in charge; a license cannot be reinstated when revoked, but applicant may apply for new license.
10-41	Oct 16	CONSERVATION COMMISSION. LEGISLATURES.	Headings in bold type may be inserted in regulations without republication of said regulations.
10-41	Oct 25	CONSERVATION COMMISSION. PURCHASING AGENT.	Conservation Commission may purchase land without the approval of the purchasing agent.
10-41	Nov 1	STATE PARK BOARD. APPROPRIATIONS.	Legality of paying salaries of technical personnel out of accounts other than personal services.
11-41	Mar 31	COUNTY BUDGET	Expense for stenographic hire for prosecuting attorney can only be

		ACT.	paid out of surplus, if any exits, or class 6.
11-41	Aug 22	LOTTERIES.	Taking pictures of patrons and awarding prize to best picture is lottery.
12-41	Jan 24	COUNTY SURVEYOR. ROAD OVERSEER.	Person may hold both office of county surveyor and road overseer at the same time.
12-41	Mar 4	STATE SEAL.	Use of by Secretary of State.
12-41	July 8	SECRETARY OF STATE.	Proposed plan approved of handling service of process on nonresident operators of automobiles, growing out of civil actions in this state.
12-41	July 22	INSURANCE.	Approval of Articles of Agreement of Old Reliable Atlas Life Society of Springfield, Missouri, under Article 4, Chapter 37, R. S. 1939.
12-41	July 31	LEGISLATURE.	Laws enacted by the 1941 Legislature and approved by the Governor without an emergency clause go into effect October 10, 1941.
12-41	Aug 26	Hon. Dwight H. Brown	WITHDRAWN
12-41	Sept 3	HIGHWAY COMMISSION.	Members of the Highway Commission may attend a meeting of Highway officials outside of the State and have the expenses therefor paid by the State.
12-41	Sept 6	STATUTES. AMENDMENTS. REPEALS.	A statute amended by different acts of the same general assembly should be construed so that all amendments may have force and effect.
12-41	Sept 12	STATE PRINTING COMMISSION.	Has the authority to set aside order of July 11, 1940, rejecting all bids. May now make new contracts as to binding and printing.
12-41	Sept 23	SECRETARY OF STATE.	Limited to statutory fee of \$1.00 for notification of service of process.
12-41	Oct 21	SECRETARY OF STATE.	Official Manual should contain names and salaries of employees during the preceding biennium.
12-41	Oct 30	MISSOURI SCHOOL FOR THE BLIND.	(1) Compulsory attendance law applies to blind children. (2) Questions relating to rules are admissible. (3) Missouri School for the Blind is a charitable institution in so far as income tax deductions are concerned.
12-41	Nov 15	MOTOR VEHICLES.	Service of process, Laws of Missouri, 1941, page 435, the word "person" includes corporations.
12-41	Nov 24	SCHOOL FOR THE BLIND.	Under Chapter 72, Article 25, R. S. Missouri, 1939, if no separate school is provided for colored, blind children, such children are entitled to attend the Missouri School for the Blind.
12-41	Dec 19	ELECTIONS.	Size of ballots on constitutional convention and retaining of a judge.
13-41	Aug 6	COUNTY COURTS. OFFICERS.	County court can refuse to pay for publishing notice to delinquent personal taxpayers that a suit would be filed against them for personal

		COUNTY COLLECTORS.	taxes.
13-41	Aug 15	BILLS AND NOTES. BANKS.	A bank who is holder of a check in due course is not liable for an account of the payee in the misuse of the money.
13-41	Oct 3	SCHOOLS.	A person elected director is entitled to serve if he paid state and county taxes before qualifying.
15-41	Feb 8	TAXATION. SALES TAX.	Regulation of State Auditor imposing a use tax on property bought outside the State of Missouri and on property bought in Missouri by non-resident where property is not consumed in Missouri but is bought with intention of transporting to another state for use is invalid.
15-41	July 7	CONVICTS.	Citizenship not lost by conviction subsequently held void.
15-41	Aug 28	TAXATION AND REVENUE.	Right of redemption of owner after two year redemption period.
16-41	Feb 7	COUNTY BUDGET ACT.	Sheriff's expenses for conveying inmates to the hospital should be paid out of class 5; (2) Sheriff whose term expires before date of sale under trustee deed should conduct the sale.
16-41	Mar 14	CHAUFFEURS.	May operate on certificate furnished by Commissioner of Motor Vehicles pending issuance of metal tags. Metal tags, when issued must be conspicuously displayed.
16-41	Nov 25	SCHOOLS.	When consolidated districts close outlying rural schools districts, board should transport children under Section 10946, R. S. Missouri, 1939.
16-41	Dec 2	MONOPOLIES.	To maintain prosecution the paying of a higher price in one place than in another place, there must be an intention to suppress competition.
17-41	Jan 20	COUNTY COURTS. SOLICITORS ON PUBLIC GROUNDS. JUSTICE OF PEACE SOLICITING MARRIAGES.	The power of the County Court to make orders relating to trespassers on county property and to prohibit persons from performing such acts.
17-41	Feb 24	MOTOR VEHICLES. FOREIGN CORPORATION.	Trucks belonging to a corporation with headquarters in Ohio and stationed and registered only in the State of Illinois must also register in the State of Missouri.
17-41	Apr 10	BONDS. PUBLIC ADMINISTRATOR. OFFICERS.	County Court not authorized to pay premium on bond of Public Administrator.
17-41	Aug 13	TAXATION.	Certificates of purchase of property in Kansas City are personal

			property and taxable as such.
17-41	Oct 20	MOTOR VEHICLES.	States of Missouri and Tennessee do not have full reciprocity.
17-41	Oct 20	TAXATION. SHARES OF STOCK.	Present attitude of Supreme Court indicates that shares of stock held by a resident of this state in a foreign corporation may be subjected to a personal property tax.
17-41	Oct 22	MOTOR VEHICLES.	Full reciprocity does not exist between Indiana, Illinois and Missouri.
17-41	Nov 8	COUNTY COURTS.	Procedure to be followed in proceeding to correct error of valuations under Section 11118.
18-41	April 11	COUNTY TREASURERS.	Compensation can not be increased during term.
18-41	June 18	POOR PERSONS.	County Court may provide surgical treatment; acts judicially in determining necessity.
18-41	Aug 8	Hon. Clyde E. Combs	WITHDRAWN
18-41	Aug 12	TAXATION. COLLECTOR'S DEED.	County Collector may issue deeds of correction for deeds which have been issued for lands which have been sold for delinquent taxes.
18-41	Nov 10	CRIMINAL COSTS.	The State is only liable for the costs, including transportation to the Missouri Training School, in juvenile trials on conviction before a jury, pleas of guilty, acquittal, or dismissal under the general criminal law, where the punishment is solely imprisonment in the state penitentiary.
18-41	Nov 17	ELECTIONS. COUNTY TREASURERS.	Failure to elect County Treasurer at proper time does not create vacancy and incumbent holds office until successor is elected at next regular election and qualified.
19-41	Aug 20	OFFICIAL BONDS. COUNTY COLLECTOR.	County court can, at any time, require additional bond to be furnished by county collector if a mistake was made in the amount of taxes collected in the years previous to his election.
19-41	Aug 29	COUNTY COURTS. EMPLOYMENT OF SPECIAL COUNSEL.	County courts may employ special counsel to represent the county in civil matters only when the prosecuting attorney refuses to act or is interested, or shall have been employed as special counsel and when such employment is inconsistent with the duties of the office or if the prosecuting attorney is related to the defendant.
19-41	Oct 10	HEALTH, BOARD OF. COUNTIES.	Board of Health by regulation may quarantine person with communicable venereal disease; sheriff must serve writ of isolation but is not entitled to fee; person quarantined must pay cost thereof, but is indigent, cost must be paid by the county.
19-41	Dec 18	TAXATION.	Property person in military service not exempt. Effect and application Soldiers and Sailors Relief Act on proceeding to enforce collection.
19-41			

20-41	Jan 24	DRAINAGE DISTRICTS DELINQUENT TAXES.	Trustee appointed by county court to bid at tax sales not authorized to include delinquent drainage tax in the amount of his bid.
20-41	May 22	COUNTIES. LIABILITY FOR REVENUE BONDS.	County courts issuing revenue bonds under Section 8548, R. S. Mo. 1939, incur no objection on a county other than that mentioned in the bond.
20-41	July 23	HIGHWAY PATROL. CONSTABLES. FEES.	Highway patrolman is entitled to fee of \$1.00 upon service of a warrant which must be paid into the state treasury. The same applies as to commitments. Only one officer entitled to fee.
20-41	July 29	AGRICULTURE.	Mode of certification by the State Veterinarian for payment of cattle condemned on account of reacting to the agglutination blood test for Bang's disease.
20-41	Aug 4	TAX. COLLECTOR'S COMMISSION. DRAINAGE TAX.	Collector's commission for collecting delinquent drainage taxes should be paid out of drainage tax funds.
20-41	Sept 2	PROSECUTING ATTORNEY. SCHOOLS.	Not entitled to fee from person receiving school fund loan for examination of abstract.
20-41	Nov 10	TAXATION. PAYMENT OF TAXES WITH PROTESTED WARRANTS.	Only the owner of a protested warrant may use same for the payment of taxes.
20-41	Nov 25	ATTORNEY. CLIENT.	A corporation or association can only transact its legal affairs through a duly licensed and practicing attorney and not by a laymen.
20-41	Dec 16	OFFICERS.	County can recover on county treasurer's bond after settlement where a fraudulent settlement was made.
21-41	May 2	TAXATION.	Tax liens on property acquired by county at school fund foreclosure are extinguished.
21-41	Aug 21	LABOR.	Female employees engaged in hotel work not subject to provisions of Section 10171, R. S. Mo. 1939.
21-41	Oct 25	COUNTY COURTS AND ARMORY APPROPRIATIONS. COUNTY BUDGET LAW.	County courts may make appropriations for armories provided such appropriations are not in violation of the provisions of the County Budget Act and are not in violation of the provisions of the constitution, and especially Section 12, Article 10, thereof.
23-41	Oct 15	BARBERS.	(1) Article 5 R. S. Mo., 1939, which has to do with the trade of cosmetology, hairdressing and manicuring, has no application in cities having a population of less than five hundred inhabitants. (2) Persons

			practicing the trade of barbering must procure a barber's license in cities having a population of less than five hundred, whether they have complied with Art. 5, R. S. Mo., '39 or not.
24-41	June 5	TAXATION AND EQUALIZATION.	County Board not bound by valuations of tracts fixed by the Assessor.
24-41	June 7	TAXATION AND EQUALIZATION.	State Board of Equalization may reconsider valuation of class of property before certification of its judgment; but has no power to review its judgment after certification by State Auditor except by way of approving recommendations of State Tax Commission.
24-41	July 11	BONDS. FUND COMMISSIONERS. SCHOOLS.	State Board of Fund Commissioners not authorized to invest Public School Fund in United States bonds, said authority vested in State Board of Education; Fund Commissioners may invest in registered county, municipal or school district bonds of state, but not in drainage or levee district bonds.
24-41	July 18	GOVERNOR.	Has 30 days after final adjournment of General Assembly to act upon legislation presented him after final adjournment.
24-41	July 22	APPROPRIATIONS.	Section 5 of House Bill No. 556 valid.
24-41	July 30	TAXATION.	Mode of apportioning for taxation the valuation of the distributable property of telephone, telegraph, electric power and light companies and electric transmission lines.
24-41	Aug 4	GOVERNOR.	Time within which to approve or disapprove bills in his hands at the time of adjournment of the Sixty-first General Assembly.
24-41	Aug 11	GOVERNOR.	In the absence of a protest as contemplated by Art. V, Sec. 37, presumption is that bill was not amended on passage so as to change its original purpose, which presumption is conclusive; the amendment made by Senate to H. B. 431, does not change its original purpose.
24-41	Aug 11	GOVERNOR.	Time when the Governor shall approve or reject a bill which has been presented to him by the General Assembly.
24-41	Aug 11	GOVERNOR.	If last day on which Governor may act on legislation falls on Sunday, the following Monday is to be considered as last day.
24-41	Aug 11	STATUTES.	Constitutionality of exemption provisions of House Bill No. 431.
24-41	Aug 19	TAXATION. TAX EXEMPTION. FRAUDULENT EVASION.	Taxpayer who converts assets into tax exempt securities with fraudulent intent to evade taxes does not relieve himself of the liability to pay the taxes.
24-41	Aug 21	CONSTITUTIONAL LAW.	State Highway Patrol, under Section 44a, Article IV of the Constitution of Missouri can only enforce the law as to motor vehicle laws and

		STATE HIGHWAY PATROL.	traffic regulations.
24-41	Sept 2	GOVERNOR. PATENTS. PUBLIC LANDS.	Governor may issue patent in correction of a defective one.
24-41	Sept 8	PROSECUTING ATTORNEY. PUBLIC OFFICERS.	Officer elected for a term, and until successor is elected, holds office until the election of a properly qualified successor.
24-41	Sept 19	HIGHWAY PATROL.	Forty-seven questions concerning powers and duties of Highway Patrol.
24-41	Oct 3	GOVERNOR.	Upon a vacancy he shall appoint State Administrator of the Social Security Commission for a term of four years and not for the unexpired term of his predecessor.
24-41	Oct 17	PENAL INSTITUTIONS.	Concerning leasing of property; use of convicts for service, and sale of articles manufactured in the various penal institutions.
24-41	Oct 22	OFFICERS.	Public Administrator does not forfeit his office by moving from the county to another county within this State.
24-41	Oct 23	LEGISLATORS HOLDING OFFICE OF RECORDER OF DEEDS.	A member of the General Assembly may not be appointed to office of Recorder of Deeds during the term for which he is elected to the General Assembly.
24-41	Oct 28	OFFICERS.	Present incumbent of the office of Grain Warehouse Commissioner is entitled to remain in office until April 15, 1943.
24-41	Oct 29	GOVERNOR.	Writs directing election to fill vacancies in House of Representatives in Jackson County, Missouri, under Sections 12860, and 12861, R. S. Missouri, 1939, should be directed to the Board of Election Commissioners instead of the sheriff.
24-41	Nov 10	OFFICERS. NOTARY PUBLIC.	An employee of the Marine Hospital of Kirkwood, Mo., may be a notary public; (2) the powers of a notary public terminate at the expiration date of his commission; (3) a person may only be commissioned for the county in which he resides and he shall have power to transact his official business in such county and all adjoining counties thereto.
24-41	Dec 5	STATE PURCHASING AGENT.	State Purchasing Agent may permit emergency purchase to be made by a state department without soliciting competitive bids therefor. State Purchasing Agent by rule or regulation may determine what is an emergency within the meaning of the Act.
25-41	Jan 21	OFFICERS. QUALIFICATIONS.	Assistant Prosecuting Attorney must have same qualifications as Prosecuting Attorney.

		DEPUTIES.	
25-41	Feb 18	NEPOTISM.	It is a violation of Section 13 of Article XIV of the Constitution of Missouri to appoint a road overseer who is the son of one judge and first cousin of another judge's wife.
25-41	Apr 2	TAXATION AND REVENUE. COLLECTOR. AUTHORITY TO PROPORTION TAXES.	The tax collector is not authorized to accept proportion of taxes where lands subject to the tax are sold to the federal government during the year for which the taxes are assessed and levied.
25-41	Sept 11	COUNTY OFFICERS. BONDS. CIRCUIT CLERKS.	County court is only liable for premiums on a surety bond furnished by the circuit clerk when it consents and approves the payment of the premiums. The bond may extend past the term of the county judge.
26-41	July 28	APPROPRIATIONS. DEPARTMENT OF AGRICULTURE.	Salaries of employees under the Commissioner of Agriculture must be paid from the specific appropriation for each department under the Commission.
26-41	Oct 15	EGGS. COMMISSIONER OF AGRICULTURE.	Authority of the Commissioner of Agriculture over persons or farms who handle eggs.
27-41	Jan 10	TAXATION. STREET RAILWAYS.	Motor busses operated in connection with street railroad or street railway for the transportation of passengers should be assessed by the State Tax Commission and not by the local assessor.
27-41	Jan 21	TAXATION. STATE TAX COMMISSION. INTERSTATE BUS AND TRUCK LINES.	Only properties of bus and truck lines used in interstate business may be assessed by State Tax Commission.
27-41	Jan 30	TAXATION.	Taxation of Interstate Bus and Truck lines on irregular routes.
27-41	Apr 11	INTOXICATING LIQUOR.	Liquor sold on licensed premises may be legally opened and consumed on other, separate adjacent premises owned by the licensee, and not described in license.
27-41	June 4	Hon. Clarence Evans	WITHDRAWN
27-41	Oct 29	TAXATION AND REVENUE.	I. Drainage districts under county court organization may purchase realty sold for taxes due such district. After such date the land is not subject to taxes. II. County court may purchase land in foreclosure of school fund mortgage for such fund and takes the title to the property free from all outstanding general county and state taxes.
28-41	Mar 13	COUNTY BUDGET ACT.	County court cannot return money transferred under Section 13829 to drainage districts after money has been taken into consideration for

			estimates for 1941. Can give drainage districts any surplus remaining in classes.
28-41	June 13	Senator Joseph A. Falzone	WITHDRAWN
28-41	Aug 19	STATE PURCHASING AGENT.	Authority to authorize emergency direct purchases by department as result of uncertainty in the market created by National Defense Program.
28-41	Aug 28	STATE PURCHASING AGENT.	When two or more bidders tie in amounts bid, the State Purchasing Agent may declare one the lowest and best bidder.
29-41	May 1	SPECIAL ROAD DISTRICT.	Article 10, Chapter 46, makes no provision for the appointment of a trustee where such district is disorganized under Section 8706 R. S. Missouri, 1939. Therefore, must resort to circuit court for the appointment of trustee.
29-41	July 16	BONDS. AIRPORTS. ELECTIONS.	County is authorized to hold an election for bond issue for airport. Method of election should follow bond election of county hospital.
29-41	Aug 28	MOTOR VEHICLES.	Automobile owned by a Maryland Corporation, when used in interstate business, is not required to have Missouri Registration Plates.
31-41	June 2	TAXATION. COUNTY COURTS. TOWNSHIP ORGANIZATION.	Township boards in counties under township organization levy taxes in subordination to the county court and the total levy made by the county court and township board shall not exceed the constitutional limit.
32-41	Jan 20	COUNTY SUPERINTENDENT OF SCHOOLS SALARY.	If the 1940 census shows a decrease in population putting county in lower salary bracket decrease in population would effect the salary of the County Superintendent of Schools effective July 1, '41.
32-41	Apr 28	ROADS AND BRIDGES.	Special road districts must pay the same rate of levy for the county generally as other road districts. Surplus in special road districts cannot be returned to the county court and can only be used for road and bridge purposes.
32-41	Aug 21	RECORDER OF DEEDS.	Licenses issued on Sunday or other designated legal holidays are valid. Marriage solemnized on Sunday or other legal holidays is valid.
32-41	Oct 20	DEAD ANIMAL DISPOSAL PLANTS. LICENSING. PERIOD OF LICENSE.	The license fee for operation of dead animal disposal plants should be charged for the full year regardless of the date of application for the license.
32-41	Oct 21	LOTTERIES.	Tickets given with each sale of merchandise and weekly drawing had thereon, is lottery. The fact that tickets may be obtained upon request does not change rule.

32-41	Dec 3	CIRCUIT CLERK. OFFICERS.	Fees earned by a circuit clerk and collected by his successor should be paid to the prior circuit clerk.
32-41	Dec 30	INTOXICATING LIQUOR. MINORS.	Adult who purchases for person under 21 is guilty of a misdemeanor.
33-41	June 14	SENATE BILL NO. 101.	If passed and approved will not affect present compensation of any officers except circuit clerks and prosecuting attorneys.
33-41	Aug 11	WORKMEN'S COMPENSATION.	Commission, in case of self-insurers, may forfeit deposit periodically to pay award, or may cause a sum sufficient to purchase any annuity to be forfeited and applied to that purpose.
34-41	Feb 18	LIQUOR. (INJUNCTION).	State or county not liable for costs or damages where injunction suit is dismissed by prosecuting attorney.
34-41	May 24	TOWNSHIP ORGANIZATION.	Outstanding warrants from the road and bridge fund of 1937-38-39 cannot be paid from the general revenue fund at this time. At the close of the fiscal year warrants may be paid out of any revenue remaining or from surplus or back taxes.
34-41	July 9	TOWNSHIP ORGANIZATION.	Board of Directors of township may furnish an office for justices of the peace. However, there is no statutory duty to do so.
34-41	July 23	Hon. Arthur U. Goodman, Jr.	WITHDRAWN
34-41	Sept 26	TOWNSHIP CLERK.	Is entitled to ten cents for filing a cancelled warrant and ten cents for each complaint or statement filed with him as clerk of the township board.
34-41	Nov 13	TAXATION. SALES TAX LIEN.	Lien created by filing of sales tax assessment does not violate the due process clause of the constitution.
34-41	Dec 5	COLLECTORS COMMISSIONS.	Township collectors should include income tax collections with general taxes collected in calculating their commissions for collecting taxes.
35-41	Jan 20	ROADS AND BRIDGES.	Taxpayer, in special road district, must also pay, in addition, general taxes issued for road purposes. Bonds voted on by entire township must also be paid by taxes received from a special road district where no outstanding bonds are against the special road district or any part of the special road district.
35-41	Apr 16	SCHOOLS.	Board can levy more than forty cents for a sinking fund if it does not violate the Constitution. Excess in interest fund can be transferred to sinking fund.
35-41	Apr 21	JUSTICES OF THE PEACE.	No specific constitutional or legislative prohibition against justices of the peace soliciting marriage ceremonies.

35-41	Apr 25	CRIMINAL LAW.	Agent of the corporation can be prosecuted even though money obtained by fraud is paid into the corporation.
35-41	May 29	MISSOURI ATHLETIC COMMISSION.	(1) Commission has right of supervision and tax, absent legislative consent, as provided in Clause 17, Sec. 8, Art. 1, U. S. Constitution. (2) Collection of 5% not an undue burden on the Federal Government.
35-41	July 18	ARMORIES. NATIONAL GUARDS. MUNICIPAL CORPORATIONS.	The State has power to purchase or lease armories. Municipal corporations has no right in absence of statute to sell armories to state.
35-41	Aug 18	TAXATION AND REVENUE.	The items of cost which should be included in the publication for sale.
35-41	Dec 23	OFFICERS.	Circuit clerk in a county of less than 50,000 population may purchase his own supplies within his budget.
37-41	Jan 30	CITY MARSHAL CITY OF THIRD CLASS.	Has power as ex officio constable to serve warrants in other counties.
37-41	Feb 26	OFFICERS.	Legislature can terminate any office that it creates.
37-41	Mar 12	Mr. A. M. Harlan	WITHDRAWN
37-41	May 13	CLERK OF COUNTY COURTS. COMPENSATION AS AGENTS, LIABILITY OF BONDSMEN FOR.	Bondsmen of county clerks are not liable for acts of their principal done while acting as an agent for the county court.
37-41	June 5	COUNTIES. INSURANCE. MUTUAL.	Prohibited from insurance in mutual companies where assessment liability is unlimited, but may insure where liability is fixed and would not exceed in any year revenue provided for such year. Also applicable to cities and school districts.
37-41	Sept 11	PROBATE COURTS.	Notices of Final Settlement should be directed to the first day of term of Probate Court and not to day during the term at which settlement is docketed.
37-41	Sept 29	SHERIFFS. STATE PARK BOARD.	It is not mandatory upon the sheriff to appoint park superintendents as deputy sheriffs.
37-41	Nov 15	SCHOOLS. COUNTY SUPERINTENDENTS.	Under the Act of 1941, page 546, it is proper for the State Superintendent to request the County Treasurers of the various counties to obtain an order from the County Court to require the State Auditor to pay the same.
37-41	Nov 19	COUNTY COURT. RIGHT OF	A county court may recoup against claim by officer for salary.

		RECOUPMENT.	
38-41	Feb 3	ELECTIONS.	City Committee may nominate candidates for unexpired terms of members of the Board of Aldermen.
38-41	Feb 18	Mr. Charles M. Hay	WITHDRAWN
38-41	June 16	BURIAL ASSOCIATIONS.	Agency contract entered into under authority of unconstitutional statute is void.
39-41	Apr 29	TAXATION. PENALTIES. UNIFORM LEGISLATION.	A law providing for remission of penalties on delinquent taxes in certain parts of the State is unconstitutional.
39-41	Oct 9	INTOXICATING LIQUOR. CLOSED PLACE.	Licensed one-room restaurants selling substantial quantities of food etc., excepted from closed place requirement. Restaurant is eating house selling food for consumption on premises. Substantial quantities are actual amounts of real value, as distinguished from pretense of substance.
39-41	Oct 21	Mr. W. G. Henderson	WITHDRAWN
39-41	Nov 3	Mr. W. G. Henderson	WITHDRAWN
39-41	Dec 29	NON-INTOXICATING BEER. LICENSE. PREVIOUS REVOCATION.	License may be issued to person whose license was revoked prior to Oct. 10, 1941, not if revoked thereafter. License may be issued to person whose intoxicating liquor license has been revoked, and vice versa.
39-41	Dec 31	INTOXICATING LIQUOR. RATHSKELLER. LICENSE.	Rathskeller may be licensed if interior visible from entrance or approach, though not visible from street.
40-41	Mar 10	JUSTICE OF THE PEACE.	Justice of the peace appointed upon petition may hold court any place in township.
40-41	June 27	NOTARIES PUBLIC.	Acknowledgments attached to intoxicating liquor and non-intoxicating beer applications for license shall be received in a court of record as prima facie evidence where the same are regular on their face: Second, should the evidence warrant, a notary public could be removed from office through a quo warranto proceeding: Third, the office of notary public could be forfeited and the notary removed under Sec. 12828 R. S. Mo. 1939, should the evidence warrant.
40-41	Sept 10	HIGHWAYS. MUNICIPAL CORPORATIONS.	State Highway Commission has exclusive control over location of highway within the confines of municipal corporations.

40-41	Oct 3	FEES.	A sheriff, constable or any other officer is not entitled to a statutory fee for serving notice on insufficient check.
41-41	Feb 19	TAXATION. ASSESSOR.	Assessor is entitled to compensation for list for each joint owner of real estate in tenancy in common, joint tenancy or separate real estate of husband and wife.
41-41	Apr 3	BANKS AND BANKING. SMALL LOAN BUSINESS.	Banks are not authorized under their charter to do a banking business to exercise the powers of the Small Loan Act, nor act as a corporation authorized to subscribe for majority stock of Small Loan Corporations.
41-41	May 16	TRUST COMPANIES. INVESTING IN STOCK OF SMALL LOAN COMPANIES.	Trust companies are not authorized to invest in the stock of small loan companies.
41-41	May 24	FINANCE DEPARTMENT. COOPERATIVE COMPANIES. BOND.	Concerns issuing coupon books for trade do not come under the provisions of Section 5426, R. S. Mo. 1939.
41-41	June 13	JUDGMENTS. INTEREST.	Section 3228, R. S. 1939, authorizes payment of interest on judgments.
41-41	July 21	COUNTY BUDGET ACT.	Warrants should not be issued in excess of the estimate of budget; warrants issued in excess of the anticipated revenue are illegal and void.
41-41	Aug 25	CIRCUIT CLERKS.	Compensation of deputy circuit clerks is fixed by circuit court, and county court may not alter.
41-41	Nov 18	TAXATION.	Surplus from general county and state tax sales should be paid to party or parties having the title or interest in and to the realty sold.
42-41	Jan 20	COUNTY COURTS. AGRICULTURAL CONSERVATION COMMISSION FURNISHING OFFICE SPACE FOR.	County Courts may provide an office in the courthouse or may pay for office rent for Agricultural Conservation Administration offices.
42-41	Jan 23	TAXATION. SALE OF DELINQUENT LANDS FOR TAXES BY CITIES.	All cities are not within the provisions of Section 9970, as amended by Laws of 1933 pertaining to the returning of lists of delinquent city taxes to the county collector.
42-41	Mar 17	Mr. Andrew Howard	WITHDRAWN

42-41	Apr 9	CRIMINAL LAW.	Justice of the Peace who collects fines and fails to turn them over is guilty of larceny or embezzlement.
42-41	Nov 26	COUNTY CLERKS AND DEPUTIES. TERMS OF APPOINTMENT.	The county clerk may revoke appointment of deputy county clerk.
43-41	May 22	FISCAL YEAR.	Change in the fiscal year would require enactment of Constitutional Amendment and cannot be changed by statute.
43-41	June 17	TAXATION AND REVENUE.	City collectors in cities of the fourth class cannot proceed under Section 11086, but must follow the provisions of the Jones-Munger Act.
43-41	July 31	APPROPRIATIONS.	Balance of appropriation must be transferred to the ordinary revenue fund to the credit of the state treasurer at the end of each biennium.
43-41	Aug 27	ROADS AND BRIDGES. CONSTRUCTION OF BRIDGES IN COUNTY COURT DRAINAGE DISTRICTS.	When a new road is established through or into a county court drainage district, the special road district comprising such drainage district shall pay for the construction of such bridges that are made necessary on account of the road crossing one of such drainage ditches.
43-41	Sept 24	SCHOOLS.	Time for opening and closing polls in bond elections should be considered from the standpoint of convenience of the voters and opportunity for all the voters to vote.
43-41	Nov 21	MOTOR VEHICLES. PUBLIC SERVICE COMMISSION. TAXICABS.	May occasionally operate beyond suburban territory.
45-41	Feb 28	APPROPRIATIONS IN ELEEMOSYNARY INSTITUTIONS.	Repair of operative equipment can not be paid out of appropriation for operation.
45-41	Mar 4	Hon. W. Ed. Jameson	WITHDRAWN
45-41	May 2	INSANE PERSONS.	Probate Court may make order recommitting person to State Hospital on original judgment of insanity if original judgment has not been vacated.
45-41	May 9	COUNTY COURTS.	Do not have exclusive control over the purchase of incidental expenses or supplies for the proper conduct of a county office.
45-41	May 10	ELEEMOSYNARY INSTITUTIONS. COUNTY BUDGET ACT.	Care of patients in Missouri State Sanatorium and Missouri State School cannot be paid out of Class 1; must be paid out of Class 5.

45-41	Sept 4	SHERIFFS.	Only entitled to ten cents per mile for the arrest of two defendants filed on jointly.
45-41	Oct 10	DEAD BODIES.	Removal or Burial Permits not required to be obtained, when body is removed for the purpose of preparing such body for burial.
45-41	Oct 27	BUILDING AND LOAN.	Possession of stock certificate must be given to association by borrowing member.
45-41	Dec 3	COUNTY DEPOSITARIES.	Bank which is outside of state may be selected as escrow agent.
46-41	Jan 13	PARDON AND PAROLE. BOARD OF.	Board cannot parole inmate of Intermediate Reformatory until compliance with Section 8477 R. S. 1929. The governor can parole at any time after conviction regardless of Section 8477.
46-41	Mar 19	SHERIFFS. SALARIES AND FEES. JURIES.	Sheriffs may charge for serving notices and for mileage in such service made by the court pertaining to jurors and their service.
46-41	May 16	ELEEMOSYNARY INSTITUTIONS.	Superintendent and staff may in their discretion discharge or parole patients from state hospitals.
46-41	May 20	APPROPRIATIONS. ELEEMOSYNARY INSTITUTIONS.	House Bill 66, Section 70, reverts to General Revenue Fund after expiration of six months.
46-41	June 2	APPROPRIATIONS. ELEEMOSYNARY INSTITUTIONS.	No authority to pay doctor bill of employee injured in course of employment.
46-41	June 17	ELEEMOSYNARY INSTITUTIONS.	Interest received on "patients fund" should be paid to State Treasurer for credit of fund of State Eleemosynary Institutions.
46-41	Aug 27	BLIND PENSIONS.	Construction of appropriation act to Blind Commission; removal of headquarters to City of St. Louis.
46-41	Sept 4	ELEEMOSYNARY INSTITUTIONS. PURCHASING AGENT.	State Purchasing Agent has power to sell surplus produce of respective eleemosynary institutions.
46-41	Oct 11	SHERIFFS. DEPUTY COLLECTORS.	A sheriff in Reynolds County may also hold the office of deputy collector.
46-41	Oct 21	OFFICERS. ELEEMOSYNARY INSTITUTIONS.	Member of Board of Managers appointed to fill vacancy serves only until end of term.
46-41	Oct 27	BLIND PENSION ACT.	The word "income" as used in Section 8451, R. S. Missouri, 1939, means net income.

46-41	Oct 30	BLIND PENSION APPROPRIATION.	Oculist's expense and fee for examining eligible applicant for blind pension to be paid from the applicant's first pension check.
46-41	Nov 5	BLIND PENSION.	Application may be made to probate judge or to the Commission.
46-41	Nov 10	ELEEMOSYNARY INSTITUTIONS.	County Court can discount warrants to pay for the keep of their inmates in the institutions.
46-41	Nov 14	BLIND PENSIONS. APPROPRIATIONS.	Under Section 9456, R. S. Missouri 1939, treatments or operations recommended by examining oculist must be furnished by the State.
46-41	Dec 11	TAXATION.	Municipal and school bonds are not exempt from taxation.
46-41	Dec 13	ELEEMOSYNARY INSTITUTIONS.	Board of Managers may by rule provide that when accommodations are limited psychotic cases may be given preference over senile dementia cases.
46-41	Dec 19	ELEEMOSYNARY INSTITUTIONS.	State Superintendent has no authority to act as agent or representative of a patient in the signing of checks or transaction of private business matters.
46-41	Dec 30	OFFICERS. VACANCY.	Vacancy filled in prosecuting attorney's office by circuit judge is only temporary.
48-41	Jan 16	OFFICERS. DEPUTY SHERIFFS.	A person can hold the office of deputy sheriff and constable at the same time.
48-41	Feb 5	PROSECUTING ATTORNEY.	Assistant prosecuting attorney should not represent a defendant in a trial. The determination of the matter should be left to the trial court.
48-41	Feb 11	CONSERVATION.	Section 39 of the Wildlife Code is not violative of the "commerce clause" of the Federal Constitution.
48-41	June 3	ROADS AND BRIDGES. COUNTY COURT.	Surplus in general county road fund can be transferred to a special road district. County court has no authority to rent road machinery to another county, but if they do, rental must be paid into the county treasury.
48-41	July 12	SPECIAL ELECTIONS. BOND ISSUE. CORPORATIONS.	Vernon County – In Re instituting suit against the Missouri Public Service Corporation – Participating in Election.
48-41	Sept 9	MISSOURI MANUAL. SECRETARY OF STATE.	Exact salaries of all employees of the State must be given to the Secretary of State at the time he requests the information. Bracketing or giving or salary ranges will not suffice.
48-41	Oct 11	GAMBLING DEVICE.	Slot machines which pay off in cigarettes handed to player by owner of establishment are gambling devices.
48-41	Dec 12	CRIMINAL PROCEDURE.	Affidavit substantially complying with civil procedure of appeal is sufficient for appealing in a criminal case. Criminal appeal bond, after

		BOND.	conviction, must be approved by the circuit judge and not the circuit clerk.
49-41	May 9	Hon. Lloyd W. King	WITHDRAWN
49-41	Aug 2	TAXATION.	Notice not required taxpayer on personal property and penalties accrued are payable by the taxpayer and cannot be abated by the county court.
49-41	Aug 11	SCHOOLS.	Two districts are authorized to make a temporary combination of one building for negro children; State Superintendent may make apportionment of state moneys for the temporary combination.
49-41	Aug 18	SCHOOLS.	When state aid may be allowed.
49-41	Sept 19	EXTRADITION.	A child who flees the State although in the custody of the court as a neglected and delinquent, not having been convicted of any crime, cannot be extradited.
49-41	Oct 3	PROBATION OFFICERS. (COUNTIES OVER 90,000.)	Probation officers have authority to go to any portion of the State under order of the court and to be reimbursed for necessary expenses in so doing, so long as the total sum of expenses does not exceed \$200.00 for any one year.
51-41	Jan 21	TAXATION. COUNTIES.	County has no authority to purchase land to protect its tax lien. Holder of certificate under Jones-Munger Act must pay subsequent taxes accrued before date of collector's deed.
51-41	May 14	SCHOOLS. STATE TEACHERS COLLEGES.	Board of Regents may use discretion in preserving or destroying vouchers, checks, warrants, bills etc.
51-41	Sept 15	BOARD OF HEALTH.	House Bill No. 501 is valid and authorizes the board to set up a merit system of its own.
51-41	Dec 8	BOARD OF NURSES.	Nurses working under United States Health Service are not compelled to obtain nurse's license.
52-41	Apr 11	COUNTY BUDGET LAW.	In the county budget, the traveling and hotel expenses of the circuit court reporter should be classified as class 2.
52-41	July 16	SHERIFFS. FEES.	Entitled to commission on notice of garnishment; entitled to fees on each case for serving writs on more than one case for the same trip.
52-41	Oct 25	RECORDER OF DEEDS.	A fee may not be charged by a Recorder of Deeds for recording a discharge of a soldier in military service.
53-41	Apr 28	TAXATION. SALES TAX.	Sales tax on coin operated games and devices constitutional.
53-41	May 6	NEPOTISM.	As a rule death terminates the relationship by affinity, under Article

			XIV, Section 13 of the Constitution of Missouri.
53-41	May 10	WORKMEN'S COMPENSATION COMMISSION.	House Bills 487 and 488 of the 61st General Assembly are constitutional.
53-41	Oct 16	JUSTICE COURTS.	Plaintiff, except infants, in a Justice Court cannot conduct his suit by an agent but may do so in person or by an attorney.
54-41	Mar 14	MUNICIPAL OFFICES. ELECTIONS.	The manner of filling unexpired term for the office of alderman in a city of the fourth class.
55-41	Jan 20	INSURANCE.	Approval of Articles of Association of Kansas City Casualty Company.
55-41	Jan 23	INSURANCE.	Stock casualty companies under Article VI, Chapter 37, R. S. Mo. 1929, may issue participating contracts.
55-41	Jan 29	INSURANCE.	Approval of increase of capital stock and amendments to articles of incorporation of Employers Reinsurance Corporation.
55-41	Feb 7	INSURANCE.	Proceedings to increase capital stock of the Business Men's Assurance Company of America invalid.
55-41	Feb 11	INSURANCE.	Approval of papers as to form and sufficiency submitted in connection with increase of capital stock of Postal Life and Casualty Company under Article II, Chapter 37 R. S. Mo. 1929.
55-41	Mar 11	INSURANCE.	Approval of increase of capital stock and amendments to articles of incorporation of Kansas City Casualty Company of Kansas City, Missouri.
55-41	Mar 18	INSURANCE.	Approval of articles of association of Commercial Bankers Mutual Casualty Company.
55-41	Mar 21	INSURANCE.	Approval of Articles of Association of Mutual Savings Life Insurance Company.
55-41	Apr 15	INSURANCE.	Approval to amendment of Articles of Incorporation of Commercial Bankers Mutual Casualty Company.
55-41	May 13	CORPORATIONS. INSURANCE. BUILDING AND LOAN ASSOCIATIONS.	Insurance companies, both foreign and domestic, are required to register under the provisions of Section 5085 of R. S. Mo., 1939. Building & Loan Associations not required to comply with the general statute respecting registration of corporations.
55-41	Aug 13	INSURANCE.	Town mutual may insure automobiles of members but coverage specifically limited to fire, lightning and winstorm.
55-41	Oct 24	STATUTE. INFORMATION.	Construing Section 8383, R. S. Missouri 1939.
56-41	Jan 28	COURT. FUNDS.	Cannot loan surplus money from tax sales, as school funds until 20 years elapse from date of deposit in county treasury.

57-41	Jan 23	COUNTY COURTS. SALE OF BONDS.	The authority of the county court to pay compensation to agent for selling refunding bonds.
57-41	Jan 31	CRIMINAL LAW. WITNESSES.	Testimony of a physician is not privileged communication as to his patient where the facts testified to were not necessary for him to prescribe for such patient as a physician or do any act as a surgeon.
57-41	Mar 13	ROAD DISTRICT TAXATION.	It is mandatory upon the county court to make a levy under Section 8526, R. S. Mo. 1939, and, upon the failure of the county court to make such a levy, mandamus will lie.
57-41	Apr 9	TAXATION. SPECIAL ROAD DISTRICTS.	The fiscal, calendar and financial year of the county begins on the 1st day of January and ends on the 31st day of December. Warrants accruing in 1939 cannot be paid out of the taxes assessed for 1940 unless a surplus over and above county expenses in 1940.
57-41	May 16	CONSERVATION COMMISSION. STATE PARK BOARD. APPROPRIATION.	Construing Section 74, House Bill No. 66.
57-41	May 20	APPROPRIATION. STATE PARK BOARD.	Trucks may be purchased under Section 74, House Bill 66.
57-41	June 26	CRIMINAL LAW.	Wife abandonment and failure to support may be charged separately or conjunctively.
57-41	Aug 18	DEED. CONSERVATION COMMISSION.	Interpretation of mineral reservation in deed.
57-41	Aug 23	RECORDER OF DEEDS. CLERK OF CIRCUIT COURT.	Clerk of circuit court and ex-officio recorder of deeds serves until his term expires although by operation of law at the next general election a recorder of deeds must be elected.
57-41	Sept 19	CRIMINAL LAW. COSTS.	Wife cannot testify against her husband without his consent. Upon the dismissal of a rape charge, state must pay the costs.
58-41	Mar 4	BUILDING & LOAN.	Foreign associations advertising in newspapers are not doing business within this state.
58-41	Mar 7	BUILDING AND LOAN.	Class B assets may borrow money from Class A.
60-41	Jan 23	Hon. Robert I. Meagher	WITHDRAWN
60-41	Feb 19	COUNTY CLERK.	Not liable for donation to special road district made by county court if donation is legal, unless funds are taken from the five classes of the County Budget Act.
62-41	Jan 21	GENERAL ASSEMBLY.	Upon opening and publishing the returns of the election for state

			officers, may proceed to other business.
62-41	Feb 18	FEES. SALARIES. SHERIFF AND DEPUTIES. CONSTABLES AND DEPUTIES. ST. LOUIS COUNTY.	Not entitled to mileage in addition to salary in the performance of their official duties.
62-41	June 19	Hon. Joe H. Miller	WITHDRAWN
62-41	Aug 11	TAXATION. BONDS.	Railroad bonds on railroads in receivership are subject to taxation.
62-41	Aug 13	TAXATION. BOARD OF EQUALIZATION.	Construction of House Bill No. 328 with reference to the duties of the State Tax Commission.
62-41	Aug 19	TAXATION.	Form of collector's notice of sale and certificate to proof of publication.
62-41	Sept 9	APPROPRIATIONS. PENAL INSTITUTIONS.	Balance of moneys in various funds of Department of Penal Institutions should be transferred and credited to ordinary revenue fund at the end of biennium and after all warrants on such fund have been discharged and the appropriation has lapsed.
62-41	Sept 11	TOWNSHIPS. BOUNDARY LINES. PROCEDURE.	A petition for change of boundary of townships should come from the voters of each township affected.
62-41	Sept 30	TAXATION AND REVENUE.	Appointment of an attorney for the collection of delinquent personal taxes.
62-41	Oct 2	TAXATION. MERCHANTS. TAX COMMISSION.	Jurisdiction of State Tax Commission over merchants' assessments.
62-41	Oct 3	TAXATION. PAYMENT. APPEAL AFTER PAYMENT.	Taxpayer who pays a tax for the purpose of getting benefits of reduction on account of early payment, waives his right to appeal to the State Tax Commission for relief, even though he pays such tax under protest.
62-41	Oct 3	TAXATION. TELEPHONE. EXTENSION LINES.	Extension lines of telephone should be considered as a part of the right of way of a telephone company for allocation of wire companies for taxation purposes.
62-41	Oct 8	TAXATION. STREET RAILWAYS.	Miles of street traversed on regular routes by busses owned by street railways should be used in allocation for tax purposes.

		ALLOCATION.	
62-41	Oct 8	TAXATION. TAX COMMISSION.	Jurisdiction of Tax Commission over assessment rolls after the same have been delivered to proper officers for collection of the taxes.
62-41	Oct 13	TAXATION. RAILROADS. DEPOTS.	Railway express building owned by Terminal Railroad Association of St. Louis should be assessed as distributable property of railroads.
62-41	Oct 17	TAXATION AND REVENUE.	(1) Rights of a holder of a certificate of purchase issued by the treasurer of a city of the first class. (2) When county court may redeem lands from such sale.
62-41	Oct 20	Hon. Jesse A. Mitchell	WITHDRAWN
62-41	Oct 30	JUDGMENT. RECOGNIZANCE OR BAIL BOND.	(1) Statute of limitations applies for the reason that net proceeds go to the school funds in the county. (2) The three-year lien upon the real estate of the defendant, as provided in Section 1270, R. S. Mo. 1939, immediately attaches upon rendition of judgment. (3) Such judgments may be revived by scire facias or suit upon the judgment as in other civil cases.
62-41	Nov 5	TAXATION. INTER-STATE BUS AND TRUCK LINES.	The State Board of Equalization does not have jurisdiction to assess Inter-State Bus and Truck Lines because the statute authorizing same has been repealed.
62-41	Nov 14	PENAL INSTITUTIONS. MISSOURI TRAINING SCHOOL FOR BOYS.	The Commission of Penal Institutions has the power to authorize boys at the Missouri Training School for boys to do work outside the institution for private individuals.
62-41	Dec 17	INFANTS. MO. TRAIN. SCHOOL FOR BOYS. JURISDICTION.	Jurisdiction sentence delinquent boys under 17-circuit courts, Cape Girardeau Common Pleas; such boys between 17 and 21, same courts, also St. Louis Ct. Crim. Correction. For certain felonies, circuit courts may sentence boys under 17 to pen., or Train. School; for other felonies may sentence only to Train. School. Remedy to correct sentence to wrong place is habeas corpus.
62-41	Dec 31	ANIMALS.	Slaughter of horses and mules not unlawful if done in humane manner.
63-41	July 7	CRIMINAL COSTS. JURIES.	Sheriff is only entitled to a reasonable amount allowed by the circuit judge and prosecuting attorney for the board and lodging of a jury.
64-41	Aug 25	COUNTY COURT. COUNTY HOSPITAL AND NURSES' HOME.	Nurses' Home cannot be constructed under levy for construction of a county hospital.
64-41	Sept 18	OFFICERS.	Acceptance of "tips", even though after office hours – against public policy.
64-41	Nov 18	Hon. Mark Morris	WITHDRAWN

64-41	Dec 16	Hon. Mark Morris	WITHDRAWN
65-41	July 25	NEPOTISM.	A father is not related to the sister of his son's wife by affinity, and the appointment by the father of such person as an official clerk does not violate Sec. 13, Article 14, of the Constitution.
66-41	Jan 2	TAXATION.	Even tho cemetery association later sells off part of land said land tax exempt during time held by association for cemetery purposes.
66-41	June 6	TAXATION AND REVENUE.	The taxpayer can complain to the State Tax Commission when his proper appeal from the county assessor to the county board of equalization has been denied for the reason he had not introduced evidence in support of the affidavit for appeal.
66-41	June 26	TAXATION.	Defense Bonds Series E, F, and G, not taxable as personal property.
67-41	Jan 8	COUNTIES BUDGET LAW.	Liability of county for supplies not included in officer's budget.
67-41	Jan 13	CIRCUIT CLERKS, COUNTY CLERKS.	Not entitled to retain fees to apply upon fixed salary.
67-41	May 26	INTOXICATING LIQUOR.	Supervisor may grant license to person indicted for violation of Act, if person has qualifications required by Act. May not grant license to person convicted for such violation by judgment and sentence of court.
67-41	Sept 24	TAXATION AND REVENUE.	County Court can not abate penalty on the mistake made by the collector as to the amount of taxes owed by the taxpayer.
67-41	Dec 29	ROADS AND BRIDGES.	Commissioners of special road district organized under Art. 18, Chapt. 46, R. S. Mo., 1939, have exclusive control over all roads, bridges and culverts within said district.
68-41	Jan 20	CLERK OF CIRCUIT COURT.	Salary change effected by 1940 census begins January 1, 1941.
68-41	Feb 28	SHERIFFS.	Entitled to mileage in each case for serving several summons on same trip.
68-41	Mar 6	TAXATION. REVENUE.	An election for a county library cannot be held if at that time the county court has levied to its full limitations under Section 11, Article X of the Constitution of Missouri.
68-41	Mar 31	PENAL INSTITUTIONS. CRIMINAL PROCEDURE.	Upon conviction in a capital case on appeal and stay of execution the sheriff must deliver the convict to the Warden of the Penitentiary not more than ten days from the date of the judgment.
68-41	Aug 28	MOTOR VEHICLES. PROSECUTING ATTORNEYS.	A jury, judge, or prosecuting attorney cannot assess or recommend a fine of less than Five Dollars for careless driving under Section 8383, R. S. Missouri 1939.

68-41	Aug 28	BOARD OF CHIROPRACTIC EXAMINERS.	May not remit renewal fees; issuance of renewal license is mandatory on payment of required fee.
68-41	Oct 18	CRIMINAL LAW. INSANITY.	Convict under death penalty reprieved by Governor and discharged by State Hospital as sane is subject to execution.
69-41	Jan 21	INTOXICATING LIQUOR.	The penalty for a violation of Section 8 of the Liquor control Act is a misdemeanor as provided by Section 43 of said act.
69-41	Feb 12	PROSECUTING ATTORNEY. CRIMINAL LAW. FORMER JEOPARDY.	One charged with careless and reckless driving who paid a fine is not put in jeopardy by being subsequently charged with carrying a deadly weapon while intoxicated.
69-41	Apr 17	COUNTY SUPPLIES.	Section 2511, R. S. 1939, did not prescribe method for purchase of supplies in counties having a population of 15,700 inhabitants.
69-41	Apr 21	FOOD STAMP PLAN.	Counties under 50,000 inhabitants may participate in Food Stamp Plan if expenditure properly budgeted, but have no authority to borrow funds against unknown future revenue for this purpose.
69-41	Aug 18	SOLDIERS AND OTHER PERSONS IN MILITARY SERVICE.	Civil courts have jurisdiction concurrent with military courts to try for violations of civil laws.
69-41	Oct 2	PEDDLERS.	Farmer who feeds and kills his own cattle may sell the meat therefrom without paying a peddler's license.
69-41	Oct 24	ANIMALS.	The stealing of a dog is subject to a charge of larceny.
69-41	Nov 22	ROADS AND HIGHWAYS. OVERSEERS. CONTRACTING FOR ROAD MACHINERY.	Road overseers of common road districts are not authorized to contract for road machinery nor to incur obligations in excess of income for current year.
69-41	Dec 1	ROADS AND BRIDGES.	County may ask damages for injury to county roads in the original condemnation suit by the United States condemning roads in any army area.
71-41	Mar 29	COUNTY TREASURER AND EX OFFICIO COLLECTOR.	Section 11106 applies to compensation as ex-officio collector and section 13450 does not.
71-41	Aug 20	COUNTY TREASURERS.	House Bill 255 becomes effective October 10, 1941, but operation may be postponed to some treasurers.
71-41	Oct 15	OFFICERS.	Probate Judge may be a notary public at the same time as the duties are not incompatible.

73-41	Jan 30	HIGHWAY ENGINEERS.	County Highway Engineers not entitled to mileage in counties of twenty thousand to fifty thousand.
73-41	Feb 13	GARNISHMENT.	Notice to a judgment debtor after general execution is not a prerequisite before issuing a writ of summons to a garnishee.
73-41	Apr 10	MOTOR VEHICLES.	Dealer's license plates may not be used in the demonstration or transportation of farm tractors.
73-41	Sept 4	MOTOR VEHICLES. HIGHWAY PATROL.	Highway Patrol unauthorized to keep slow moving, heavily loaded motor vehicles off highways.
73-41	Sept 30	MOTOR VEHICLES.	"Push-a-Bike" is a motortricycle within the meaning of the motor vehicle act.
73-41	Nov 21	Hon. W. Oliver Rasch	WITHDRAWN
74-41	Sept 10	CRIMINAL LAW.	Affidavit sufficient to charge the crime of Grand Larceny under Section 4456 R. S. Mo., 1939 – Larceny and Embezzlement distinguished.
75-41	July 18	PARENT & CHILD.	Valid marriage affects emancipation of child from parental control, and parental consent for vaccination of married minor not necessary.
76-41	Jan 23	NEPOTISM. OFFICERS APPROVING APPOINTMENTS.	A member of the County Court voting for approval of his son-in-law as assistant county engineer violates the nepotism act; but if other members of the court vote for such approval without the connivance, understanding or agreement of the related member then the act is not violated.
76-41	Jan 24	TAXATION. SPECIAL ROAD AND BRIDGE TAXES.	County Court authorized to make additional levy under provisions of Section 22 of Art. X of the Constitution for special road and bridge taxes.
76-41	Feb 12	SPECIAL ROAD DISTRICTS.	Cannot use funds derived from special road tax to pay bonded indebtedness.
76-41	Apr 17	ELECTION CONTESTS.	In absence of statute the county clerk cannot receive any compensation for additional expense in recounting ballots in gubernatorial contest. The county court cannot reimburse him because the claim is not a valid claim and the court is precluded from paying the same by the County Budget Law.
76-41	Apr 22	TAXATION AND REVENUE.	(1) Nonresident owner may, through a legally constituted attorney in fact, redeem his land sold under the Jones-Munger law, within the statutory period of redemption. (2) Answered by an opinion rendered to Mr. Bryan A. Williams, Prosecuting Attorney, Marble Hill, Missouri.
76-41	May 9	Mr. G. Oscar Robinson	WITHDRAWN
76-41	Aug 16	MUNICIPAL	In cities of the third class the mayor only has the power of

		CORPORATIONS. CONFLICT OF LAWS.	appointment of non-elective officers. City ordinance conflicting with state law absolutely void.
76-41	Oct 17	BURIAL INSURANCE SOCIETIES.	Persons or corporations doing burial insurance business without authority from Insurance Department subject to punishment.
76-41	Nov 10	TAXATION.	Surplus from tax sale should be paid to persons entitled thereto. In case of doubt or dispute of such surplus, the collector should pay the same into the county treasury for the use and benefit of such person or persons.
76-41	Nov 19	OFFICERS. COUNTY TREASURERS.	Treasurer can not receive extra compensation for taking care of accounts of county toll bridges.
77-41	Jan 18	SHERIFFS.	Special election to fill vacancy.
80-41	Aug 7	JOURNALISM SCHOOL. LINCOLN UNIVERSITY. REASONABLE TIME.	Establishment of journalism school 7 months after demand is within a reasonable time.
80-41	Sept 6	SCHOOLS. LINCOLN UNIVERSITY.	Rules made by Board of Curators with reference to paying Negro school students' tuition outside of State are reasonable; 1% of fund can not be used for administrative purposes.
80-41	Sept 19	BUILDINGS. LINCOLN UNIVERSITY.	Public bodies must enter into contracts for labor and materials in the construction and repair of public buildings and improvements.
81-41	Jan 9	GENERAL ASSEMBLY.	Power to investigate election returns prior to seating executive officials.
81-41	Jan 20	GOVERNOR.	Veto of Resolution No. 3 passed in Joint Session by Sixty-first General Assembly is a nullity.
81-41	Jan 21	CORPORATION.	Notice of reduction of employees' wages is mandatory and has reference to all classes of employees (Sections 4590 and 4591, R. S. Mo. 1929).
81-41	Mar 22	COUNTY OFFICERS. SHERIFF. DEPUTY.	The sheriff and his deputies may not legally receive from and be furnished free transportation by a street railway company.
81-41	May 26	RECORDER OF DEEDS.	It is the duty of the recorder of deeds to record all instruments when properly proved or acknowledged according to law and authorized to be recorded in his office.
82-41	Aug 25	CORONERS.	When the act of violence occurs in one county and the victim dies in another, the coroner of the county in which the victim dies should have jurisdiction and the county court of that county is liable for the

			legal expense incurred in connection with such inquest.
83-41	Jan 15	SALARIES. CONTESTED ELECTION. CIRCUIT JUDGE.	Circuit Judge Sam C. Blair cannot collect a salary from the state unless he gives bond and complies with Section 11423, R. S. Missouri 1929.
83-41	Jan 20	SPECIAL ROAD DISTRICTS.	Warrants to be paid in future years for payment of machinery where total costs is in excess of the unspent year's income and that which can be anticipated for the year that said machinery is bought are void and non-enforceable within the meaning of Section 12, Article 10 of the Constitution of Missouri, and therefore, said warrants would have no affect upon a reorganization of the said road districts.
83-41	Mar 10	Hon. Forrest Smith	WITHDRAWN
83-41	Apr 11	BOARD OF FUND COMMISSIONERS.	Comparison of paid bonds and coupons does not have to be done personally by Board of Fund Commissioners, but may be delegated.
83-41	Apr 25	CRIMINAL LAW. MOTOR VEHICLES.	Prosecution for theft of tires of the value of more than Thirty Dollars must be brought under the grand larceny section and not under the tampering section and upon acquittal the state must pay the costs.
83-41	May 1	CRIMINAL COSTS ON CHANGE OF VENUE.	Reporter's fee of Three Dollars should be paid in the county where the information or indictment is filed.
83-41	May 8	BOND ISSUES.	Uncertified assessments can not be used in ascertaining value of property within political subdivisions.
83-41	May 9	SCHOOLS.	Contract for more than one year with teacher is legal and binds new board, if contract is made in good faith without fraud or collusion, and is for reasonable time. (Overruling opinion of Mr. Buffington and reaffirming opinion of General Crow of May 1, 1933, to Board of Education, Columbia, Missouri)
83-41	July 2	MOTOR VEHICLES. PUBLIC SERVICE COMMISSION.	Motor vehicles carrying agricultural products exclusively in intrastate traffic exempt from Public Service Commission Act.
83-41	July 8	CRIMINAL COSTS.	Court reporter not entitled to costs of transcript of bill of exceptions on a pauper appeal until the case is finally decided and determined without right of further appeal.
83-41	July 24	STATE AUDITOR. ESCHEAT FUND.	Auditor precluded from drawing warrants upon Escheat Fund absent an appropriation by the Legislature creating funds out of which the State Treasurer may pay such warrants.
83-41	July 25	SCHOOLS.	School board is not authorized to by caps and gowns and invitation cards for students at graduation time. There is no statute authorizing the same.

83-41	Oct 2	CRIMINAL LAW.	Setting out officers subject to prosecution for the purchase of fees and warrants at less than par under Section 4349, R. S. Missouri 1939.
83-41	Oct 10	APPROPRIATIONS.	Appropriation from Private Grain Inspection fund for six months period is not affected by Section 73 of House Bill 581.
83-41	Oct 16	Hon. Forrest Smith	WITHDRAWN
83-41	Oct 22	STATE AUDITOR.	State auditor has power, under Section 13100, R. S. Mo. 1939, to compel Recorder of Deeds to show actual amount paid deputies or assistants. If he refuses to do so the matter should be referred to the Prosecuting Attorney.
83-41	Oct 25	BOARD OF HEALTH.	No limit on inspectors in Food & Drug and cosmetology departments or their salaries. State Board through president may sign all payroll vouchers, except water and sewage division which Commissioner of Health may sign, but such duty may be delegated.
83-41	Dec 10	Hon. Forrest Smith	WITHDRAWN
85-41	July 19	BOARD OF HEALTH.	Commissioner of Health has a right to investigate the health conditions of a county jail, and should report his findings to the County Court and the Circuit Judge of the particular county, and may furnish his report to the City Council of the city in which the jail is situated.
85-41	Sept 11	STATE BOARD OF HEALTH.	Has no legal duty to make laboratory tests for individuals or officials in matters not affecting the public health.
85-41	Oct 9	STATE BOARD OF HEALTH.	Although a hotel is exempt from property tax it is not exempt from hotel license fees. Deputy of State Board of Health must follow the statutes in condemnation and forfeiture of food and drugs.
85-41	Oct 30	HEALTH, BOARD OF. MUNICIPAL CORPORATIONS.	Board of Health and cities of the first class both have authority to inspect food and drugs.
85-41	Dec 1	STATE BOARD OF HEALTH.	It is the duty to inspect homes for incurable people even though no special appropriation was made for the purpose.
85-41	Dec 2	ADMINISTRATION.	Upon refusal to grant letters of administrations under Section 2, Laws of Mo. 1941, page 289, widower, widow or minor children under the age of 18, through their guardian, as the case may be, may assign title to automobile in the estate. A creditor under Clause 2 of said section, supra, has the right to transfer the title to an automobile in the estate, if there be one.
85-41	Dec 10	COUNTY COURTS. PUBLIC BUILDINGS.	County courts may convey a site for construction of a public health center provided such location is not needed for county public buildings.
85-41	Dec 13	STATE BOARD OF	

		HEALTH. NURSING SHELTERS OR BOARDING HOMES. RULES AND REGULATIONS.	
85-41	Dec 15	Dr. James Stewart	WITHDRAWN
85-41	Dec 17	BOARD OF HEALTH. HOTELS.	Board of Health may make tourist camp regulations applicable to hotels.
85-41	Dec 29	OFFICERS.	Any state, county or city officer is eligible as federal agent under the state tire rationing administrator if they serve without pay.
86-41	Feb 15	HIGHWAY COMMISSION.	Right to rescind construction contract by mutual consent by paying for work and materials actually furnished; payment of any sum in excess of money actually earned by contractor under a contract is illegal.
86-41	Mar 10	STATE HIGHWAY COMMISSION.	May not abandon voluntarily a constitutionally established road.
86-41	Mar 26	COUNTIES. FEDERAL SURPLUS COMMODITIES. FOOD STAMP PLAN. COUNTY BUDGET ACT.	County courts may appropriate monies for purchase of food stamps, but such purchases must be subject to the provisions of the County Budget Act.
86-41	Nov 25	SCHOOLS.	Board does not have statutory authority to appropriate money for sending out delinquent tax notices. School district is not liable for paving and improving streets adjacent to building.
88-41	Jan 6	POLL TAX.	City of Third Class has right to impose.
88-41	Sept 18	INTOXICATING LIQUORS.	Provision of ordinance of incorporated city under special charter which excepts licensing and sale of malt liquors in original package at retail liquor stores is invalid, same being inconsistent with state law.
89-41	Feb 21	SALARIES OF COUNTY OFFICERS.	Change in salaries occasioned by change in population should be effective as soon as changed report of population is available.
89-41	Feb 28	Hon. Gene Thompson	WITHDRAWN
89-41	Apr 24	COUNTY BOARD OF EQUALIZATION.	Cannot equalize values between farm lands and city lots; cannot raise value of a class of property.
89-41	Sept 3	TAXATION. RURAL ELECTRIFICATION.	Rural Electrification Co-operatives are not government agencies and are therefore subject to the provisions of the Tax laws.

		GOVERNMENT AGENCIES.	
89-41	Oct 3	PROSECUTING ATTORNEYS.	Prosecuting Attorney not entitled to retain for his services, under Sec. 12942 R. S. Mo., '39, any compensation, but may receive his necessary traveling expenses.
89-41	Dec 12	COUNTY COURTS.	County courts have power to employ watchmen to preserve county property.
90-41	Jan 3	COUNTY TREASURER.	Surplus monies can only be paid through suitable order from county court.
90-41	Nov 28	LABOR DEPT. MATTRESSES. STERILIZATION OF.	Used mattresses must be sterilized before sale, and during renovation. Failure to do so, misdemeanor, and ground for refusal and revocation of license.
90-41	Dec 8	LABOR, DEPARTMENT OF.	Female contestants in a "walkathon" come within the provisions of Section 10171, R. S. Mo. 1939, and cannot participate more than nine hours a day or fifty-four hours a week.
93-41	July 3	NEPOTISM.	Section 13, of Article XIV, of the Constitution of Missouri, does not prohibit the appointing by a public officer of a husband of a wife whose great grandfather was the brother of the grandfather of the office holder.
93-41	Dec 31	SHERIFFS' DEPUTIES. PRIVATE GUARDS.	Not necessary for private guards to be commissioned as deputy sheriffs.
94-41	Mar 27	SCHOOLS.	Benefits for teachers in St. Louis. Act can include requirement that teacher reside in St. Louis during time required for obtaining pension; not necessary to pass amendment to the Constitution for legislative act to be valid for teachers only in St. Louis.
94-41	Aug 8	TAXATION. EXTENSION OF TAXES BY COUNTY CLERK.	The ninety-day period in which County Clerk shall extend taxes and turn books over to Collector, begins to run when County Board of Appeals has completed its work and the certificate from the State Tax Commission has been received.
94-41	Aug 26	CIRCUIT JUDGE.	Exercises same powers as a member of the county court as jury commissioner.
94-41	Nov 6	OFFICERS. TRAVELING EXPENSES.	State cannot place deposit with airplane company to cover traveling expenses of state officials and employees.
95-41	Feb 13	COUNTY TREASURER.	Not authorized to issue check in payment of judgment until warrant was presented.
97-41	Feb 7	ROAD DISTRICTS.	Special Road District may make levy under Section 8067 R. S. Missouri,

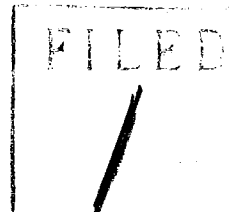
		ROADS & BRIDGES.	1929, for repairing roads in the district and may also purchase rock crusher, to crush rock to be used in repairing said roads.
97-41	Feb 19	COUNTY COLLECTOR.	Back taxes are not to be included in the limitation of fees under Section 11106 R. S. Mo. 1939.
97-41	Feb 26	COUNTY BUDGET ACT.	Traveling expenses of prosecuting attorney can be paid out of surplus in class 5, or can be paid out of class 6.
97-41	Mar 5	Hon. Robert P. C. Wilson, III	WITHDRAWN
97-41	Mar 14	COUNTY COURT. JURY COMMISSIONERS.	The county and circuit courts may examine a poll book in preparing, before selecting, persons qualified to serve as jurors as provided in Section 705 and Section 706 R. S. Mo. 1939.
97-41	Mar 24	SCHOOL DISTRICTS.	May sell school buildings if no longer required and new building is provided.
97-41	Apr 14	TOWNSHIPS.	Arbitrary refusal of chairman to sign order for purchase price of road machinery where the majority of the members of the board have voted for the issuance of said order, forces the recipient of said order to bring court action.
97-41	May 21	TAXATION.	Omitted personal property on a return to the assessor cannot be assessed as to previous years.
97-41	Aug 7	CONSTABLES. OFFICERS.	County court is not prohibited from appointing a constable who is in the general mercantile business.
97-41	Sept 5	TAXATION. TOWNSHIP.	Amount of levy that may be made for township purposes, including special road and bridge fund.
97-41	Oct 7	MUNICIPAL CORPORATIONS.	Violation of city ordinance regulating automobile speed is offense against city and is not a State offense.
97-41	Oct 11	PRISON MADE GOODS. SHIPMENT PRIOR TO OCT. 14TH.	Prison made goods may be shipped outside Missouri prior to midnight October 13, 1941.
97-41	Oct 18	SHERIFF. COUNTIES.	County Counselor of St. Louis County is sole attorney for sheriff.
97-41	Oct 29	TAXATION. PERSONAL TAXES. PRIORITY OF LIEN.	The state's lien on personal property seized to satisfy personal taxes is superior to all prior liens, including chattel mortgages.
97-41	Nov 25	COUNTIES.	Deficit in road districts can not be paid out of the current revenue, but must be paid out of the delinquent taxes or surplus in subsequent years.

97-41	Nov 29	ADMINISTRATION.	Section 301, Laws of Missouri 1941, is procedural in character and becomes effective ninety days after the adjournment of the Legislature.
98-41	Apr 4	Hon. Con Withers	WITHDRAWN
98-41	May 7	EXTRADITION.	Apprehension pending Governor's warrant; arrest on suspicion; affidavit before justice of the peace by competent witness sworn to in Missouri; examination.
98-41	June 19	TAXATION.	Federal employees in Veterans' Hospital on reservation at Excelsior Springs are liable for personal property tax on their motor cars.
98-41	July 22	SHERIFF, JAILS AND JAILERS.	County court cannot increase the allowance for feeding prisoners during the current year.
98-41	Dec 30	ROADS AND BRIDGES. COUNTY BUDGET.	County treasurer can protest warrants against special road and bridge fund of any road district but not the county road and bridge fund.
99-41	Apr 23	ELECTION CONTEST.	Board of Election Commissioners of Kansas City, because of special statutes, may employ and pay extra help in conducting recount in gubernatorial contest.
99-41	Oct 31	WITNESS BEFORE GRAND JURY.	Any witness appearing before a grand jury is entitled to witness fees and it is the duty of the county treasurer to pay such witness out of any money in the county treasury appropriated for other expenses provided such witness has the proper scrip for his fees as is provided in Sec. 13421, R. S. Mo. 1939.
100-41	June 24	MOTOR VEHICLES. INFORMATION.	May not display placard bearing words "License Applied for" as substitute for registration plates; approved information for such violation.
100-41	July 22	COUNTIES.	Contract of insurance on buildings and county property for more than one year is void.

ELECTIONS: Mode of conducting elections
COMMISSIONERS: and powers of Commissioners at
SPECIAL ROAD DISTRICTS: Special Road District Commissioners'
Election.

January 23, 1941

1-25
Mr. George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement of facts and questions:

"The West Sailing Public Road District is a special road district governed by three commissioners as provided for by statutes. At the last election the names of two persons were placed in nomination for the office of one of the commissioners. The ballot resulted in a tie, 9 for each nominee. A second ballot was taken resulting in the count of 11 and 8. In the first ballot one of the votes was cast by a person residing outside of the district and in fact outside of the county. On the second ballot this same person voted and apparently another person not voting on the first ballot voted on the second. The non-resident owns a farm in the road district but as heretofore stated is not a resident thereof.

"In each of the balloting another vote was cast by a person who did not own land nor was he a tax payer, but he was a resident.

"I would like to know first if the last mentioned person, a resident but not a tax payer or land owner was entitled to vote.

"There is apparently no question but what the non-resident mentioned above was not entitled to vote. Consequently if his vote had not been counted in the first ballot the count would have stood 9-8. On the second ballot the non-resident's vote, of course, did not affect the result as far as a majority was concerned.

"Should the first ballot be the determining one and the person receiving the 9 ballot votes declared elected? Does the second ballot, notwithstanding the vote of the non-resident on the first ballot control?

"Please also give me your opinion as to the procedure necessary to correct the result of the election if in fact an illegal election was held."

Your request indicates that your inquiry concerns a road district formed under the provisions of Article 10, Chapter 42, R. S. Mo. 1929. Section 8061 of this article provides in part as follows:

"County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of this article shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled '_____ road district of _____ county,' and in that name

shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of this article, or of which it may be rightfully possessed at the time of the passage of this article, and of contracting and being contracted with as hereinafter provided. * * * * *

It will be noted that the body formed under the provisions of this section, operating through its commissioners, possesses the usual powers of a public corporation for public purposes. Selection of commissioners for such special road districts is provided by Section 8063, R. S. Mo. 1929, which, in so far as it applies to your question, provides as follows:

"At the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the voters of the district, at an hour and place to be filed by said commissioners, shall elect three commissioners, one of whom shall serve one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years. No person shall be elected or appointed commissioner who is not a resident of the district and an owner of land in the district. * * * * *

It will be noted that this section provides that the voters shall select the commissioners.

You inquire whether or not a voter should be a land owner or a taxpayer before he would be entitled to vote. The commissioner, before he may be selected a commissioner must be an owner of land in the district, but the qualifications of those voting at the election for the commissioner do not have to be land owners or taxpayers. A voter is defined in Section 10178, Laws of Missouri 1939, at page 382, as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people; Provided, each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides; provided, further, no idiot, no insane person, and no person while kept in any poor-house at public expense, except the Soldiers' Home at St. James and the Confederate Home at Higginsville, or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

If a voter possesses the qualifications set out in this section, then he can vote for the commissioner at the election held under said Section 8063, supra.

From your statement it seems that the commissioners at the election, the first ballot having been a tie, ruled that a second ballot should be cast. By their ruling that the second ballot should be cast they, in effect, held that the votes cast on the first ballot were legal, and, there being no objection, we think the commissioners were authorized to request that a second ballot be cast. Said Section 8061, supra, would indicate that such bodies are authorized to conduct their business as a public corporation for public purposes and would, therefore, be empowered to determine the procedure for their official business meetings. We think this rule is supported by the announcement of the Supreme Court in the case of *State ex inf. Prosecuting Attorney of Greene County, v. Heffernan*, 243 Mo. 442. In that case the selection of a commissioner of a special road district was under consideration and, in discussing the powers of the voters at the election to select the commissioner, the court said, l. c. 452:

"* * * The commissioners are to call these elections, and indicate the time and place of their holding; and the implication is clear that the manner of taking as well as of ascertaining and recording the result of the vote, is left to that body. The statute provides, as we have seen, that the secretary shall keep a true and complete record of the proceedings of the board, to be attested by him and signed by the presiding officer. * * *"

It will be noted that the court in that case held that the commissioners were authorized to ascertain the result of the election held in the road district. By this power we think the commissioners were authorized to determine

that the first ballot cast was a tie and to direct that the second balloting for commissioner proceed. That being the case, the balloting on the second ballot would be controlling.

This department is, therefore, of the opinion that a person voting at an election to select commissioners of a special road district under the provisions of Article 10, Chapter 42, R. S. Mo. 1929, is not required to be a taxpayer or a land owner before being entitled to vote.

We are further of the opinion that where a tie vote is cast for a commissioner at such election and the officials at the election so declare and require a second balloting that the result of the second balloting, if not a tie, is binding on the district.

As to the procedure in case of an illegal election being held for a commissioner of a special road district, it is our opinion, from the procedure followed in the Heffernan case, that quo warranto would be proper in such cases.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

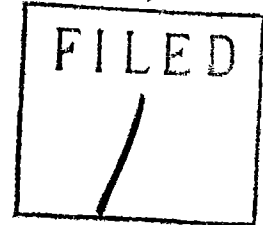
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COUNTY COURT:
SPECIAL ROAD DISTRICTS:
BONDS:

Special Road District unauthorized
to vote bonds to retire road district
notes held by a bank as security for
a loan to the Special Road District.

March 20, 1941.

Honorable George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri



Dear Mr. Adams:

This will acknowledge receipt of your request
for an official opinion, under date of March 6, 1941,
which reads as follows:

"May I have your office's opinion
on the following:

"A special road district of this
county has borrowed money from a
certain bank in the amount of
approximately \$6000.00, which
indebtedness is evidenced by the
district's notes.

"The district desires to issue
bonds for \$8000.00, \$6000.00 of
which will pay off the indebtedness
and the balance will be used for
strictly road purposes.

"Can such bonds be issued under
the general authority of the
district to issue 'road bonds'.

"Can such bonds be issued under
the article permitting road
districts and other political sub-
divisions to issue 'funding bonds',
or are such funding bonds limited

to bonded indebtedness and judgment indebtedness?

"Thanking you for giving this matter your usual prompt attention, I am"

Under Section 3279, R. S. Mo. 1939, funding and re-funding bonds may be issued under certain circumstances by a special road district and said section reads as follows:

"The various counties in this state for themselves as well as in behalf of any township or parts of townships for which said counties may have heretofore issued any bonds, and the several cities, villages, incorporated towns, school districts and road districts in this state, are hereby authorized by their respective county courts and the said cities, villages, incorporated towns, school districts and road districts by their proper authorities, to fund or refund any part or all of their bonded or judgment indebtedness, including bonds, coupons or any judgment, whether based on bonded or other indebtedness, and for that purpose may make, issue, negotiate, sell and deliver renewal, funding or refunding bonds, and with the proceeds thereof pay off, redeem and cancel such judgments or old bonds and coupons as the same mature or are called for redemption, or such renewal, funding or refunding bonds may be issued and delivered in exchange for the judgments, bonds or coupons to fund or refund which the renewal, funding or refunding bonds were issued: Provided, that in no case shall the amount of the debt of any such county, township or parts of

townships, or city, village, incorporated town, school district or road district be increased or enlarged under the provisions of this chapter; and provided also, that no renewal, funding or refunding bonds issued under this chapter shall be payable in more than twenty years from the date thereof, and that such renewal, funding or refunding bonds shall be of the denomination ~~of~~ not more than one thousand dollars (\$1,000) nor less than one hundred dollars (\$100) each, and shall bear interest at a rate not to exceed six per centum (6%) per annum, payable annually or semi-annually, and to this end each bond shall have annexed thereto interest coupons, and such bonds and coupons shall be made payable to bearer: Provided further, that nothing in sections 3279 to 3281, inclusive, shall be so construed as prohibiting any county, city, township, school district or road district from renewing, funding or refunding such debt without the submission of the question to a popular vote: Provided, however, that no indebtedness, judgment or claim founded on bonds or coupons issued in the aid of or in payment for the capital stock of any railroad company shall be funded, nor shall any bonds be issued in lieu thereof or in compromise therefor until authorized by a majority of the qualified voters of such county, city, township or parts of townships voting at an election held for that purpose pursuant to an order entered of record by the county court of such county or council or aldermen of such city on petition of at least fifty of the resident taxpayers of such county, city or township, after public notice by advertisement in some weekly newspaper printed and published in such county or city, if there be such paper, and if not, then in such paper nearest to such county or city, setting forth the object of the election, for four

weeks, and in addition posting up ten written or printed handbills in public places in such county or city, before the time for such proposition to fund its said indebtedness shall be voted on, which said notice shall contain the object and general nature of the proposition to fund said indebtedness. The election herein provided for shall be held in conformity with the statutes of the state covering state, county or municipal elections. And when such indebtedness has been once compromised and funded, the funding bonds issued in lieu thereof may again be refunded according to the other provisions of this article without such election."

The above provision authorizes the issuance of funding or refunding bonds but only to fund or refund any part or all of their bonded or judgment indebtedness, including bonds, coupons or any judgment, whether based on bonded or other indebtedness, and with the proceeds thereof pay off, redeem and cancel such judgments, or old bond and coupons as the same mature or may be called for redemption, or such renewal funding or refunding bonds may be exchanged for the judgment, bonds or coupons to fund or refund which the renewal, funding or refunding bonds were issued.

In construing statutory provisions, one of the cardinal rules is to determine the intent of the legislature and to give it that meaning, if at all possible. (Wallace vs. Woods, 102 S. W. (2d) 91, 340 Mo. 452). Lee vs. Hancock Co., 178 Sp. 790, l. c. 792, the court defined refunding bonds as follows:

"* * * a refunding bond 'is a bond issued to pay off an older issue,' Webster, op. cit.; before a debt can be refunded, it must, of course, have been first funded."

As stated in the above citation, Webster's New International Dictionary, 2nd Edition, defines "refunding bond" as:

"A bond issue to pay off an older bond."

Also, in Bay Co. et al. vs. State, 157 So. 1, 1. c. 2, the court said:

"Refunding bonds are not only obligations in themselves for what they purport to be on their face and under the statutes pursuant to which they are issued, but are authorized extensions and continuations of the obligations represented by the bonds that are refunded. State v. Sholtz, (Fla.) 155 So. 736, 739."

Therefore, from a careful examination of the above statutory provision and decisions, construing funding and refunding bonds, we conclude that it was never contemplated that a funding or refunding bond shall issue to meet expenditures of a special road district unless such expenditures have been reduced to judgment or bonded indebtedness.

It is well established that special road districts are creatures of statute and can exercise only such powers as are granted by the constitution or statute. In Harris vs. Bond Co., 244 Mo. 664, 1. c. 688, the court said:

"It is the consensus of opinion in this country that the Legislature in the creation of municipal and

public corporations of every description is absolute and unlimited, in the absence of some specific State or Federal constitutional provision restricting such powers.

"The Legislature is vested with the whole power of the State in the absence of some such constitutional limitation; and may establish any public or municipal corporation it deems necessary or expedient in the public interest.

"It may also confer upon such corporations such public power and authority as it may deem wise and best. Moreover, it may not only create such public corporations, but it may also change, divide and abolish them at pleasure.

"These corporations are bodies politic; created by laws of the State for the purpose of administering the affairs of the incorporated territory. They exercise powers of government, which are delegated to them by the Legislature, and they are subjected to certain duties. They are the auxiliaries, or the convenient instrumentalities, of the general government of the State for the purpose of municipal rule. . The whole interests are the exclusive domain of the government itself and the power of the Legislature over them is supreme and transcendent; except as restricted by the Constitution of the State. * * *"

In answering your request, we are assuming that the special road district referred to is one organized under

Article 10, Chapter 46, R. S. Mo. 1939. If this be true then, under said article, we find many powers granted the special road district commissioners, but no where are we able to find any authorities for borrowing money from a bank and giving a special road district note as security for such a loan. Under Section 8721, R. S. Mo. 1939, there is some authority, under limited condition, for a special benefit assessment road district to borrow money, but such provision is only applicable to those districts organized under Article 11, Chapter 46, R. S. Mo. 1939.

The special road district commissioners may purchase, sell, construct and keep in good repair roads and bridges, keep records of all expenditures and income and repair same, there are further provisions for raising money such as levies, taxes and voting bond issues. But there is no specific provision or can we, by implication or inference, find anything in the constitution or statute which leads us to believe that the legislature ever intended that the special road district, organized under the above article, shall borrow money at a bank and give their notes as security for same. Therefore, since a road district can only exercise such powers as given them, by the constitution and the statute, we must hold that a special road district can not vote on a bond issue to retire these notes which are held by the bank as security for a loan.

We are enclosing a copy of an opinion rendered by this department, under date of March 9, 1934, to Honorable Elliott Dampf, Prosecuting Attorney of Cole County, Missouri, which holds, the county court can not borrow money by issuing notes on anticipated revenue. Which the writer believes is applicable as to other political subdivisions.

CONCLUSION.

Therefore, in conclusion, it is the opinion of this department that no bond issue can be presented

Hon. George Adams

- 8 -

March 20, 1941.

for a vote of the people in this special road district, the proceeds of which shall be used to take up the notes given to secure a loan made to said road district, by a bank, and which are now held by said bank, for the reason, such a loan does not come within the purview of Article X, Chapter 46, R. S. Mo. 1939.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

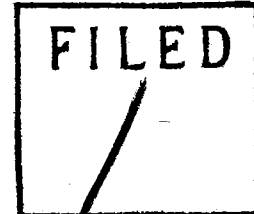
APPROVED:

VANE C. THORLO
(Acting) Attorney-General

ARR:LB
Encl.

June 16, 1941.

6-73



Honorable George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Mr. Adams:

This will acknowledge receipt of your request for an opinion under date of May 27, 1941 which reads, in part, as follows:

"I find that there is a statute section 8900 R. S. Mo. 1939 stating under what circumstances that land owners and tenants may destroy any wild fur-bearing animal which is committing depredations upon poultry, crops or domestic animals.

"My idea is that the farmer will have a slim chance of protecting his property from the foxes if he is not allowed to kill them except when he sees them committing depredations on his poultry and pigs. The short investigation discloses that the word is sometimes refers to the past as well as the present depending upon the context.

"I would like to have your opinion as to the word is in said section with citations of authorities, if any you find, to support Corpus Juris which says 'however, according to the context, the word may not have a present signification, and may accordingly have a future or past meaning.'"

June 16, 1941.

Section 8900, R. S. Mo. 1939, is as follows:

"It shall be lawful for land owners and tenants to destroy any wild fur-bearing animal which is committing depredations upon their poultry, crops, or domestic animals, but under no circumstances shall it be legal to sell, ship or commercialize in the pelts of such depredating animals, or any part thereof, if caught or killed out of season."

The word "is" is ordinarily defined as third person, present indicative, of the verb "be". The word, in its plain and ordinary usual sense denotes present tense.

In *Kasarsky v. New York Life Insurance Company*, 260 N. Y. S. 769, 1. c. 771, the plaintiff was seeking to recover under two life insurance policies. There are two clauses in each policy which reads as follows:

"* * * 'Permanent Disability--Disability shall be presumed to be permanent. * * * (b) After the insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof.' 'No. 3. Benefit-- Upon receipt of the Company's Home Office before default in the payment of premiums, of due proof that the insured is totally and presumably permanently disabled. * * *'"

The court, in construing the word "is" in Clause No. 3, held that same constituted the third person singular of the present indicative of the verb "be". In so holding the court said, at 1. c. 772:

"The company insists that the reasonable construction to be placed upon the word 'is' as used in the policy term, clause

June 16, 1941.

three, 'Upon receipt of due proof that the insured is * * * presumably permanently disabled,' etc., should be that the defendant was to be furnished with due proof of disability at a period during the existence thereof. In view of the context such construction would appear the fair and reasonable intendment thereof. The word 'is' constitutes the third person singular of the present indicative of the verb 'be.' It is employed only in indication of the present tense. Had it been used with regard to an action or condition consummated or in the past the words 'was' or 'has been' might only appropriately have been employed. * * *

In *Indiana State Board of Medical Registration and Examination et al. v. Pickard*, 93 Ind. App. 171, 1. c. 179, 180, 177 N. E. 870, in construing the expression "is a graduate" in an act which required the issuance of a license practicing medicine without an examination to one who is a graduate of a certain school or college, the court held the word "is" as used in said statute should be construed as being present tense and that had reference, of course, to the time when the act took effect. In so holding the court said:

"In construing a statute, courts will give effect to the intent of the Legislature, and, in seeking such intent, will look to the act as a whole, as well as its general purpose and the evils or mischiefs it is enacted to remedy. The words or phrases of a statute will be taken in their plain, ordinary and usual sense unless a contrary purpose is clearly manifest. *Smith, Trustee, v. State, ex rel.* (1930), 202 Ind. 185, 172 N. E. 911. Webster's New International Dictionary defines the word 'is' as being the third person singular present indicative of the verb be. The word 'is' in its plain, ordinary and usual sense denotes present tense, and

there is nothing in the above-quoted statute to denote a contrary purpose in the use of this word. The phrase 'is a graduate' has reference, of course, to the time when the act took effect, for, from that time only, a statute ordinarily speaks. Hoagland v. State (1861), 17 Ind. 489. The act in question became effective May 16, 1927. We hold that, as a prerequisite to an applicant being granted a certificate for a license under Section 2 of this act (Acts 1927, ch. 248, p. 725), it is necessary that such applicant present to the board satisfactory evidence that he was, on or before May 16, 1927, a graduate of a school or college teaching the system or method of healing which he was practicing on January 1, 1927."

In State v. Boner et al., 49 S. W. 944, the court also construed the word "is" to be in the present tense, and not the perfect, "has been". In so holding the court said:

"It is said that the court after judgment had power to remit or release the recognizance by reason of Code 1899, c. 162, Section 9, saying, 'When, in an action or scire facias on a recognizance, the penalty is adjudged to be forfeited, the court may, on application of a defendant, remit the penalty, or any part of it, and render judgment on such terms and conditions as it deems reasonable.' Plainly, this section limits the power of remission to the pendency of the proceeding on the recognizance. The words 'in an action or scire facias' show this. The word 'is' supports the argument. It is the present tense, not the perfect, 'has been.' The words 'render judgment' make it clear and conclusive. The recaption of Ray, I may add, could not be pleaded after final judgment."

June 16, 1941.

In Cunningham v. Moser et al., 215 Pac. 758, 1. c. 759, the court in holding "is removing" as used in a statutory provision signifies present action said:

"In Greeley v. Greeley, 12 Okl. 659, 73 Pac. 295, the court says:

'The language of section 3346--"intends to remove, or is removing, or has within thirty days removed"--is significant as pointing out the time when the acts of the defendant authorize the commencement of an action under this statute. "Intends" refers to future, contemplated action; "is removing" signifies present action; and "has within thirty days removed" limits the backward reach of defendants' acts to 30 days. One of these three acts must exist in order to authorize an attachment under this statute. This affidavit was made on the 20th day of June, 1902, and by no possibility could it authorize an attachment for rent for the year 1901.'

Therefore to say that "is", as used in this instance, shall be construed as to mean in the past, is at least the exception to the rule rather than the rule. There are a few cases reported wherein the word "is" has been construed as past tense.

In Collins v. Carr, 44 S. E. 1000, the jurors returned a verdict which reads, in part, as follows:

"We, the Jury, find that John H. Carr is of sound mind, and is not, on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be intrusted with the right and management of the property; that the trust sought to be created in the second item of the will of Josiah Carr is void; and that the appointment of Jno. G. Collins as trustee be annulled.
* * *

One objection was made to the above verdict in that it does not specify at what time the item of the will appointing the trustee became void. The court said:

"The father had a right to appoint the trustee upon his knowledge of the son's habits and the presumption is that the son, at the time of the execution of the will was, in the opinion of the father, not a fit person to take charge of the property. That presumption remained until rebutted by proof before the jury. Up to the time sufficient proof was made on the trial to authorize the finding that the trust was invalid, that item of the will was valid and binding upon the son and the trustee. When the jury, in their verdict, declared that the trust 'is void' this meant that the trust was void at the time the petition was filed and at the time of the trial."

In Hall v. Brackett, 62 New Hamp. 509, Brackett was elected Treasurer August 1, 1857 and since that time no treasurer had been chosen. He held office until suspension of the bank in September, 1877. In 1869 the treasurer gave a bond which cited, in part, that "If the above bounden, John M. Brackett, who is treasurer of the Carroll County Five Cents Savings Bank of Wolfeborough, shall faithfully, etc." The charter provided that the treasurer was one of those who shall hold their offices for one year, and until others are chosen and have accepted in the stead. The court, in this case, held that the defendants cannot deny that Brackett was treasurer at the time he gave the bond and that the words "is treasurer", in the bond, might refer to no other term than the indefinite one he was holding, and that the bond given in 1869 covers any default that occurred during the continuance of the indefinite term for which it was given.

In Delaware Bay and Cape May Railroad Company v. Markley, 45 N. J. Eq. 139, 1. c. 149, the court said:

"As already stated, this procedure is based on the act to be found in the Rev. Sup. p. 834 Section 42. its general provision is thus expressed, viz.:

'That if any railroad in this state has, or may hereafter, fail or neglect to run daily trains on any part of its road for the space of ten days, then the chancellor of this state, upon petition of any citizen of this state, and due proof of the facts, shall speedily appoint a receiver' &c.

"And then follows the following clause:

'Provided, that this act shall not apply to any railroad company whose road is constructed at any sea-side resort, not exceeding four miles in length, and which was built and intended merely for the transportation of summer travelers and tourists.'

"In the present case, the appellant has shown, in the clearest manner, that, in point of fact, its road is exactly one of those described in this proviso; it is less than four miles in length; is at a sea-side resort; was designed to be and was a mere adjunct of a boat running in the summer season from Philadelphia, and was used merely, except incidentally, for the transportation of 'summer travelers and tourists.' We think, therefore, that the appellant has, under the evidence, demonstrated that it stands within the definition of this proviso, if such proviso applies to roads already in existence at the time of its enactment.

"The vice-chancellor was of opinion that this exceptive clause did not apply to

the appellant's road, because it was built before the passage of the law, and he declared that he did not feel himself at liberty to give this provision any retrospective operation.

"But this interpretation appears to us to be in plain repugnancy, not only to the spirit, but to the language of the statute. In its first line this is manifest, for it declares that its summary processes are to apply not only to roads that thereafter should fail to run their daily trains, but also to roads that had, before the passage of the law, failed so to do; and the proviso, by its strict terms, is made applicable exclusively to a road which, to use the statutory expressions, 'is constructed,' and which 'was built and intended' &c.; plainly designating, if we look to terms alone, roads already in existence, and not those which might come into existence at a future time."

As hereinabove stated, by the court, the contention of the vice-chancellor that the exceptive clause did not apply to this particular road because it was built before the passage of the act, was erroneous, for the reason in reading the whole act such an interpretation would be repugnant to the spirit as well as the language of the statute. The words "That if any railroad in this state has, or may hereafter, fail etc." clearly indicates that it was intended that the acts should apply to roads already constructed.

The writer is fully apprized of the fact that it is very difficult to catch a fox in the act of killing poultry and can sympathize with the farmer. However, in construing this act it is necessary that we follow certain rules of construction as laid down by the Supreme Court in this state.

One of the cardinal rules of construction is to ascertain and give effect to the lawmakers intent which should be done from the words used, if possible, considering the language honestly and lawfully, to ascertain its plain and rational meaning and to permit its object and manifest purpose. City of St. Louis vs. Pope, 126 S. W. (2d) 1201, 1. c. 1210.

Another well established rule, and well recognized, is that words of common use ought to be construed in their natural and ordinary meaning. In Betz vs. Kansas City Southern Railway Co., 314 Mo. 391, 1. c. 411, the court quoted approvingly:

"In 36 Cyc. 1106, it is said: 'The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority.' And in 36 Cyc. 1114, it is furthermore said: 'In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect.' * * *"

There is still another rule of construction that is applicable in the instant case and that is, that a statute will not be so construed as to require impossibility or lead to absurd results if susceptible of reasonable interpretation. In State vs. Irvine, 72 S. W. (2d) 97, 1. c. 100, the court said:

"* * * The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reason-

able interpretation. * * *

Looking to the act the language clearly indicates that the legislature fully intended the word "is", as used therein, to be used in the present and not in the past tense. The courts ordinarily have construed the word "is" in such manner as hereinabove shown. As previously stated, it is the exception instead of the rule to construe the word "is" as used in the past tense. We have hereinabove set out a few cases wherein this was done. In each case the reason given for such a construction is evident. From a reading of the balance of the acts, wherein such construction was given, it clearly indicates the legislature could have intended no other construction, and to construe it in any other manner would defeat the purpose of the act.

In the instant case we are confronted with a very different situation. Here we have a statute which requires a person to kill a fox which is committing depredations upon poultry, etc. If we should construe the word "is", in the past tense, then this would lead to an absurdity for the reason, if the fox had already killed the poultry without being caught or killed, how could a person ever identify the same fox if he should see him again. It is almost impossible to identify one fox from another fox. Surely the legislature never intended to say that if a fox had been preying upon a farmer's poultry and was not killed while in the act, that the farmer thereafter could kill any fox upon sight. We think the legislature never intended such a construction. It would be much more sensible to say, that the legislature intended that the word "is", is to be used in the present tense which follows the ordinary and usual meaning of same.

Furthermore, the fox is protected under the law. The legislature as well as the Conservation Commission have seen fit to enact legislation and promulgate rules and regulations for their protection and the state now has certain closed seasons for their protection. In view of this, it seems to the writer that it would practically amount to repealing these laws and regulations to construe the word "is" as being in the past tense.

Hon. George Adams

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June 16, 1941.

CONCLUSION

Therefore, it is the opinion of this department that the word "is", as used in Section 8900, supra, should be interpreted in the present and not in the past tense.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

ARH:LB

SCHOOLS: Voters of consolidated school district cannot authorize additional levy of ten cents in excess of One Dollar for repairing and furnishing colored school.

February 28, 1941

Mr. James L. Anding
Attorney at Law
Pacific, Missouri



Dear Sir:

This Department is in receipt of your letter of February 24, wherein you request an opinion as follows:

"Consolidated School District No. 3 of Franklin County, Missouri, at its annual meeting always votes the increased maximum rate of One Dollar on the One Hundred Dollars valuation allowable for school purposes. This year the Board contemplates submitting to the voters of the District a proposition authorizing an additional Ten Cents on the One Hundred Dollars valuation for the purpose of repairing and furnishing the school for colored children maintained by said District. The question is, can this be legally done under the provisions of R. S. Mo. 1939, Sec. 10359?"

You state that the school district, which is a consolidated district, has already voted the maximum rate of One Dollar on the One Hundred Dollars valuation.

Section 11, Article X of the Constitution of Missouri, contains the proviso:

"Provided, the aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, * * *."

This section further contains the provision as follows:

"For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor."

Section 10359, R. S. Mo. 1939, provides as follows:

"The board of education or directors of any school district in this state shall, whenever in their judgment it becomes necessary, or they be requested, by a petition of ten taxpayers of any such school district, to increase the annual rate of taxation for the purpose of paying for school building sites, whether the same have been purchased or condemned, for buying or erecting school buildings in such districts, or repairing or furnishing such buildings, or for building, repairing and maintaining foot bridges over running streams, determine the rate of taxation necessary to be levied within the maximum rates

prescribed by the Constitution, and as therein limited for such purposes, and shall submit to the voters of such school district, at an election to be by such board called and held for that purpose, at the usual place for holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board for any of the purposes mentioned in this section, due notice having been given as required by section 10418, and if two-thirds of the qualified voters of such school district, or of such city, town or village forming a school district, voting at said election, shall vote in favor of such increase for the purposes aforesaid, the result of such vote, and the rate of taxation so voted, shall be certified by the secretary or clerk of such board to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess the amount so returned for any or all of the purposes mentioned in this section on all the taxable property, both real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants, as is provided by law: Provided, that when the proposition to be voted on refers only to repairing or furnishing, or both repairing and furnishing such school building, the proposition shall be deemed to have been carried at the election if a majority of the votes cast are cast in favor of the proposition, where said increase together with amount or amounts levied under Section 10358, Revised Statutes of Missouri, 1939, does not exceed constitutional limitations for school purposes."

The Legislature in 1939 (Laws of 1939, page 701) amended the above section by including the words: "where said increase together with amount or amounts levied under Section 10358 R. S. Mo. 1939, does not exceed constitutional limitations for school purposes."

Section 12, Article X, of the Constitution of Missouri as stated in your suggestions, requires consent of two-thirds of the voters of the school district with exceptions as to certain cities..

We think the decision of State ex rel. Marlowe v. Himmelberger-Harrison Lumber Co., et al., 58 S. W. (2d) 750, is illuminative of the question, where the court held in substance:

"Increased tax rate allowed by Constitution for school district for 'erecting public buildings,' after election therefor, could not be voted for purpose of making repairs or alterations of existing buildings."

We are of the opinion that you are correct in your conclusions regarding the matter and that the voters of the Consolidated School District, under the provisions of Section 11, Article X and of the statute quoted supra, cannot legally authorize the additional levy of ten cents in excess of the one dollar on the hundred dollars valuation for repairing and furnishing the colored school.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

OWN:CP

BOARD OF HEALTH: Commissioner of Health is under no statutory duty to post bond before entering upon the duties of his office.

July 17, 1941

Mr. Arens
Executive Secretary
Executive Offices
Jefferson City, Missouri

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FILED

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Dear Sir:

This is in reply to your telephone inquiry for an opinion from this department upon the following questions:

1. Is the Commissioner of Health required by statute to give a bond?
2. If no statutory requirement exists, should the Governor of the State of Missouri require such a bond?
3. If such a bond were required, what would be its conditions?

From an examination of Chapter 57, Article 1, R. S. Missouri, 1939, we find that Section 9744 provides as follows:

"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be

no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars (\$5000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this law, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

A further examination discloses no statute requiring the Commissioner of Health to post a bond before entering upon the discharge of his duties.

Therefore, in the absence of such a statute, it is the opinion of this office that the Commissioner of Health is not required, as a matter of law, to post such a bond, and may enter upon the performance of his duties without the giving of such a bond.

Now, turning to the second and third questions, we are confronted with the general proposition that the Legislature has in its wisdom conferred upon the Executive Branch of State Government the power to make numerous appointments, and in nearly all instances has provided that the persons so appointed shall first post a bond, and the Legislature has gone farther in each instance and set forth the conditions

Mr. Arens

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July 17, 1941

of such bond. In these instances, of course, it is incumbent upon the person appointed to one of the offices requiring such a bond to fulfill the requirements of the statute. On the other hand, where the Legislature has not seen fit to provide and require a bond, and there does not exist a statutory duty upon the person appointed to a particular office, as is the case of a person appointed to the office of Commissioner of Health, then we do not see how the person who has the appointing power, namely, the Governor of the State of Missouri, in this particular instance, could as a matter of statutory right require the giving of a bond, and further, in the absence of a statute setting forth what the conditions of the bond should be, we do not see what precedent the Governor could follow in setting forth conditions for a bond which was not contemplated or provided by statute.

Therefore, we are of the opinion that if the Governor of the State of Missouri required a bond, it would be without the contemplation of the statute, and whatever terms and conditions were incorporated in the bond would have to be designated by him, which would make the terms and conditions fall outside of any statutory requirement.

It is our opinion, therefore, that the Commissioner of Health is under no statutory duty to post a bond before entering upon the duties of his office.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:HR

GOVERNOR: The clause "during the recess", as used in Section 12859, R. S. Mo. 1939, means after the final adjournment of the General Assembly and when it is not in session. (b) General Assembly is now in recess. (c) The expression "without delay" means without unreasonable and unnecessary delay. (d) Writ of election issued under Section 12859, R. S. Mo. 1939, for election in March or April, 1942, may be unreasonable and unnecessary delay. Governor cannot be compelled to issue election because can not be mandamused.

November 6, 1941 11-7

Mr. Richard Arens
Secretary to the Governor
Jefferson City, Missouri



Dear Sir:

As Secretary to the Governor, on November 5, 1941, you submitted a request to this Department for an official opinion on the construction of Section 12859, R. S. Missouri, 1939, and other questions arising in connection therewith. The first portion of your letter is as follows:

"Section 12859 of the 1939 Revised Statutes of Missouri provides: 'Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy.'

"Since the adjournment of the 61st General Assembly of the State of Missouri the resignations of certain members of the General Assembly have been received by the Governor."

I.

Questions (a) and (b) are closely related and we shall treat them as one.

"An opinion from your office is respectfully requested on the following questions:

"(a) What is the meaning of the phrase 'during the recess' as used in Section 12859 of the 1939 Revised Statutes of Missouri?

"(b) Is the 61st General Assembly now in recess within the meaning of this section?"

Section 12859, R. S. Missouri, 1939, contains the clause "during the recess", and is as follows:

"Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

We think Section 12858, R. S. Missouri, 1939, lends some bearing on the intent of the Legislature in using the clause "during the recess" in Section 12859. Said section is as follows:

"If any member elected to either house of the general assembly shall resign in the recess thereof, he shall address and transmit his resignation, in writing, to the governor; and when any such member shall resign during any session, he shall address his resignation, in writing, to the presiding officer of the house of which he is a member, which shall be entered on the journal; in which case, and in all cases of vacancies happening,

or being declared, during any session of the general assembly, by death, expulsion or otherwise, the presiding officer of the house in which such vacancy shall happen shall immediately notify the governor thereof."

Condensing the section, the meaning is that when there is a vacancy from any cause in the recess (after final adjournment), the member who resigns addresses his resignation to the Governor, but when there is a resignation or vacancy from any cause during the session, the resignation is to be addressed to the presiding officer of the house in which the vacancy occurs, and the presiding officer in turn shall immediately notify the Governor.

We think it proper to resort to the rules of statutory construction to the effect that a statute should not be construed as if it stood alone and complete in itself, and when two statutes are susceptible of construction which gives force and aid to both, they must be so construed. *McGill v. City of St. Joseph*, 38 S. W. (2d) 725.

Referring again to Section 12859, quoted supra, and bearing in mind the terms of Section 12858, we find that the statute is so worded as to present two conditions for the Governor to issue a writ of election to supply a vacancy, first, whenever the Governor receives a resignation direct from the member of the General Assembly or notice of the vacancy which we construe to mean when notified by the presiding officer of either house. Second, when he shall be satisfied of the death of any member of either house during the recess. So that, in either event, irrespective of whether the vacancy occurs during the session of the Legislature or after final adjournment, it is the duty of the Governor to issue a writ of election to supply such vacancy.

Further, bearing on the meaning of the clause "during the recess," we shall consider the Constitution. Section 14 of Article IV states that:

"Writs of election to fill such vacancies as may occur in either house of the General Assembly shall be issued by the Governor."

Section 21 of Article IV states:

"Every adjournment or recess taken by the General Assembly for more than three days shall have the effect of and be an adjournment sine die."

Section 22 of Article IV provides:

"Every adjournment or recess taken by the General Assembly for three days or less shall be construed as not interrupting the session at which they are had or taken, but as continuing the session for all purposes mentioned in section sixteen of this article."

Section 23 of Article IV omits the word "recess" but provides:

Neither house shall, without the consent of the other, adjourn for more than two days at any one time, nor to any other place than that in which the two houses may be sitting."

We are of the opinion that the clause "during the recess", when construed in the light of the statute itself, and the fact that the Constitution uses the word "adjournment" and the word "recess" interchangeably, that the word "recess" as used in the statute under consideration means

final adjournment. Therefore, in either event, irrespective of whether the vacancy takes place during the session of the General Assembly or after it is finally adjourned, it is the duty of the Governor to issue writs of election to supply the vacancy. The General Assembly having finally adjourned on the 12th day of July, 1941, is now in recess within the meaning of the section and within the meaning of the law.

II.

"(c) If writs of election should issue, to supply such vacancies as hereinbefore set forth, when should such writs be issued?"

Section 12859, R. S. Missouri, 1939, states that the Governor "shall, without delay, issue a writ of election to supply such vacancies."

In the decision of *Ex parte Ryan*, 124 La. 356, the expression "without delay" is defined to mean without unreasonable and unnecessary delay and with reasonable promptness. In the decision of *State ex rel. Compton Company v. Walter*, 23 S. W. (2d) 167, it was interpreted to mean at once. The statute can be construed as directory in its nature as it does not prescribe the result or the effect if the Governor does not issue the writ of election without delay. We are of the opinion that the Governor should issue the writs of election without unreasonable and unnecessary delay.

III.

"(d) If writs of election should issue, to supply such vacancies as hereinbefore set forth, would it be in compliance of Section 12859 of the 1939 Revised Statutes of Missouri to hold such elections in March or April of 1942?"

Mr. Richard Arens

(6)

Nov. 6, 1941

In view of our conclusion in answer to your question (c), relating to the time when the writs should be issued, we are of the opinion that the time mentioned in your letter, being March or April of 1942, might constitute an unreasonable and unnecessary delay in the absence of any unusual circumstances or conditions to the contrary. However, we do not think it amiss to point out to you that the Chief Executive of the State may exercise discretion in issuing the writs of election, in the event that he does issue the same, and as to the time of issuing the same for the reason that the Governor as Chief Executive, cannot be compelled to do so as he would not be subject to a mandamus action.

Respectfully submitted,

OLLIVER W. NOLLEN
Assistant Attorney General

APPROVED:

VANE C. TEURLO
(Acting) Attorney General

OWN/rv

SHERIFFS: Deputies employed as private watchmen."

December 20, 1941

Mr. Richard Arens
Secretary to the Governor
State Capitol Building
Jefferson City, Missouri



Dear Mr. Arens:

Under date of December 15, 1941, you wrote this office requesting an opinion upon several questions concerning the guarding of industrial plants, utilities and transportation facilities by persons commissioned as deputy sheriffs. For convenience in replying, the letter and questions are herein set out:

"It has been deemed advisable during the National Emergency and war period to guard certain industrial plants, utilities and transportation facilities. The plan under consideration provides that the necessary guards shall be furnished and paid by the owners and operators of such properties and that they will be commissioned deputy sheriffs.

"Your opinion is requested upon the following questions:

"1. Are the sheriffs of the respective counties required to protect the above mentioned properties?

"2. May the respective sheriffs of the various counties be required to deputize suitable and proper persons for the purpose of protecting the essential industrial, utility and transportation property?

"3. By what particular statutory authority and proceedings should such deputies be commissioned?

"4. Are the respective sheriffs and their bondsmen liable for the acts of such persons as may be deputized while guarding the properties sought to be protected?

"5. May each respective sheriff require the persons he may deputize to indemnify him by a suitable bond?

"6. May such persons to be deputized be paid by the owners or operators of such property?

"7. Would persons so deputized have any claim against the county or state for compensation?

"8. May such deputies use physical force and firearms in preventing attempted or actual molestation of and damage to such property, or in apprehending persons who

(a) are apparently about to damage such property

(b) are in the act of damaging such property

(c) have damaged such property

and, if so, to what extent may such force and firearms be used?"

Before proceeding to answer specific questions, it is considered advisable to make a few general remarks upon the duties of a sheriff and his deputies and the guarding of private property.

The office of sheriff is a constitutional one, being created by Section 10 of Article IX of the Constitution. The Constitution does not prescribe the duties of the sheriff. These are found in Sections 13136 and 13138, R. S. Missouri, 1939. Briefly summarized they are, to conserve the peace, to cause all offenders against law, in his view, to enter into recognizance, to keep the peace and appear at the next term of court, to quell and suppress assaults and batteries, riots, routs, affrays and insurrections and apprehend and commit to jail all felons and traitors, and execute all legal process directed to him and attend upon the courts of record. He is authorized, by Section 13133, R. S. Missouri, 1939, to appoint one or more deputies with the approval of the judge of the circuit court and in addition thereto, by Section 13136, R. S. Missouri, 1939, is authorized, in any emergency, to appoint deputies who shall serve not to exceed thirty (30) days, and who shall be paid not to exceed Two Dollars (\$2.00) per day from the county treasury. At no place is there any express direction to the sheriff to guard private property.

In carrying out the duties enumerated by statutes, it would be incumbent upon the sheriff to be diligent and vigilant in order that he might act promptly, and he would also have the duty implied of preventing breaches of the peace, riots, routs, affrays, felonies and treason, as far as it is within his power to do so. However, the only method of proceeding the sheriff has is by arrest, and no arrest can be made until some overt act towards the commission of an offense has been committed.

In this country it has been always recognized that the first duty of the guarding of private property rests upon private individuals. The Constitution of the State of Missouri recognizes this and by Section 17 of Article II, guarantees to the citizens the right to keep and bear arms in defense of their homes, persons and property. Of course a corporation, not being a natural person, could not bear arms but it could act by its agents in protecting its own property to the same extent that a natural person in protecting his property.

In the performance of this duty upon the citizens, the practice has become quite common to employ watchmen to guard

private property, and having the watchmen commissioned as police officers, deputy sheriffs, special police officers, deputy constables, et cetera, and the paying of these special watchmen by the owner of the property. These watchmen, when so commissioned as police officers, function in a dual capacity. When they are guarding the property and acting within their scope of employment, they are merely employees of the person who has hired them and the employer is liable for their wrongful acts, done within the scope of their employment. In functioning as police officers and making arrests they step outside of their function as private employees and are public officers charged with the duties of a public officer and are liable for wrongful acts, just as any other officer of the same classification is liable for is wrongful acts. It is a question of fact to be determined by the circumstances of each case whether or not the watchmen commissioned as police officers are functioning in their private capacity or in their public capacity.

In replying to your question Number One, the duties of a sheriff are set out in Sections 13136 and 13138, R. S. Missouri, 1939, and these sections are as follows:

"Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace; and he shall attend upon all courts of record at every term, and in all cities which now have or shall hereafter have a population of three hundred thousand inhabitants or more, he may employ counsel to aid and advise him in the discharge of his duties and to represent him in court, and may fix the compensation to be paid such counsel, not, however, to exceed the sum to two thousand dollars per annum: Provided, the whole compensation is paid out of the fees of his office of sheriff; and the court shall have power to audit and allow such compensation as other fees and expenses are allowed by law."

No case has been found construing these sections with regard to the guarding of private property by a sheriff. In the case of *State ex inf. McKittrick v. Williams*, 144 S. W. (2d) 98, a case in which ouster was sought against a sheriff for neglect of duty in failing to arrest persons violating the law, the Supreme Court, at l. c. 104, used the following language in discussing the duties of a sheriff:

"* * * His is an important office and one of the oldest known to law. Under the common law he was the conservator of the peace within the county, had the safe keeping of the county jail and commanded the posse comitatus. One author says that 'for a thousand years the sheriff has been the principal conservator of the peace in his county, with full power to command, whenever necessary, the power of the county.' Murfree on Sheriffs. He has also been

referred to as the chief executive officer of his county. By statute (Secs. 11516, 11518, R. S. 1929, Mo. St. Ann. Secs. 11516, 1518, p. 7435) as well, he is made the conservator of the peace within his county. His duties are described in *Farmers' Mutual Fire A. v. Hunolt*, Mo. App. 81 S. W. (2d) 977, 981: 'Sheriffs are given power, and it is made their duty, to preserve the peace arrest and commit to jail all felons, traitors, and other misdoers, to execute all process, and to attend upon courts of record. The powers and duties of conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace, and it has been held that the duty of a sheriff in the enforcement of the law implies initiative on his part, and that he must be reasonable alert with respect to possible violations of the law, and is not entitled to wait until they came to his personal knowledge, but must follow up information received from any source.'

And, again, in the case of *Maxwell v. Andrew County*, 146 S. W. (2d) 621, a case involving compensation paid to a sheriff, in discussing the duties of a sheriff, at l. c. 624, the Supreme Court spoke in the following manner:

"Respondents, however, contend that it was the duty of the sheriff to investigate complaints as to alleged criminal law violations. They say that since this duty is imposed by law on the sheriff, and since the statute makes no provisions for compensation to be paid him for the performance of such duty, he is entitled to be reimbursed

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for his reasonable expenses in connection with such activities. It is true that the sheriff is under a legal duty to investigate alleged crimes and to suppress crime and arrest felons. In speaking of the duties of the sheriff at common law Blackstone says (1 Com. 344): 'He may and is bound ex officio to pursue and take all traitors, murderers, felons and other misdoers and to commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose as well as for keeping the peace and pursuing felons, he may command all of the people of his county to attend him.' Our statute, sec. 11518, R. S. Mo. 1929, Mo. St. Ann. sec. 11518, p. 7435, reiterates this rule in the following language: 'Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors.'

In an early Arkansas Case, St. Louis I M & S Ry. Co. v. Hackett, 24 S. W. 81, the Supreme Court of Arkansas flatly stated:

"* * * An officer of the law cannot engage as such officer to guard the property of a private individual and, or corporation not in the custody of the law."

This statement seems to have been based upon the duties of the officer as prescribed by the laws of the state and, in the case of Texas N. O. Ry. Co., et al., v. Parsons, cited by the Court of Civil Appeals of Texas, reported in 109 S. W. at page 240, a suit brought to collect damages for alleging wrongful

acts of persons who had been commissioned deputy sheriffs and who were guarding railroad property, it was held that such persons were private employees of the railroad company and not deputy sheriffs when they are functioning in the capacity of watchmen.

In another Texas case, Lancaster et al. v. Carter, et al., 255 S. W. 392, also a case where damages were being sought because of alleged wrongful acts of persons who had been commissioned deputy sheriffs and were acting as watchmen for railroad property, the Commission of Appeals of Texas spoke in the following manner:

"* * * The sheriff had no authority to appoint or detail a deputy to guard and watch the property of the railroad except in specific cases of threatened injury. T. & N. O. Ry. Co. v. Parsons, 102 Tex. 157, 113 S. W. 914, 132 Am. St. Rep. 857. * * *."

Many cases of similar import for numerous jurisdictions could be cited. Among these are Hudson v. St. Louis Southwestern Ry. Co., also a Texas case, 286 S. W. 766; Kusnir v. Pressed Steel Company, 201 Federal 146, decided by the District Court of New York, Southern District and Seymoure v. Director General of Railroads, 290 Federal 291, decided by the Court of Appeals of the District of Columbia. No Missouri cases bearing directly on the point have been found, but the doctrine stated in these cases seems to be partially recognized in at least two Missouri cases. In the case of Brill v. Eddy, 115 Mo. 596, a case in which damages were sought for the alleged wrongful act of a person who was guarding railroad property, and who had been commissioned as a special police officer of the City of Sedalia, the Supreme Court spoke as follows at l. c. 604:

"It is no uncommon thing for corporations and individuals to employ duly appointed police officers to watch their property; and if such an officer so employed make an arrest for disorderly con-

duct, the presumption is that he acted in his official capacity as the agent of the state, and not as the agent of his employer. Being an officer whose duties are prescribed by law, it should be presumed, until the contrary is made to appear, that his employment contemplates only the exercise of such powers as the law confers upon him. 2 Wood's Railway Law, 1212; Tolchester Beach Improvement Co. v. Steinmeier, 20 Atl. Rep. 188; Jardine v. Cornell, 14 Atl. Rep. 590. The presumption is, however, one of fact, and it may be shown that in making the arrest he acted under orders of his employer, in which event the employer would be liable for the unlawful acts of the officer. Under the ordinance before mentioned McMahan as a police officer had a right to arrest the boy on view for hanging to the car; and if the evidence tended to show that he committed the negligent act when making or attempting to make an arrest, it would follow from what has been said that the question whether he acted under the orders of defendant or their authorized agent would be one for the jury."

And again, in Murphy v. Railroad, 168 Mo. App. 588, 1. c. 593:

"The authorities cited by both appellant and respondent agree in holding that an amusement company, railway company, or any person or persons engaged in handling the public at their places of business have a right to employ servants to maintain order and protect their property and eject objectionable characters; this person so employed may or may not be a regularly commissioned officer of the law; and

the mere fact that such person is paid by the defendant would not, standing alone, make the defendant responsible. (Brill v. Eddy, 115 Mo. 596, 605, 22 S. W. 488; Sharp v. Erie R. Co., 76 N. E. (N. Y.) 923; Deck v. Baltimore & O. R. Co., 59 Atl. (Md.) 650; Tolchester Beach Improvement Co. v. Steinmeier, 8 L. R. A. (Md.) 846; Foster v. Grand Rapids Ry. Co., 104 N. W. (Mich.) 380; McKain v. Baltimore & O. R. Co., 64 S. E. (W. Va.) 18, 23 L. R. A. (N. S.) 289; Healey v. Lathrop, 50 N. E. (Mass.) 540; Cordner v. Boston & M. R. Co., 57 Atl. (N. H.) 234; Tucker v. Erie Ry. Co., 54 Atl. (N. J.) 557; Pennsylvania R. Co. v. Kelly, 177 Fed. 189.) The authorities further agree that when an assault occurs, if the person (when an employee as well as an officer) acts within the scope of his employment and under instructions either express or implied, general or special, of his employer, then any wrongful act in his conduct is chargeable to the employer. If his act, on the other hand, does not fall within the scope of his employment and is without direction of his employer, then of course his conduct is not chargeable to his employer. In this case, the plaintiff by his instructions assumes that the evidence shows that Coates was acting under the direction of the railway company and that what he did was within the line of his duty as such employee. The defendant by its instructions assumed the very opposite, namely, that under the state of facts presented Coates was acting without the scope of his authority and as a deputy sheriff, for which the company would not be responsible."

From the above cited cases and statutes, and other cases toward same, there is no duty placed upon a sheriff to guard

private property unless some law violation is imminent. At the present time, with our Nation at war and our population containing as it does many persons who might be sympathetic towards some of the other Nations with which we are at war, it would seem that it be the duty upon a sheriff to be extremely diligent and watchful in order that he might promptly arrest persons who would damage property vital to defense industries and take such steps as are within his power to prevent any injury to such property.

In reply to your question numbered two, there is no method by which a sheriff could be required to deputize persons for the purpose of protecting essential industries. If, under the circumstances, a failure to deputize persons would be a neglect of duty, the only remedy would be an ouster proceeding against the officer so offending. Section 12828, R. S. Missouri, 1939, and State ex inf. McKittrick v. Williams, 144 S. W. (2d) 98.

In replying to question numbered three, the method of appointing deputies is set out in Section 13133, R. S. Missouri, 1939, which is as follows:

"Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

And it is not absolutely imperative that the appointment of the deputies be filed in the office of the Circuit Clerk. City of Festus v. Kausler, et al., 77 S. W. (2d) 197, 1. c. 199:

"We think the provision of the statute (Mo. St. Ann. Sec. 11513, p. 7433), requiring the appointment of one as deputy sheriff to be filed in the office of the clerk of the circuit court of the county,

is directory, and that the failure to file his appointment did not deprive him of the right to claim on trial that he was a deputy sheriff at the time of the shooting. State v. Dierberger, 90 Mo. 369, 2 S. W. 286; State v. Underwood, 75 Mo. 231; State v. Muir, 20 Mo. 303."

As to your question numbered four, a sheriff deputizing persons to function as watchmen, the sheriff and his bondsmen would be liable for the wrongful acts of the deputies committed while acting in the capacity of public officers. Evans v. Hays, 1 Mo. 697, Maxwell v. Andrew County, 146 S. W. (2d) 621, 1. c. 625:

"* * * In this connection we may point out in passing that the sheriff's deputies are public officers who perform the duties and are subject to the liabilities imposed upon the sheriff himself by law. Scott v. Endicott, 225 Mo. App. 426, 38 S. W. 2d 67."

For wrongful acts committed in their private capacity, the respective employers would be liable. Cases cited above in answer to question number one.

Answering question numbered 5, there is no provision of law which would authorize a sheriff to require persons he might deputize to indemnify him by bond.

Answering question numbered 6, it is perfectly proper for private employers to pay their private employees who are commissioned as public officers. This is recognized in all of the cases cited above.

Answering question numbered 7, we fail to see where persons privately employed and paid as watchmen would have any claim against the state or county for the performance of their private duties. There is no statutory provision authorizing payment for the performance of such private duties.

The only general statute authorizing compensation to be paid deputy sheriffs out of the public funds is found in Section 13136, R. S. Missouri, 1939, and that only in an emergency not to exceed thirty (30) days.

In response to your question number 3, answering section a, such persons would have authority to do all that was reasonably necessary, under the circumstances, to prevent injury to the property they are guarding. *Adams v. St. Louis-San Francisco Ry. Co.*, 251 S. W. 124, 1. c. 125:

"* * * That meant that it was his duty to remove trespassers. To accomplish that purpose, he was authorized to use such force as was reasonably necessary, but if, while engaged in that service, he went beyond what was reasonably necessary, the master would then be liable notwithstanding the act done by the servant should amount to a felony. *Haehl v. Railroad*, 119 Mo. 325, 24 S. W. 737; *Whiteaker v. Railroad*, 252 Mo. 438, 160 S. W. 1009."

In answer to your questions b and c, under those circumstances, the persons damaging property, or who had damaged property, would be subject to immediate arrest, and the rules of law governing the duties and powers of officers in making arrests would apply. In this case your attention is called to the case of *State v. Ford*, 130 S. W. (2d) 635, a case in which a town marshal was convicted of murder in the second degree for killing a prisoner when the latter made an assault upon him and attempted to seize his pistol, from which we quote at length, d. c. 639-640:

"We need not determine here what kind or amount of force an officer may use to effect an arrest when a misdemeanant flees, because this record deals only with a situation where the prisoner forcibly resisted arrest. But as to that,

we think the doctrine of the Dierberger case is right and that of the McGehee, Salts and Roth cases, reviewed above, is wrong; and that the latter should no longer be followed. The third subdivision of sec. 3985, supra, says a homicide shall be justifiable 'when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed.' That language is broad enough to justify a homicide resulting from force (shooting, a blow or the like) necessarily exerted in effecting the arrest of an accused felon in flight. But it is not necessarily a negation of the right to use all force reasonably necessary to effect and maintain against resistance the arrest of a misdemeanor, especially in view of the provisions of Sec. 3571, supra.

"If the latter doctrine were not the law, then, as Judge Sherwood said in State v. McNally, supra, 87 Mo. 644, loc. cit. 653, 'it is patent to the most casual observation that a peace officer "would be of all men the most miserable," compelled by his duty to press forward and make arrests when ordinary misdemeanors were being committed, or where, as in the case at bar, some violent and dangerous man was "making night hideous" with the most flagrant breaches of the peace, the officer would proceed with the consciousness that though the law imperatively demands at his hands the arrest of the law breaker, yet it gave no adequate powers for the accomplishment of the end commanded, but while placing the officer in position of extreme peril took from him all protection arising from his official character and the performance of his official duty and placed him on the same plane as an ordinary individual when engaged in a private quarrel,

and invoking the doctrine of self-defense. The bare statement of such a proposition constitutes its own ample refutation. The law never requires an impossibility, and having made it the duty of peace officers to make arrests, to quell disturbances and breaches of the peace, it is not so unreasonable, as to deny the means to compass the end commanded.'

"State ex rel. and to use of Kaercher v. Roth, supra, 330 Mo. 105, loc. cit. 110, 49 S. W. 2d 109, loc. cit. 110, looks to 5 C. J. Sec. 62, p. 426, note, 95a(2), and State v. McClure, 166 N. C. 321, 330, 81 S. E. 458, for the reason behind the rule forbidding the use of a deadly weapon in making arrests on misdemeanor charges. These are quoted as follows: 'As the law-making power itself could not inflict the death penalty as a punishment for a misdemeanor, "it would ill become the 'majesty' of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender who is often brought into court without arrest and dismissed with a nominal fine."'

"That may be true when the accused flees, but how can it be thought the majesty of the law is served by subjecting peace officers to invited personal violence in the apprehension of misdemeanants and making the arrest contingent on which is the 'better man.' Sec. 3985, supra, expressly covers felonies. The punishment in all but a few is less than death. As to some the maximum punishment is only two years in the penitentiary and may even be graduated down to a fine of \$100. For instance, see Sec. 4029, R. S. 1929, Mo. St. Ann. Sec. 4029, p. 2835, forbidding the carrying of concealed weapons. Sec. 3985, also expressly covers rioting and breaches of the peace, both of which are

Mr. Richard Arens

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misdemeanors, Sec's 4222, 4247, Mo. St. Ann. pp. 2958, 2965. The footnotes to 5 C. J. p. 426, note 95 and 30 C. J. p. 41, note 90, indicate the weight of authority is against the view we have taken in this case. But the analysis of the decisions in 3 A. L. R. page 1170, 1175, note and 42 A. L. R. 1200, 1203, note, shows that many well reasoned decisions support it."

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

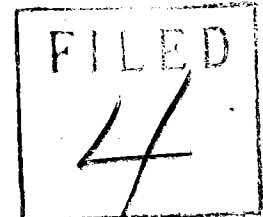
VANE C. THURLO
(Acting) Attorney General

WOJ/rv

COUNTY CLERK OF JASPER COUNTY SALARY: Preparation of financial
statement.

February 10, 1941

2-13



Honorable Ralph Baird
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This will acknowledge receipt of your letter of January 20, 1941, enclosing copy of a letter, dated January 3, 1941, written to you by Roscoe Claycomb, County Clerk, asking for an opinion on certain questions. The copy of which letter is as follows:

"We are now ready to prepare the 1940 County Financial Statement under the provisions of Laws of Missouri, 1933, page 353, as amended Laws 1935 page 317 and laws 1937 page 419. This statement must be prepared, published and approved by the State Auditor in order for the County Court to draw its salary after February.

"Until now, we have been working under the provisions of Section 11,811, Laws 1937 page 440, applying to counties of 70,000 to 80,000, which allows the County Clerk a certain salary but does not give him such salary in lieu of non-accountable fees. We understand that under the 1940 census we will now work under a section applying to counties of 75,000 to 90,000. However, this county falls in both brackets, being less than 80,000 and more than 75,000, our population being 78,654. See Laws 1937 page 442.

"Under Laws 1937 page 442, the County Clerk is allowed a salary of \$4,000 per year, said salary 'to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind under and by reason of the terms of any statutory provisions outside of this article.'

"There is considerable doubt in my mind, as well as the County Court's minds, as to which of the two sections apply to this county. Also, we are in doubt as to whether I could be paid, legally, for preparing the County Financial Statement under Laws 1937, page 442. The County Clerk has always prepared the financial statement in this county, and is the logical person to prepare it at the rate specified by the amendment found at Laws 1937 page 419.

"The court and I would like to know:

"1. Under which of the overlapping and conflicting sections should we be working and paying and receiving salaries and fees?

"2. Who should the County Court employ to prepare the County Financial Statement?

"3. If the Court employs me to prepare the statement, could I legally collect the fee for preparing it, and keep such fee?

"All haste is necessary in obtaining this opinion, since preparation of the statement will entail bringing down to date certain records that it would be more convenient for us to defer until a later time, and with such records completed to Dec. 31, 1940, it would still require more than a month for preparation alone, working nights, as we must, in order to avoid conflict with our regular official duties. Thus we have only to about the middle of February to complete preparation of the copy for publication."

and asks for an opinion upon the questions contained in the copy of the letter.

I.

What was Section 11811 R. S. Mo. 1929, first appeared in our laws in 1874, and was entitled "an action in relation to clerk of courts of record." With various changes and amendments, it has remained in our law ever since. The last change was made by the General

Hon. Ralph Baird.

- 3 - February 10, 1941

Assembly of 1937, which repealed Section 11811 R. S. Mo. 1929, and enacted a new Section 11811 by Senate Bill 30, approved May 14, 1937. This new Section is as follows:

"The clerks of the county courts of this State and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: In counties having a population of less than 7,500 persons, the sum of \$1,000.00 for themselves and the sum of \$600.00 for deputies and assistants; in counties having a population of 7,500 and less than 10,000 persons, the sum of \$1,100.00 for themselves and the sum of \$900.00 for deputies and assistants; in counties having a population of 10,000 and less than 11,500 persons, the sum of \$1,250.00 for themselves and the sum of \$900.00 for deputies and assistants; in counties having a population of more than 11,500 persons and less than 12,500 persons, the sum of \$1,300.00 for themselves and the sum of \$1,100.00 for deputies and assistants; in counties having a population of 12,500 and less than 15,000 persons, the sum of \$1,500.00 for themselves and the sum of \$1,300.00 for deputies and assistants; in counties having a population of 15,000 and less than 17,500 persons, the sum of \$1,700.00 for themselves and the sum of \$1,600.00 for deputies and assistants; in counties having a population of 17,500 and less than 20,000 persons, the sum of \$1,900.00 for themselves and the sum of \$1,800.00 for deputies and assistants; in counties having a population of 20,000 and less than 25,000 persons, the sum of \$2,100.00 for themselves and the sum of \$2,000.00 for deputies and assistants; in counties having a population of 25,000 and less than 30,000 persons, the sum of \$2,300.00 for themselves and the sum of \$3,000.00 for deputies and assistants in counties having a population of 30,000 and less than 70,000 persons, the sum of \$2,500.00 for themselves and the sum of \$3,500.00 for deputies and

assistants; in counties having a population of 70,000 and less than 80,000 persons, the sum of \$3,000.00 for themselves and such sum for deputies and assistants as the county court shall find necessary for the prompt and proper discharge of the duties of such office, provided such sum for such deputies and assistants shall not exceed \$5,000.00; in counties having a population of 80,000 and less than 90,000 persons the sum of \$4,000.00 for themselves and such sum for deputies and assistants as the county court shall find necessary for the prompt and proper discharge of the duties of such office; in counties having a population of 90,000 and less than 200,000 persons the sum of \$3,600.00 for themselves and such sum for deputies and assistants as the county court shall find necessary for the prompt and proper discharge of the duties of such office; in counties having a population of 200,000 and less than 300,000 persons, the sum of \$3,000.00 for themselves and a sum not exceeding \$16,000.00 for deputies and assistants, in such of said counties where court is held at more than one place, and in all other such counties the sum not exceeding \$5,000.00 for deputies and assistants. Provided, that the county court in all counties in this State having a population of 15,000 and less than 40,000 persons may allow the county clerks, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed \$500.00 per annum, to be determined by the county court of such county. Provided, further, that the county court shall determine that the work required to be done by such clerk or clerks demands or requires such extra remuneration. It shall be the duty of the clerks of county courts to charge and collect in all cases every fee accruing to their offices by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month stating on what account such fees were charged and collected, together with the names of the persons paying or who are liable for

same, which said report shall be verified by the affidavit of such clerk. It shall be the duty of such clerks upon the filing of said report to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

at page 440. This is a general section of the statute, which would fix the amount of salary to be paid to all clerks of county courts in the State if there were no special legislation applying to them.

Also in Laws of 1937, at page 442, is Senate Bill 94, approved March 29, 1937, enacted by the General Assembly of that year, which was enacted for the purpose of amending Section 1, House Bill 263, enacted by the Fifty-seventh General Assembly in 1933, which is found in the Laws of 1933, at page 375. Section 1 of House Bill 263, enacted by the Fifty-seventh General Assembly is as follows:

"From and after the passage and approval of this section, the following salaries per annum shall be paid the hereinafter named officers of all counties in this State, which now contain, or may hereafter contain, a population of 75,000 inhabitants, and less than 90,000 inhabitants, viz: Collector of Revenue four thousand (\$4000.00) dollars; Judges of the County Court twenty-seven hundred (\$2700.00) dollars each; Clerk of the Circuit Court four thousand (\$4000.00) dollars; clerk of the County Court four thousand (\$4000.00) dollars; Recorder of Deeds four thousand (\$4000.00) dollars; County Treasurer thirty-two hundred (\$3200.00) dollars; County Assessor four thousand (\$4000.00) dollars; all of said salaries to be paid in monthly installments of the first day of each month from the available funds of the County Treasury. Said salaries to be in lieu of all other salaries, fees, commissions or emoluments

of whatsoever kind under and by reason of the terms of any statutory provisions outside of this article."

The amendment of 1937 made no change which effected the county clerk. The change made was merely to increase the salary of the recorder of deeds, in cities within the population classification provided for in that act.

Also a portion of House Bill 263 of the Fifty-seventh General Assembly, is Section 6, found on page 337, Laws of 1933, which is as follows:

"All provisions of law outside of this act, allowing any fee, compensation, or emolument to either of the before mentioned officers, to be paid out of the Treasury of any such county, or hereby declared to be ineffective as to any and all such counties, and all fees, compensation, and emoluments of every kind to any of such officers by the terms of any contract or any such provision of law outside of this article, due or receivable from any source other than the county treasury or upon the taking effect of this act, hereby transferred to the county and shall be paid into the county treasury as hereinafter provided; and no such officer shall receive any compensation or retain any fees, compensation, or emoluments from any provision of law, otherwise than in this act provided."

The copy of the letter of the county clerk states that the population of Jasper County is 78,654. In order to determine under which law, Section 11811 as amended by Laws of 1937, or Section 1 of House Bill 263 of the Fifty-seventh General Assembly, the county clerk of Jasper should be paid, it is necessary that these sections should be considered together.

Coble v. Scullin Steel Co. 54 S. W. (2d) 777,
1. c. 779:

"In construing the statute we must read all of the sections involved together and harmonize them, if possible. State ex rel. Dean v. Daues, 321 Mo. 1126, 14 S. W. (2d) 990, loc. cit. 1001; Johnson v. Kruckemeyer, 224 Mo.

App. 351, 29 S. W. (2d) 730, loc. cit. 732 and cases cited; Biswell v. St. Louis San-F. Ry. Co. (Mo. App.) 49 S. W. (2d) 203, loc. cit. 204."

And in considering them it is necessary to bear in mind certain well established rules of statutory construction. Among these rules are the following, which are in the case of Keller v. State Social Security Commission 137 S. W. (2d) 989, 1. c. 990:

"Where the language of a statute is plain and unambiguous nothing contrary to the evident intent can be implied. State ex rel. Jacobs-meyer v. Thatcher, 338 Mo. 622, 92 S. W. (2d) 640. A statute should be so construed as to give effect to the legislative intent. State ex rel. Wabash R. Co. v. Shain, 341 Mo. 19, 106 S. W. (2d) 898. A statute that is clear in its terms and leaves no room for construction must be enforced as written. Dahlin v. Missouri Commission for Blind, Mo. App., 262 S. W. 420."

And also in the case of State ex rel. McDowell, Inc., v. Smith, 334 Mo. 653, 1. c. 671:

"It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular, provisions.' (1 Lewis-Sutherland Stat. Const. (2 Ed.), sec. 274, pp. 537-539. See, also, State ex rel. Rutledge v. School Board, 131 Mo. 505, 516, 33 S. W. 3; Manker v. Faulhaber, 94 Mo. 430, 440, 6 S. W. 372.)"

House Bill 263, Laws of 1933, at page 375, is a special act relating to the payment of salaries of all officers in counties which have, or may thereafter have a population of not less than 75,000 inhabitants, or more than

90,000 inhabitants. It is full and complete in every respect. And as pointed out above, Section 11811 is the same section, and would apply to all county clerks. Neither act is ambiguous, the language of each is proper, and standing alone either is easily understood, but the terms of the acts conflict in regard to the amount of salary that the county clerk should receive in counties having a population of not less than 75,000, nor more than 90,000 inhabitants, and in counties having a population of between 70,000 and 80,000 inhabitants. In accordance with the rule above quoted from the State ex rel. McDowell, Inc., v. Smith, supra, it would appear that the county clerk of Jasper County should be paid in accordance with the terms of Section 1, of House Bill 263, Laws of 1933, as re-enacted Laws of 1937, page 442.

II.

The preparation and publication of the county financial statement is directed and provided for in Sections 12165 and 12166 R. S. Mo. 1929. Both of these sections have been amended since, and published in 1929. Section 12165 was amended by Laws of 1933, at page 453, and by the Laws of 1935, page 317; and Section 12166 was amended by Laws of 1937, page 412. Section 12165, Laws of 1935, directing the preparation of financial statements, goes at great length into the details of preparation, and contains the following:

"At the end of the statement the person designated by the county court to prepare the financial statement herein required shall append the following certificate:

"I, the duly authorized agent appointed by the county court of county, State of Missouri, to prepare for publication the financial statement as required by section 12165 of the Revised Statutes of Missouri, 1929, hereby certify that I have diligently checked the records of said county and that the above and foregoing is a complete and correct statement of every item of information required in said section 12165 of the Revised Statutes of 1929 for the year year ending December 19..... and especially

have I checked every receipt from every source whatsoever and every disbursement of every kind and to whom and for what each such disbursement was made and that each such receipt and disbursement is accurately shown. If for any reason complete and accurate information is not given the following shall be added to the certificate) Exceptions: the above report is incomplete because proper information was not available in the following records. which are in the keeping of the following officer (or officers). The person designated to prepare the financial statement shall give in detail any incomplete data called for by this act. Date. Officer Designated by County Court to prepare financial statement required by Section 12165, Revised Statutes 1929.

"Or if no one has been designated said statement having been prepared by the county clerk, signature shall be in the following form:

"Clerk of the County Court and ex-officio officer designated to prepare financial statement required by Section 12165 Revised Statutes 1929."

This clearly indicates that it is discretionary with the county court whether it is to have the county clerk prepare the financial statement.

Section 12166 R. S. Mo. 1929, as amended by Laws of 1937, at page 419, is as follows:

"The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been

received and that it complies with the requirements of this Section. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record. For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law, and no pay shall be allowed for pasting a printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor. Provided, any part not properly chargeable to any specific fund shall be paid from the fund from which officers salaries are paid. The state auditor shall notify the county treasurer immediately of the receipt of the proof of publication of the statement in this act required. After the first of April of each year after the effective date of this act the county treasurer shall not pay or enter for protest any warrant for the pay of any judge of any county court until notice is received from the state auditor that the proof of publication herein provided for has been filed. Any county treasurer paying or entering for protest any warrant for any judge of the county court prior to the receipt of such notice from the state auditor shall be liable on his official bond therefor. Within twelve months after the effective date of this act the state auditor shall prepare sample forms for financial statements and shall mail the same to the county clerks of the several counties in this state, but failure of the auditor to supply such form shall not in anywise excuse any person from the

performance of any duty imposed by this act. If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required the county court shall require such person to give bond with good and sufficient sureties in the penal sum of one thousand dollars for the faithful performance of his duty. If any county officer or other person employed to prepare financial statement herein provided for shall fail, neglect, or refuse to, in any manner comply with the provisions of this act he shall, in addition to other penalties herein provided, be liable on his official bond for dereliction of duty." (Underscoring ours).

The underscored passages in the above section also recognize this discretionary power in the county court.

III.

Section 6 of House Bill 263, Laws of 1933, at page 375, l. c. 377, prohibits any of the officers mentioned in Section 1 of such act from receiving any other additional fees, compensation, or emoluments. And the last sentence of Section 1 of this act as amended by Laws of 1937, at page 442 is as follows:

"It shall be the duty of such clerks upon the filing of said report to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

It is quite clear that if the county clerk is paid the salary directed in Section 1 of House Bill 263, Laws of 1933, as re-enacted by Laws of 1937, at page 440, he cannot receive any additional compensation.

Hon. Ralph Baird.

- 12 -

February 10, 1941.

CONCLUSION.

It is the conclusion that the county clerk of Jasper County should be paid in accordance with the provisions of Section 1, House Bill 263, Laws of 1933, at page 377, as re-enacted by the Laws of 1937, at page 442; that it is within the discretion of the county court of Jasper County to employ whomsoever it chooses to prepare the financial statement for publication; and also, that if the county court should designate the county clerk to prepare the financial statement for the printers proofs thereof, the clerk would be prohibited from receiving any additional compensation therefor.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General.

W. O. JACKSON
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB/me

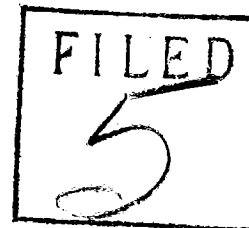
WOJ/me

TAXATION: Sales Tax Act applies to retail sales of
SALES TAX: intoxicating liquors and non-intoxicating
LIQUOR SALES: beverages.

April 28, 1941.

4-29

Mr. G. H. Bates, Supervisor
Sales Tax Department
Jefferson City, Missouri



Dear Mr. Bates:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether or not the Sales Tax Act applies to retail sales of intoxicating liquor and non-intoxicating beverages. In our search through the opinion files of this department I fail to find where an official opinion has been rendered on this question.

Section 11408 of Article 24 of Chapter 74, in so far as it applies to the question here submitted, is as follows:

"From and after the effective date of this article and up to and including December 31, 1941, there shall be and is hereby levied and imposed and there shall be collected and paid:

"(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

April 28, 1941.

Section 11411 of the same Article and Chapter imposes on the seller a duty of collecting and remitting the tax collected on each retail sale taxable under the act. Section 11412 imposes on the purchaser the duty to pay this tax and inflicts a penalty if he does not pay it. Section 11410 of the same Article and Chapter provides as follows:

"The tax imposed by this article shall be in addition to any and all other taxes and licenses except as herein otherwise provided."

By this section it will be seen that the lawmakers intended to impose the sales tax on certain retail sales transactions, in this state, even though other taxes and licenses may have been imposed on the article sold.

From your letter it would appear that the sellers of intoxicating liquors and non-intoxicating beverages take the position that since the state has imposed other licenses and taxes on such articles, that the Sales Tax Act therefore does not apply.

Under Section 4898, of Article 1, Chapter 32, R. S. Mo. 1939, certain licenses are required of parties who sell, at wholesale or retail, intoxicating liquors in this state. Section 4900 of the same Article and Chapter impose additional charges for the privilege of selling intoxicating liquors in this state. Section 4925, imposes an inspection fee on malt liquor containing alcohol in excess of 3.2% weight. Section 4954, Article 2 of Chapter 32, provides for permits authorizing the manufacture and sale of non-intoxicating beer. The taxes authorized by the Liquor Control Act are for the privilege of selling and for inspection, while the tax imposed by the Sales Tax Act is one imposed on the purchaser of each retail sale. These taxes are separate and distinct and are imposed on different parties to the transactions, namely, under the Liquor Control Act, on the seller, while under the Sales Tax Act, upon the purchaser.

The Liquor Control Act was in effect when Section 11410, supra, was re-enacted and there could be no question but that the lawmakers had these other taxes in mind when it provided, by said Section 11410, supra, that the Sales Tax Act would apply in addition to any other licenses or taxes on the article sold.

Section 3, Article X of the Constitution of Missouri, provides that taxes shall be uniform upon the same class of subjects within the territorial limit of the authority levying the tax. It has been suggested that such a tax would be in violation of the constitution because it is double taxation, however double taxation is not prohibited by the constitution although it is not favored.

In the case of State vs. Hallenberg-Wagner Motor Co., 108 S. W. (2d) 398, 341 Mo. 771, 1. c. 778, the court, in speaking of the power of the General Assembly to levy excise taxes and the question of double taxation, said:

"The inherent power of the Missouri General Assembly to levy taxes, independent of constitutional grant, is subject only to limitations prescribed in the Federal and State constitutions. (State ex rel. v. St. Louis, 318 Mo. 870, 894, 2 S. W. (2d) 713, 720(11); Hannibal & St. J. Railroad Co. v. State Board of Equalization, 64 Mo. 294, 307; State ex rel. v. Smith, 338 Mo. 409, 90 S. W. (2d) 405, 406(1).) Respondent's assault against the foregoing construction on the stated ground it results in double taxation confuses, we think, nonuniformity in taxation with double taxation. Respondent refers us to no constitutional prohibition against double taxation, and the cases relied upon (Auto Gas Co. v. St. Louis, 326 Mo. 435, 443, 35 S. W. (2d) 281, 283

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(3); State ex rel. v. Louisiana & M. Railroad Co., 196 Mo. 523, 535, 94 S. W. 279, 281; and State ex rel. v. Koeln, 278 Mo. 28, 39, 211 S. W. 31, 34) are only to the effect that double taxation is not favored and is not to be presumed; illegal double taxation occurring when a given subject of taxation contributes twice to the same burden while other subjects of the same class are required to contribute but once. * * *

In the case of Ex Parte Asotsky, 5 S. W. (2d) 23, 1. c. 27, it was held:

"The question of the propriety of a classification, measured by section 3, art. 10, is largely one for the Legislature. The courts may not declare a particular classification unreasonable and violative of said section 3, art. 10, unless the classification made cannot be justified on any reasonable grounds. So long as the tax imposed bears alike upon every one within the class and the classification can be justified upon any reasonable theory, the tax cannot be declared violative of section 3, art. 10."

* * * * *

"It is said that the imposition of the cigarette tax compels the dealer to pay a double tax. This same question was raised and decided adversely to petitioner's contention in Viquesney v. Kansas City, supra, where we said:

"It is claimed by appellant that he is compelled by this ordinance to pay a double occupation tax, because Ordinance 38141, as amended by Ordinance 39337, imposes a tax upon every retail merchant of fifty cents for each one thousand dollars or fraction thereof of gross receipts of the business operated by such merchant. This tax, however, is imposed upon every retail merchant "except as otherwise provided in this ordinance." The ordinance was amended by Ordinance 44965, as pointed out above, by the addition of sections levying the tax objected to here. Thus it

seems this ordinance "otherwise provided " for the tax of appellant."

In Vol. 61, C. J., page 139, l. c. 140, Section 71, the rule on the construction of a statute imposing double taxation is stated as follows:

"* * * but where the language of the statute is clear, the fact that double taxation results therefrom will not justify the court in disregarding the language."

So, on the question here, even though it could be successfully maintained that the tax on liquor is a double tax, yet under the foregoing rule and in view of the fact that the lawmakers have clearly stated their intention of imposing the sales tax in addition to any other taxes or licenses on such articles, then the court would not be justified in disregarding the plain language of the statute.

Special Rule No. 53 of the rules and regulations relating to the Sales Tax Act of 1937 and which was practically re-enacted in 1939, reads as follows:

"Retail sales of all drinks and beverages are taxable and the seller thereof must collect and remit the tax thereon. The foregoing shall include both intoxicating and non-intoxicating drinks and beverages, and the fact that the seller is subjected to various licenses, fees, revenue stamps, etc., by cities, counties, state or federal government, does not exempt the sale of intoxicating liquors from the sales tax.

"No deductions are to be made for license fees, revenue stamps or any other overhead or selling costs from the gross receipts taxable under the Act."

There can be no question but that the officers administering this act have construed it to apply to retail sales of intoxicating liquors. This construction is entitled to great weight. *Auto Gas Company vs. City of St. Louis*, 32 S. W. (2d) 281. A question similar to the one here presented has never been before the Appellate courts of this state, but in the State of Illinois we find, in the case of *Bardon v. Nudelman, Director of Finance*, 15 N. E. (2d) at page 836, the Supreme Court of that state held that the retailers occupation tax applied to sales of intoxicating liquor. There the court said:

"While both of the taxes here involved may be classified as occupational in character, an examination of the two statutes shows that they were enacted with different objects in view. The Retailers' Occupation Tax act is a revenue measure based upon the taxing power. There are no provisions in it which seek to regulate the business of persons engaged in selling tangible personal property at retail, except to the extent necessary to collect the tax imposed by the act. On the other hand, the Liquor Control act, Ill. Rev. Stat. 1937, c. 43, Section 94 et seq., is primarily an exercise of the police power. Section I of article 1 thereof provides that the act shall be liberally construed 'to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in

the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors; article 3 provides for the establishment of the Illinois Liquor Control Commission; article 4 empowers cities, villages, towns and counties to regulate the use of alcoholic liquors; article 5 provides for the issuance of licenses, and specifies the kind and cost thereof; article 6 fixes the qualifications of licenses, and places limitations upon the operation of their respective businesses; article 7 establishes the procedure to be followed in issuing and revoking licenses, and article 10 fixes penalties for violations of the act. The Liquor Control Commission is vested with power to administer the regulatory provisions of the act. Article 8 is the only provision of this act which levies a tax purely for revenue. This article is administered by the Department of Finance and levies a tax only upon manufacturers and importing distributors of alcoholic liquors, and these taxes are declared to be in addition to all other occupation or privilege taxes imposed by the State, municipal corporations, or subdivisions thereof.

"The retail liquor dealer's license fee to the State, fixed by the Liquor Control act, Ill. Rev. Stat. 1937, c. 43, Section 118, is \$50 per year. It is significant that no effort is made to show that this license fee is prohibitory or that the amount charged is more than sufficient to

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defray the reasonable expense of enforcing this police measure. It is not charged that under the guise of regulation, the State is, in fact, collecting these fees for revenue purposes."

In comparing the Illinois Retailers Occupation Tax and liquor regulation laws, we find that they are quite similar to Missouri laws relating to the same subject. The Illinois Retailers Occupation Sales Tax Act contained a section similar to Section 11410, supra, of the Missouri act, and finally the court, in speaking of the authority to impose the retailers occupation tax on the sales of intoxicating liquors, said:

" * * * There is no constitutional provision forbidding the enactment of both measures and there is nothing invalid about either of them. These two statutes are not inconsistent and both may be given effect."

CONCLUSION

From the foregoing authorities, it is the opinion of this department that the Missouri Sales Tax Act applies to sales at retail of intoxicating liquors and non-intoxicating beverages which may be so sold in this state.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

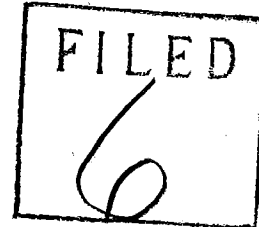
VANE C. THURLO
(Acting) Attorney General

TWB:LB

BONDS:) Bonds deposited in banks and trust companies
STATE TREASURER:) do not have to be inspected by Governor,
Attorney-General and State Treasurer personally,
but such duty may be delegated.

April 12, 1941

H-14



Honorable Wilson Bell
State Treasurer
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request
for an official opinion which reads as follows:

"Under Section 13086, R. S. Mo. 1939,
the Governor, Attorney-General and
State Treasurer are required to inspect
bonds deposited by the state in various
banks and trust companies in this state.

"Must this inspection be done by the
various officials therein mentioned, or
may this duty be delegated by them?"

Section 13086, R. S. Mo. 1939, provides in part as
follows:

"* * * and the governor, attorney-
general and state treasurer shall,
from time to time, inspect such bonds
and see that the same are actually
kept in the vaults of the state treas-
ury, or in the vaults of such banks
or bank, trust company or trust com-
panies, other than the bank or banks,
trust company or trust companies,
selected as the state depositories,
as the governor, attorney general and
state treasurer may have duly agreed
upon: * * *"

The question presented is whether this inspection of the bonds must be by the Governor, Attorney-General and State Treasurer in person, or may such duty be delegated by them?

The duty imposed by the statute is that it must be ascertained from time to time that certain bonds deposited by the State in the vaults of various banks and trust companies are actually kept in such vaults. This duty in no ways requires the exercise of any discretion but is a mere ascertainment of a fact, that is, whether the bonds are, or are not, in such vaults.

It is the universal rule that "an officer, to whom discretion is intrusted, cannot delegate the exercise thereof, but ministerial duties, except where there is a statutory prohibition, may be delegated." 46 C. J. 1033, and Missouri cases cited thereunder.

A "ministerial duty," as defined in State ex rel. Hutchinson v. McGrath, 92 Mo. 355, 5 S. W. 29, is:

"A simple definite duty, arising under conditions admitted or proved to exist, and imposed by law."

As was said in State ex rel. v. Meier, 143 Mo. 439, 45 S. W. 306,

"A ministerial act is one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the acts being done."

It appears obvious that the inspection of the vaults to ascertain whether the bonds are kept therein, is something which is a duty in which nothing is left to discretion but must be performed in a manner prescribed by law, and the person performing the duty cannot exercise his own judgment in regard to such act.

In the case of State ex rel. Construction Co., v. Reber, 226 Mo. 229, our Supreme Court had the following to say in regard to whether the President of the Board of Public Improvements was required to sign tax bills. We quote at length from this opinion because the language therein is apropos to the instant case. The court said (l. c. 236):

"The requirement of section 41, article 4, is that, 'He shall authenticate all special taxbills.' If that should be construed to mean that he must go over the calculations made by the street commissioner to see that the apportionment to each lot of the total cost is correct, and that that must be done in person, the task would be as great and as enduring as if he had made the calculations himself in the first instance. The authentication required by that section of the charter is the certification, evidenced by his signature, that the taxbills are those that came to him through the regular official channel. It is doubtless his duty under the ordinance to receive personally from the street department the taxbills and himself deliver them to his assistant to be signed and himself deliver them to the comptroller and take his receipt. But all that is ministerial work, not work of unimportance, not work to be carelessly done, but still not work that requires the exercise of discretion and judgment. The discretion that the president of the board of public improvements has in reference to the subject is exercised when he counsels with the other members of the board in their meeting on the subject of the then contemplated street improvement, when he draws or assists in drawing the ordinance, when he assists in awarding the contract, etc., but after

the contract is let and the work is done and the street commissioner has found that it is done according to the contract and makes out the tax-bills and delivers them to the president, the latter has then no discretion, but it is his simple duty to authenticate them by his signature and deliver them to the comptroller. An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion."

In State ex rel. Gay v. Reyburn, 158 Mo. App. 172, the court had before it a statute providing that the books and papers of the clerk of the county court should be at all times ready "for the inspection of the court or any judge thereof." The court held as follows (l. c. 176):

"The matter of inspecting the books and papers of the clerk's office is purely ministerial and in no respect judicial in its character. It is therefore entirely clear that the law does not devolve it as a personal duty upon a judge of the county court which he may not delegate to another who is competent to perform such a task, especially when it appears the judge himself is from any cause unable or incapacitated to effectually discharge it. But that matter is unimportant, for the judge might cause the investigation to be made by expert accountants or others of his choosing though he were entirely competent himself. The principle announced in State ex rel. Johnson v. Transit Co., 124 Mo. App. 111, 100 S. W. 1126, is equally relevant here."

Even though this duty of inspecting the bonds in the vaults were not ministerial, still it seems that such inspection could be delegated to an assistant or agent who could report back to his superior his findings. In this regard we call your attention to the case of *Town of West Springfield v. Mayo*, 163 N. E. 653, decided by the Supreme Court of Massachusetts in 1928. The question involved in that case was whether a zoning by-law had been approved by the Attorney-General as required by law. The court said: (l. c. 654)

"In this respect the contention of the defendants is that the map is an essential part of the by-law, and that as matter of law the Attorney-General could not approve the map which he did not see. Of course it is true, as the defendants contend, that 'official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person.' *Brown v. Newburyport*, 209 Mass. 259, 266, 95 N. E. 504, 508 (Ann. Cas. 1912B, 495), and cases cited. Obviously this rule goes no further than to require the official to exercise his own judgment and discretion upon matters which are committed to him for determination. It does not inhibit the official's use of assistance when the act to be done requires an examination or inspection of documents or physical objects. Nor does it prohibit the official from arriving at a conclusion of fact which is based upon the report of an assistant. It was not necessary that the Attorney General should approve the map separate and apart from the by-law. Nor was it necessary to the exercise of his judgment that the map should have been physically before him or that he personally should have examined it and traced the boundaries of the various zones. It was sufficient that the

Apr. 12, 1941

map was examined with the by-law for him, by one of his legal assistants; and that, receiving the report of his assistant, upon his own judgment he approved the by-law of which the map was an integral part. Lajoie v. Milliken, 242 Mass. 508, 523, 136 N.E. 419."

Conclusion

In view of the above authorities it will be seen that the inspection of state bonds in vaults of banks and trust companies, as required by Section 13086, R. S. Mo. 1939, does not have to be personally done by the Governor, State Treasurer and Attorney-General, but such duty may be delegated by them.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

FUND COMMISSIONERS: No authority to transfer funds from general revenue funds to unemployment compensation administration fund; said transfer may be made by State Auditor and State Treasurer.

August 29, 1941

✓ 126
Honorable Wilson Bell
State Treasurer
Jefferson City, Missouri



Attention: Mr. A. L. Jones,
Bond Superintendent

Dear Sir:

We are in receipt of your request for an opinion under date of August 21st, wherein you state as follows:

"At the meeting of the State Board of Fund Commissioners held on the 20th of August, 1941, there was presented a letter from Honorable Elmer John Keitel, Sr., Chairman of the Unemployment Compensation Commission of Missouri as follows:

"Under Section 64A of House Bill No. 581 the Board of Fund Commissioners is authorized and directed to transfer from the appropriation out of the general fund which is therein provided, to the Unemployment Compensation Administration Fund, such amounts as may be requested by the Unemployment Compensation Commission.

"You are requested to transfer immediately the sum of \$45,000 from the said appropriation out of general revenue Fund. This transfer will represent a pro rata portion of the appropriation for the period July 1 to December 31, 1941."

"We would like to have an opinion as to whether it is necessary for the transfer of Funds from one account to another on the books of the State Treasurer and the State Auditor, to be approved by the Board of Fund Commissioners, or whether these transfers can be made by these respective Officials."

Section 64a of House Bill 581, to which you refer, provides as follows:

"Unemployment Compensation Commission-- Employment Service Fund. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of One Hundred Thirty-five Thousand Dollars (\$135,000.00) to the Unemployment Compensation Administration Fund for the biennium 1941-1942, and the Board of Fund Commissioners, when requested by the Unemployment Compensation Commission, is hereby authorized and directed to make transfers of funds from the General Revenue Fund to the Unemployment Compensation Administration fund until said sums shall have been so transferred."

The special fund designated in the above appropriation act as the unemployment compensation administration fund was created by the 59th General Assembly, and is found in the 1939 Missouri Session Acts, Section 13, page 597. The above section was carried forward in the 1939 Revised Statutes of Missouri, Section 9434, and was recently amended by Senate Bill 110, and approved by Governor Donnell on June 21, 1941, together with an emergency clause.

Section 9434, sub-section (a), after amendment, provides as follows:

"Unemployment compensation administration fund-- nature and purpose. --(a) There is hereby created in the state treasury a special fund to be known as the unemployment compensation administration fund."

All moneys in this fund shall be continuously available to the commission for expenditure in accordance with the provisions of this law, and shall not lapse at any time or be transferred to any other fund, and shall be expended solely for the purpose of defraying the cost of the administration of this law, and for no other purpose whatsoever. The fund shall consist of all moneys appropriated by this state, and all moneys received from the United States of America, or any agency thereof, including the Social Security Board and the United States Employment Service, or from any other source, for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources from losses sustained by the unemployment compensation administration fund or by reason of damages to equipment or supplies purchased from moneys in such fund and any proceeds realized from the sale or disposition from any such equipment or supplies which may no longer be necessary for the proper administration of this law. All moneys in this fund shall be deposited, administered and disbursed, in the same manner and under the same conditions and requirements as is provided by law, for other special funds in the state treasury. The state treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the unemployment compensation administration fund provided for under this law."

The underscored portion of the above section is the same as when the original act was passed. We have examined our statutes carefully and we fail to find a legislative direction as to the manner, conditions and requirements for the

deposit, administration and disbursement for special funds in the state treasury.

We have also examined our statute relating to the powers and duties of the Board of Fund Commissioners and fail to find any express requirement directing said board to transfer funds from the general revenue fund to the unemployment compensation administration fund.

We are aware of Section 13010, R. S. Mo. 1939, which establishes a Treasury Department embracing the "offices of State Treasurer and State Auditor," and also of Section 13110, R. S. Mo. 1939, which empowers the Board of Fund Commissioners to "exercise a supervisory control over the Treasury Department" and "do and perform all such acts and things as may be required of them by law."

Can the authorization to the Board of Fund Commissioners as provided for in the above appropriation act to transfer funds, be said to be an act or thing required of them by law?

The answer is obviously in the negative, for the reason that "legislation of a general character cannot be included in an appropriation bill." State ex rel. Davis v. Smith, 75 S. W. (2d) 828. Again, in the case of State v. Thompson, 289 S. W. 338, 1. c. 341, the court after pointing out that an appropriation bill is just what the terminology imports, and no more, said:

"As has been observed in well-reasoned cases, if the practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not vicious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated. The possibilities of such legislation and this court's condemnation thereof are well illustrated in the case of State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S. W. 403, as well as the following cases from other states; State ex rel. v. Carr, 129 Ind. 44, 20 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; Com. v. Gregg, 161 Pa. 582, 29 A. 297."

The fact that the Board is given supervisory control over the Treasury Department cannot be construed as a grant or authority to transfer funds, since the Legislature has expressly designated when transfers may be made by the Board.

Section 13122, R. S. Mo. 1939, provides as follows:

"It shall be the duty of the board of fund commissioners, by order, to direct the state auditor and state treasurer to transfer, upon their books, at such times as they shall deem proper, the surplus in the state interest fund into the state sinking fund; and they shall, also, by order, direct the state auditor and state treasurer to pay the maturing interest on the certificates of indebtedness held in trust by the state for the 'state school fund' and 'state seminary fund,' by transferring the necessary amounts, on their books, from the state interest fund to 'state school moneys' and 'state seminary moneys.'"

The maxim "expressio unius est exclusio alterius," which means that the expression of one thing in a statute is the exclusion of another, is particularly applicable.

There being no authority for the transfer of the above fund by the Board of Fund Commissioners, the question arises whether the transfer can be made by the State Auditor and State Treasurer.

Section 13026, R. S. Mo. 1939, provides that the State Auditor shall, among other duties:

"* * *; second, draw all warrants upon the treasury for money, except only in cases otherwise expressly provided by law; third, express in the body of every warrant which he may draw upon the treasury the particular fund, appropriated by law, out of which the same is to be paid; * * *"

Aug. 29, 1941

Section 13047, R. S. Mo. 1939, provides the duties of the State Treasurer in part as follows:

"The state treasurer shall receive and keep, as provided by law, all the moneys of the state not expressly required by law to be received and kept by some other person; disburse the public moneys upon warrants drawn on the treasury according to law, and within the time limited in the Constitution, and not otherwise; keep a just and true account of the funds and the appropriations made therefrom by law, and the disbursements made thereunder.
* * * * *

Since the Auditor must draw warrants for money upon the Treasurer out of the particular fund appropriated by law and the Treasurer is required to disburse the public moneys upon warrants drawn on the Treasurer according to law, they would have ample authority to transfer funds appropriated by law from the general revenue to a special fund created and set aside by statute for a particular purpose.

We are of the opinion that the Board of Fund Commissioners have no authority to transfer funds from the general revenue fund to the unemployment compensation administration fund as provided for in Section 64a of House Bill 581, but that said transfer may be made by the Treasury Department consisting of the State Auditor and State Treasurer.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

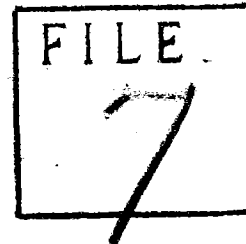
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

ROADS AND BRIDGES: County may finance the improvement of roads in common road districts out of surplus road funds.

✓ / 42
August 25, 1941
8-25

Mr. G. A. Berry
County Clerk
Miller County
Tuscumbia, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"May the County Court finance the grading and improvement of roads in certain common road districts if such districts do not have the necessary funds? The county does have sufficient money budgeted for such work. Miller County has not adopted township organization."

The general rule is given in 29 C. J., page 563, as follows:

"The construction, improvement and repair of highways is regulated largely by statute, the general rules relating to statutes being applicable, as to constitutionality and construction, which must be reasonable. * * *"

We must, therefore, look to the statutes to determine whether a county has the right to repair and maintain a road within the confines of a road district.

Section 8513, R. S. Mo., 1939, provides as follows:

"All taxes derived from the levy authorized by section 8526, are hereby appropriated to the use of the county court in each county where levied, to be used at the discretion of said court for the construction and maintenance of roads and bridges located within the confines of the county highway system herein provided for as well as all other roads and bridges in such county."

Section 8526, R. S. Mo., 1939, referred to in Section 8513, supra, reads:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

The road funds received under Section 8526, supra, must be returned to the special road district in which they are collected. (State ex rel. v. Burton, 283 Mo. 41, 222 S. W. 844; State ex rel. v. Barry County, 302 Mo. 279, 258 S. W. 710.) As was aptly said in Hawkins v. Cox, 334 Mo. 640, 66 S. W. (2d) 539, 1. c. 540:

"* * * this special road district is entitled to whatever taxes are levied and collected on property within its boundaries, * * by the county court *."

Aug. 25, 1941

This return by the county court to the special road districts is mandatory, if application therefor is made by the commissioners. (Road District v. Phelps County, 116 S. W. (2d) 61.)

It is a rule of statutory construction that a legislature in passing a statute is presumed to have acted with full knowledge of judicial decisions under the pre-existing law. (Plater v. Mullins, 17 S. W. (2d) 658, 59 C. J. 1008.) Furthermore, a construction of a statute by the courts, supported by long acquiescence on the part of the legislature, is evidence that such construction is in accordance with the legislative intent. (59 C. J. 1037)

Section 8513, supra, was passed in 1927 (Laws of Missouri, 1927, page 421, Section 11a) and at the time of its passage what is now Section 8526, supra, had for more than fifteen years been interpreted to mean that the taxes collected on property within the limits of a special road district must be given to that road district. Therefore, the clause in Section 8513, which provides that the tax money could be used for "other roads and bridges in such county," must have meant that such money could be used "at the discretion of said court" for road purposes other than the roads of the county highway system and that given to the road districts.

We believe, therefore, that under Section 8513, supra, the county court may use any surplus in the "county road and bridge fund" for the use of any roads and bridges in the county. It will be noted that like power is given to the county in regard to bridges to aid road districts. Section 8534, R. S. Mo. 1939, provides:

"Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts: Provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

Under the above statute it is also within the county court's discretion what bridges shall be maintained by the county and what by the road district.

Mr. G. A. Berry

-4-

Aug. 25, 1941

Conclusion

It is, therefore, the opinion of this Department that a county court may finance out of surplus road funds the grading and improvement of roads in common road districts.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

TAXATION: Certificate holder, his heirs or assigns must procure a deed to property and have the same recorded within four years from date of issuance of such certificate.

November 12, 1941

11-13

Hon. E. W. Bennett
Assistant Prosecuting Attorney
Salem, Missouri



Dear Mr. Bennett:

This is an acknowledgement of your request for an opinion of November 8, 1941, which is as follows:

"The County Collector of this Dent County has requested that I get your opinion on a matter pertaining to his official duties as County Collector.

"It appears that on November 4, 1936; a certain party purchased at Auction, a forty (40) acre tract of land and a certificate of purchase was issued for such.

"This party never tendered payment for subsequent taxes and never demanded a deed until November 7, 1941.

"In the meantime the party who claims said tract on August 20, 1941 pays all subsequent taxes then due, namely for the years 1936, 1937, 1938, 1939 1940 and 1941.

"Now purchaser of the tax certificate has presented his certificate of Purchase demanding that the County Collector issue a deed to him and threatens suit. The County Collector desires your opinion as to what steps to take, as soon as possible."

Section 11137 R. S. Mo. 1939 is as follows:

"In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs and a certificate of purchase has been or may hereafter be issued it is hereby made the

duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale: Provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided."

The right of a certificate holder is defined in the case of City of St. Louis v. Baumann 153 S. W. (2d) 31, 34, in the following language:

"We have previously passed on the office of a certificate of purchase and held that it alone did not pass title for the obvious reason title to land sold for taxes under the law of this State remains in the owner during the period of redemption. See Donohoe v. Veal, 19 Mo. 331; Kohle v. Hobson, 215 Mo. 213, 114 S. W. 952. In Hilton v. Smith, 134, Mo. 499, 33 S. W. 464, 466, 35 S. W. 1137 the period of redemption had elapsed but the holder of the certificate of purchase had never called for a deed and in interpreting the statute there under consideration in order to determine who was included within the term owner, we held that only a record owner was intended. We did say 'after the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector.' Granted that he has this right, there must be some interest vested in him to sustain it.* * *

"Under the act we are considering, a holder of a certificate of purchase is qualified to take a deed when the period of redemption has run. In effect the act vests the holder of a certificate of purchase with an inchoate or inceptive interest in the land which may ripen into such an estate as would entitle him to a deed. After the period of redemption has passed without the owner redeeming, upon producing his certificate, the holder is such an

November 18, 1941

owner as may call in the legal title. All that is necessary for him to accomplish this is to pay such taxes as are then against the land. He has already paid the purchase price as his certificate of purchase evidences.

"The right to call in the legal title ordinarily presupposes an equitable title in the person who may exercise the right. * * * The act permits the application of this rule in this case. Therefore, the City is now vested with the equitable title to the land and the land is not subject to taxes." * * *

The equitable right obtained under a certificate of title issued upon the sale of lands for delinquent taxes is so obtained by virtue of an ancillary action of foreclosing the lien of the state for such delinquent taxes. The legal title must be obtained and recorded within four years from the date of such sale; otherwise, the foreclosed lien of the state, by such ancillary action--which is the foundation of the equitable title--ceases to be a lien against the land and therefore the equitable title also ceases.

Therefore, it is our opinion that a certificate holder, his heirs or assigns, failing to cause a deed to be executed and recorded for the land described in such certificate within a period of four years from the date of sale, the lien on said land so purchased ceases and the equitable right of the certificate holder also ceases.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

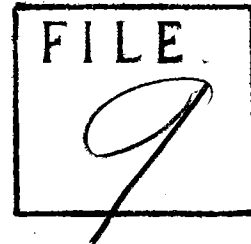
BVM/aw

COUNTY TREASURER:
COMPENSATION:

Committee Substitute for House Bill
No. 255 by implication repeals last
clause of Section 10400, R. S. Mo.
1939, authorizing compensation for
disbursing school monies.

October 14, 1941

Honorable David E. Blanton
Prosecuting Attorney
Scott County
Sikeston, Missouri



Dear Sir:

Under date of August 26, 1941, you wrote this
office for an opinion, as follows:

"Housebill No. 255 pertains to the
salary paid to the County Treasurers
of the several counties of this State,
and said Housebill repeals Section 13,800
Article 8, Chapter 100, Revised Statutes
of the State of Missouri, 1939.

"The Housebill provides for the payment
of the salary to the Treasurer in accord-
ance with the census of the respective
counties. Please advise my office as
to when this Bill becomes effective and
as to when the respective counties will
pay the salaries referred to in the new
bill; that is, is it to be paid as of
September 1st, 1941, January 1st, 1942
or January 1st, 1943. Also, will the
Treasurer be entitled to any commissions
on the school money that he handles."

At the time of the receipt of your request, an
opinion had been prepared as to the effective date of C.
H. S. B. 255, referred to in your request, and a copy of
this opinion was sent to you. But your letter contains an
additional request as to the effect of C. S. H. B. 255 upon
the compensation of county treasurers for disbursing school

Hon. David E. Blanton

(2)

October 14, 1941

monies, which compensation is provided for in Section 10400, Article 2, Chapter 72, R. S. Missouri, 1939, by the following clause:

"* * * and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury."

You will observe this is found in the laws pertaining to schools and not to county treasurers.

C. S. H. B. 255 is now published in Laws of Missouri, 1939, at page 534, and is as follows:

"AN ACT to repeal Section 13800, Article 8, Chapter 100, Revised Statutes (of) Missouri, 1939, pertaining to the compensation of county treasurers and deputy county treasurers and to enact in lieu thereof a new section pertaining to the same subject matter, to be known and numbered as Section 13800, Article 8, Chapter 100, Revised Statutes (of) Missouri, 1939.

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

"SECTION 1 - That Section 13800, Article 8, Chapter 100, Revised Statutes (of) Missouri, 1939, pertaining to the compensation of county treasurers be and same is hereby repealed; and a new section to be known and numbered as Section 13800, Article 8, Chapter 100, Revised Statutes (of) Missouri, 1939, pertaining to the same subject matter is enacted in

lieu thereof, and to read, as follows:

"SECTION 13800 - The county treasurers of the several counties of this State (except counties under township organization) shall receive for their services annually, to be paid out of the county treasury in equal monthly installments at the end of each month by a warrant drawn by the county court upon the county treasury, the following sums: In counties having 10,000 inhabitants or less, the sum of \$1,200; in counties having more than 10,000 inhabitants and not more than 12,500, the sum of \$1,500; in counties having more than 12,500 inhabitants and not more than 15,000, the sum of \$1,800; in counties having more than 15,000 inhabitants and not more than 20,000, the sum of \$2,200; in counties having more than 20,000 inhabitants and not more than 25,000, the sum of \$2,400; in counties having more than 25,000 inhabitants and not more than 30,000, the sum of \$2,400; in counties having more than 30,000 inhabitants but not more than 35,000, the sum of \$2,500; in counties having more than 35,000 inhabitants but not more than 40,000, the sum of \$3,200; in counties having more than 40,000 inhabitants but not more than 75,000, the sum of \$3,500; in counties having more than 75,000 inhabitants but not more than 120,000, the sum of \$4,000; and in all counties having more than 75,000 inhabitants and not more than 120,000 inhabitants, the county treasurer may employ one deputy at a salary of \$1,680 to be paid monthly in same manner as county treasurers are paid; Provided, that this act shall not apply to any county now or hereafter containing a city of not less than 70,000 or more than 200,000 in population, to be determined by the last federal decennial census.

Provided, salaries set out and pre-
scribed in this section shall be in
lieu of any other or additional salaries,
fees, commissions or emoluments of what-
soever kind for county treasurers in all
counties of this state to which this
section, by its terms, applies, the pro-
visions of any other statute of this
state to the contrary notwithstanding."
(underscoring ours)

House Bill 255, as originally introduced, did not contain the above underscored clause. It is as follows:

"AN ACT To repeal Section 13800, Article 8, Chapter 100, Revised Statutes Missouri 1939, pertaining to the compensation of county treasurers and to enact in lieu thereof a new section pertaining to the same subject matter, to be known and numbered as Section 13800, Article 8, Chapter 100, Revised Statutes Missouri 1939.

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

"Section 1 - That Section 13800, Article 8, Chapter 100, Revised Statutes Missouri, 1939, pertaining to the compensation of county treasurers be and the same is hereby repealed; and a new section to be known and numbered as Section 13800, Article 8, Chapter 100, Revised Statutes Missouri, 1939, pertaining to the same subject matter is enacted in lieu thereof, and to read as follows:

"Section 13800 - The treasurers of the counties of this state, not otherwise provided for, shall receive for their services annually, to be paid out of the

county treasury in equal monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: In counties having a population of less than 7500 persons, the sum of \$1000.00; in counties having a population of 7500 persons and less than 10,000 persons, the sum of \$1300.00; in counties having a population of 10,000 persons and less than 15,000 persons, the sum of \$1600.00; in counties having a population of 15,000 persons and less than 20,000 persons, the sum of \$1800.00; in counties having a population of 20,000 persons and less than 25,000 persons, the sum of \$2100.00; in counties having a population of 25,000 persons and less than 30,000 persons, the sum of \$2400.00; in counties having a population of 30,000 persons and less than 35,000 persons, the sum of \$2700.00; in counties having a population of 35,000 persons and less than 40,000 persons, the sum of \$3000.00; in counties having a population of 40,000 persons and less than 75,000 persons, the sum of \$3200.00; in counties having a population of 75,000 persons and less than 120,000 persons, the sum of \$3200.00."

The difference between the bill as originally introduced and as it was finally passed and became a law, will be readily noted.

In order to reach a proper understanding of your question and solve the problem, it is necessary that we go back to the origin of what was Section 13800, R. S. Missouri, 1939, and the clause in Section 10400, R. S. Missouri, 1939, which permits the county court to allow to the treasurer for disbursing school moneys not to exceed one-half of one per

cent of the amount disbursed, to be paid out of the county treasury.

What was Section 13800, R. S. Missouri, 1939, originated in 1855, and was slightly different in form. It first appeared in the laws of 1855, at page 523, in an Act entitled:

"AN ACT To Establish and Regulate
County Treasuries."

This Act contained four articles. Article I, of the election, qualification and duties of the treasurer. Article II, of the duties of the collectors, clerks and other officers. Article III of the powers and duties of the Court. Article IV of miscellaneous provisions. The portion relating to the compensation of the treasurer is found on page 523, Section 18, of Article I, and is as follows:

"He shall be allowed for his services under this act, such compensation as may be deemed just and reasonable."

At this time no compensation was provided for the treasurer for his duties in connection with school funds, although he performed some duties and some of the duties in connection with the disbursement of school funds were performed by the school commissioner. With slight amendment, it remains the law of the state until Section 13800, R. S. Missouri, 1939, was repealed by the Sixty-first General Assembly. The section, as it was before repealed, is as follows:

"Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

The section of the law giving to the county treasurer compensation for the disbursement of school moneys first appeared in the laws of 1865, in an Act entitled:

"AN ACT To provide for the Reorganization, Supervision and Maintenance of common schools."

This Act is found in Laws of 1865, at page 170, and at page 180, Section 31 of the Act, is the following:

"* * * and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one per cent of all school funds disbursed by him."

This clause follows the enumeration of duties of the treasurer in connection with school funds. Later, in 1870, the amount was reduced to not to exceed one-half of one per cent, and still later the clause, "and to be paid out of the county treasury," was added. In the case of Sanderson v. Pike County, 195 Mo. 598, this clause was held not to fix the compensation, but merely to authorize the county court to pay the compensation if it deemed it proper and took affirmative action in the matter to pay the treasurer.

Section 13800, R. S. Missouri, 1939, supra, is a general law treating of the compensation of county treasurers for the handling of county funds, and for the duties performed in connection with county funds. The clause of Section 10400, R. S. Missouri, 1939, supra, is in the nature of a special law authorizing compensation for county treasurers for the performance of an added duty in connection with the disbursement of school funds.

This places us in the situation of having a later enacted general law treating generally of the compensation of county treasurers and a prior law in the nature of a special law, authorizing compensation for county treasurers for

duties performed in connection with school funds. There seems to be a conflict between the last clause of C. S. H. B. 255, and the last clause of Section 10400, R. S. Missouri, 1939. There is no direct repeal of the clause of Section 10400 by C.S.H.B. 255. A later statute dealing with the same subject matter repeals by implication a prior one treating with the same subject matter.

In the case of *Young v. Greene County*, 119 S. W. (2d) 369, 1. c. 374, it is said:

"* * * If two statutes deal with the same subject matter and are inconsistent with each other, so that both cannot be operative as to such subject matter, the later act will be regarded as a substitute for the earlier one and will operate as a repeal thereof, although it contains no express repealing clause. *State ex rel. Mo. Pac. Ry. Co. v. Pub. Serv. Comm.*, 275 Mo. 60, 204 S. W. 395. As said by Judge White the 1929 act (Sec. 2092, *supra*) made no mention of the 1925 act (Sec. 2095, *supra*), but as it covered the same subject matter and is inconsistent with the earlier act it necessarily operated as a repeal thereof."

This would indicate that C. S. H. B. 255 would act as a repeal by implication of the last clause of Section 10400. However, there is an exception to this rule. It is that a later general statute will not serve to repeal by implication a prior special statute, the special statute remaining an exception to the general statute. The following brief quotation from the case of *State ex rel. Tax Commission v. Crawford*, 303 Mo. 652, 1. c. 662, supports this statement:

"* * * Further, a special act is not to be held repealed by one of general nature, even of later enactment, in the

absence of negative words or unless an irreconcilable inconsistency is necessarily raised. (State ex rel. M. & M. Railroad Co. v. County Court, 41 Mo. 453.) And if a special provision applicable to a particular object be inconsistent with even a later general law, the special provision will prevail. (State v. Green, 87 Mo. 583.)"

And again, in State ex rel. Hyde v. Buder, 287 Mo. 307, at l. c. 309, is the following:

"The repeal of statutes by implication is not favored by the courts, and the presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another either the two statutes must be irreconcilable or the intent to effect a repeal must be otherwise clearly expressed. 36 Cyc. 1071, 1072. The act of 1891, contains no repealing clause save as to section 7538, R. S. 1889, and respondents do not point out any clearly expressed intention to repeal the act of 1879, which was section 5957, R. S. 1889, now section 6386, R. S. 1919. The act, in reality, amends article 2 of chapter 138, R. S. 1889, by repealing section 7538 and being enacted in lieu thereof. * * * *"

From the above, it would seem to be doubtful whether or not the enactment of C. S. H. B. 255 did repeal by implication the last clause of Section 10400, R. S. Missouri, 1939, which is hereinbefore set out.

But, in construing a statute, the primary object is to ascertain the intention of the legislature. Grier v.

Railway Co., 286 Mo. 523; State ex rel. American Asphalt Roof Corporation v. Trimble, et al., 44 S. W. (2d) 1103. By reading House Bill 255, as originally introduced, and then reading the Committee Substitute for House Bill 255, which was enacted by the General Assembly and signed by the Governor, it seems to be quite apparent what the intention of the legislature was. The bill, as originally introduced, did not contain anything that would, in any way, affect any other section of the statute. But the Committee Substitute did contain the added clause which is set out, supra, providing that the compensation provided for in the bill should be in lieu of all other compensation of whatever kind in whatsoever section of the statutes provided for. The General Assembly had knowledge of the items of compensation, such as that for disbursing school moneys, which were provided for in other sections of the statutes. That would clearly indicate the intention of the General Assembly to provide for the fixed salary therein set out for county treasurers and to repeal by implication all other statutes and parts of statutes giving items of compensation to county treasurers.

Inasmuch as the General Assembly, by the body of the bill, showed its intention that the compensation therein provided for should be in lieu of all other compensation, it is necessary that we consider the title of the bill in order to determine whether or not the title is sufficiently broad to cover such an intention.

Section 28 of Article IV of the Constitution of Missouri is as follows:

"No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title."

The title of the original bill and of the Committee Substitute both provided for the repeal of Section 13800 and the enactment of a new section 13800, R. S. Missouri, 1939, in lieu thereof. Neither title makes any reference to the repeal of any other section or any part of any other section. And it would seem that by attempting to repeal by implication other statutes or parts of other statutes the bill is broader than the title. The title to the bill, as originally introduced, and as amended by the Committee pertained to the compensation of county treasurers.

In the case of *Graves v. Purcell*, 85 S. W. (2d) 543, at 1. c. 547, is found an excellent compilation of rules for applying Section 28 of Article IV of the Constitution. These rules are copied below.

"In determining the true meaning and scope of constitutional or statutory provisions, the intent and purpose of the lawmakers is of primary importance. This court has consistently held that the intent and purpose of the framers of our organic law in providing that 'no bill shall contain more than one subject which shall be clearly expressed in its title' was to limit the subject-matter of the bill to one general subject and to afford reasonably definite information to the members of the General Assembly and the people as to the subject-matter dealt with by the bill. *City of Kansas v. Payne*, 71 Mo. 159, loc. cit. 162; *State ex rel. v. Walker*, 326 Mo. 1233, 34 S. W. (2d) 124, loc. cit. 131. Apart from the basic principle just stated as to the general purposes sought to be achieved by the constitutional provision in question, this court has recognized the impossibility of formulating any general rule or principle of universal application which can be safely applied to test the sufficiency of the titles of

particular enactments and, in general, has given its sanction to the view that each case must be determined upon its own peculiar facts. *Witzmann v. Southern Railway Co.*, 131 Mo. 612, loc. cit. 618, 33 S. W. 181; *State ex rel. v. Jackson County*, 102 Mo. 531, loc. cit. 537, 15 S. W. 79.

"* * * Where the title to a bill contains comprehensive language followed by particulars of less comprehensive scope, there can be no question that as to all details within the scope of the narrower language employed the provisions of the bill must be confined to the limits of the narrower language contained in the title. *State ex rel. v. Hackmann*, 292 Mo. 27, 237 S. W. 742; *State v. Crites*, 277 Mo. 194, 209 S. W. 863. In some instances the particulars set forth in the title expressly or by necessary implication restrict the meaning and scope of more comprehensive language contained in the title, and in such instances it is clear both upon principle and authority that the provisions of the bill must be confined within the limits of the particulars specified. *State ex rel. v. Hackmann*, supra; *Vice v. Kirksville*, 280 Mo. 348, 217 S. W. 77; *Woodward Hardware Co. v. Fisher*, 269 Mo. 271, 180 S. W. 576. But in instances where the title to the bill descends into particulars which are neither expressly nor by necessary implication restrictive of the general purpose of the bill as set forth in its title, but are merely descriptive of some of the instrumentalities or means to be employed in effectuating the general purpose of the bill as declared in its title, there is no constitutional barrier to the inclusion in the bill of provisions which are germane to and within the scope of the general purpose of the bill as declared

in its title and which, although not set forth in the particulars expressed in the title, are not out of harmony with them. State ex rel. v. Buckner, 308 Mo. 390, 272 S. W. 940; State ex rel. v. Terte, 324 Mo. 402, 23 S. W. (2d) 120; State ex rel. v. Williams, 232 Mo. 56, 133 S. W. 1; State ex rel. v. Miller, 100 Mo. 439, 13 S. W. 677. Although the general principles just indicated have not heretofore been enunciated by this court in precisely the terms we have here employed, we think the general views here expressed have been fully sanctioned by the decisions of the court. Before proceeding to the consideration of the specific reasons urged in support of the contention that the statute here in question violates the provisions of section 28 of article 4 of the Constitution, we deem it appropriate to advert to certain fundamental principles which must be applied by us in properly determining the controverted issue. There is a presumption that the statute here assailed is constitutional. The burden rests upon the party questioning the constitutional validity of a statute to establish its unconstitutionality beyond a reasonable doubt, and if its constitutionality remains in doubt, such doubt must be resolved in favor of its validity. State ex rel. v. Terte, 324 Mo. 402, 23 S. W. (2d) 120; Forgrave v. Buchanan County, 282 Mo. 599, 222 S. W. 755. This court has long been committed to the principle that section 28 of article 4 of our Constitution must be liberally construed. State ex rel. v. Buckner, 308 Mo. 390, 272 S. W. 940; State v. Mullinix, 301 Mo. 388, 257 S. W. 121. A liberal construction of the constitutional provision in question requires that such construction

Hon. David E. Blanton

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October 14, 1941

be fair, reasonable, and rational, to the end that legislative action shall not be thwarted and nullified by the courts by a resort to undue subtleties and refinements or extreme and artificial formalism."

The question is not without doubt. However, the Committee Substitute for House Bill 255 pertains generally to the compensation of county treasurers and anything coming fairly within that general subject could be dealt with in the act, unless the title is restrictive. Further, the bill is presumed to be constitutional unless shown beyond a reasonable doubt to be unconstitutional.

CONCLUSION

The conclusion follows that if Committee Substitute for House Bill 255 (Laws of 1941, page 534) be constitutional, and it is presumed so to be, then the General Assembly repealed by implication the last clause of Section 10400, R. S. No. 1939, which permitted the county court to allow the county treasurer not to exceed one-half of one per cent for disbursing school moneys to be paid out of the county treasury.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ/rv

OFFICERS: It is mandatory that a county surveyor in
COUNTY SURVEYOR: a county of not less than 20,000 nor more
than 50,000 must be ex officio highway
engineer.

December 9, 1941

Honorable David E. Blanton
Prosecuting Attorney
Scott County
Benton, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of December 1, 1941, which reads as follows:

"The County Court of Scott County, Missouri, would appreciate an opinion from you on the following matters:

"Scott County is a county that has a population of 30,000 people, and as such under the provision of 8660 RS 1939, the County Surveyor is Ex officio Highway Engineer. The County Court is of the opinion that the County Surveyor is not performing the duties of the office of ex officio Highway Engineer. The Surveyor has appointed an assistant to perform the duties of his office, but said appointment was without the consent of the County Court. The County Court, however, has not been paying the salary of the assistant, and the County Court has refused to continue to pay the salary of the Surveyor as ex officio Highway Engineer. Please advise what power, or authority, if any, the County Court possesses to regulate the activity and conduct of the surveyor as ex officio Highway Engineer, and as to whether or not the County Court are within their rights in refusing to issue a warrant for the payment of his salary as

ex officio County Highway Engineer, which was heretofore set out at \$125.00 per month.

"Please also advise as to whether or not the Surveyor can appoint an assistant in a county such as Scott County without the consent and approval of the County Court. Please also advise as to what steps, if any, might be taken and by whom for the removal of the said surveyor and also as ex officio County Highway Engineer.

"Scott County has for sometime maintained a road working crew, as have the other counties of the State, and has paid them after the Surveyor as ex officio Highway Engineer has OK'ed their statement for services rendered. The ex officio County Highway Engineer has, however, failed to OK the statements, and the Court is paying said statements, although they have not been approved by the ex officio Highway Engineer. The men who have performed the services are, in the main, day laborers and if they are not paid the highway work in the County of Scott will come to a standstill and the roads will soon be in a deplorable condition. Please advise what steps should be taken by the County Court with reference to the continued payment of the road workers.

"From the above, you can see the urgency of this matter, and your most prompt attention will be greatly appreciated by the County Court of Scott County, Missouri."

Section 8660, R. S., Missouri 1939, provides that the county court may appoint a county surveyor as county engineer and provides for the compensation of the county engineer and the appointment of assistants. It is to the effect that the county court of the several counties, in their discretion,

may appoint the county surveyor to the office of county highway engineer, and it further provided that the county surveyor may refuse to act as county highway engineer and in that event appoint an assistant with the approval of the county court who shall be paid a compensation as fixed by the county court.

This section also contained a provision which referred to counties having more than fifty thousand inhabitants or adjoining a certain city. This provision in Section 8660, supra, was held unconstitutional in the case of *State ex inf. v. Southern*, 177 S. W. 640. The provision for an appointment of a highway engineer first came into effect in 1909. It included the major part of Section 8660 of the Revised Statutes of Missouri 1939, but in 1939 the entire section was reenacted and the following provision added:

"* * * Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

The above provision is to the effect that in all counties in this state which contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants do not come within the general law as set out in Section 8660, supra. It specifically sets the salary of the ex officio county highway engineer. This provision is mandatory and does not call for any discretion on the part of the county court. It, in effect, abolished the office of highway engineer by legislative act instead of by suspension of the act by an election under Section 8668, R. S. Missouri 1939.

This provision is a special law and is an exception to the general law as set out in the balance of Section 8660, R. S. Missouri 1939.

The word "provided" was construed to be an exception in the case of *State v. Murphy*, 148 S. W. (2d) 527, par. 13, where the court said:

"Ordinarily the word 'provided' introduces a condition or exception and is often synonymous with 'if,' but sometimes, even in statutes, it has only the meaning of the conjunction 'and.' 50 C.J. pages 830, 831; *Doneghy v. Robinson*, Mo. Sup. 210 S. W. 655, loc. cit. 659; *State ex rel. v. Mooneyham*, 212 Mo. App. 573, 253 S. W. 1098."

It is also an exception for the reason that it minutely sets out a different payment and duty as is set out under the general law and is a later enactment than Section 8669, R. S. Missouri 1939, which provides specific duties and different amounts allowed to the ex officio county highway engineer.

In the case of *State v. Richman*, 148 S. W. (2d) 796, paragraphs 2,3, the court, in holding that the special statute governed over a general statute, said:

"In *State v. Harris*, 337 Mo. 1052, 1058, 87 S. W. 2d 1026, 1029, we said that if statutes are necessarily inconsistent that which deals with the common subject matter in a minute and particular way will prevail over one of a more general nature; and, citing authorities, we quoted the rule as stated in *State ex rel. County of Buchanan v. Fulks*, 296 Mo. 614, 626, 247 S. W. 129, 132, thus: "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute."

Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

When a special statute is later than a general statute relating to the same subject matter it will be regarded as exception to or qualification of the prior general one. State ex rel. Equality Savings and Bldg. Association v. Brown, 68 S. W. (2d) 55; State ex rel. Webster Groves Loan and Bldg. Association, 68 S. W. (2d) 60.

The above two cases even go further and hold that where a general statute was enacted subsequent to an earlier special statute relating to the same subject matter, the special statute will be construed as exception to the general statute, unless expressly or impliedly repealed.

The provision enacted in 1939, which was an exception to the general law as set out in that Section 8660, R. S. Missouri 1939, in a way took the duties of the county surveyor ex officio county highway engineer out of Article IX, Chapter 46, R. S. Missouri 1939, which referred to county highway engineer. It also placed the county highway ex officio county highway engineer and described his duties and salary as set out in Chapter 90, R. S. Missouri 1939, which sets out the duties of the county surveyor. The county surveyor, in a county such as Scott County, was entitled to his salary as surveyor and also to his salary as ex officio county highway engineer as determined by the county court under the provision above set out and contained in Section 8660, R. S. Missouri 1939. That he was not bound by the duties as prescribed under the chapter concerning county highway engineers was held in the case of Spurlock v. Wallace, 218 S. W. 890, where the court said:

"* * * Appellant claims that under the latter section he, as county surveyor, is ex officio county highway engineer, and that as such officer there are certain duties pertaining to the working, repairing, improvement, and main-

tenance of roads and highways, building of bridges and culverts, etc., which he is required to perform by virtue of his office and this statute, and that he must perform these duties without being ordered by the county court to do so; and that under and by virtue of certain statutes it is his duty to inspect and report certain work on the roads, bridges, culverts, etc. It is alleged that the county court is ordering and issuing warrants to road overseers for such work without any report being made by the appellant in relation thereto. It is also shown that, acting under sections 10571 and 10572, R. S. 1909, the people of Douglas county, at a duly called election voted against the proposition of having a county highway engineer. The appellant, therefore, claims that under these circumstances, by virtue of section 10572, he as county surveyor is also ex officio county highway engineer, and as such must perform the duties therein enumerated, and that the county court is without authority of law to issue and pay warrants to the road overseers until the appellant as such highway officer has inspected the work and reported thereon. It appears that the county court fixed the amount that the ex officio highway engineer was to receive, it being \$5 per day when actually engaged as such engineer by the court, and out of which he shall furnish his own conveyance and pay his own expenses while engaged as such engineer; and the order further provides that he shall work under the direction of the county court."

The court, further in the same case, said:

"If the contention made by appellant should be upheld, then we must necessarily hold

that to vote under section 10571, and to thereunder abolish the highway engineer act meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed, even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, R. S. 1909, was to permit the people of a county to abolish the office of highway engineer, yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer, and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation."

Under the above holding it is specifically stated that the duties of the highway engineer, when that position was abolished by an election, were not the same as if he was a highway engineer which had not been abolished by an election. Under the provision of Section 8660, supra, the legislature abolished the position of highway engineer insofar as to counties containing not less than twenty thousand inhabitants and not more than fifty thousand inhabitants in which bracket Scott County is, which was to the same effect as an election abolishing the office of highway engineer as set out in Section 8668, R. S. Missouri 1939.

Since the salary of the county surveyor is set, and since his salary is set under the provision of Section 8660, supra, as ex officio engineer, it is mandatory that the county court pay his salary as county surveyor and as ex officio engineer. It was so held in State v. Bulger, 233 S. W. 489, where

the court said:

"* * * So we repeat what we said as to the act of 1909, that the words 'as county surveyor and ex officio city highway engineer' as used through all these acts has reference to the office and to the duties of the highway engineer, and the pay there mentioned is to cover those duties, and not to cover the duties of county surveyor, as such. For services as county surveyor the salary is fixed at \$3,000 per annum. For 'county surveyor and ex officio county highway engineer' the salary is not less than \$3,000 nor more than \$5,000. More than the minimum of \$3,000 cannot be claimed, unless the county court has so ordered. The \$3,000 is fixed by law, and must be paid. We conclude that relator is entitled to two salaries of \$3,000 each, one as county surveyor, under section 11041, R. S. 1919, and one under section 10784, R. S. 1919. It therefore follows that our alternative writ should be made permanent, and it is so ordered."

Under Section 13208, R. S. Missouri 1939, the county surveyor may appoint deputies who shall take an oath to discharge their duties the same as the county surveyor. This section does not provide for any consent or approval of the county court. We find no law which provides that the county surveyor shall approve the payment of a road working crew employed by the county court for the reason that the county surveyor of Scott County is not subject to the rules and duties set out under Article IX, Chapter 46, which concerns county highway engineers. If the county surveyor of Scott County came within Section 8662, R. S. Missouri 1939 of the Highway Engineer Act, it would have been necessary for him to have approved the payment of the road crew. Where a county votes not to have a county highway engineer the duties of such office are abolished and the county courts may order warrants drawn to road overseers without having them approved by the county surveyor acting as ex officio engineer. It was so held in *Spurlock v. Wallace*, 218 S. W. 890. Under the provision of Section 8660, *supra*, the proviso abolished the county

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highway engineer in the same manner as if an election had been held.

The county surveyor is subject to removal for non-performance of his duties the same as any other elective county officer. Under Section 13208, R. S. Missouri 1939, which provides for the appointment of a deputy surveyor there is no provision for the payment of the deputy by the county court and it necessarily follows that his salary must be paid by the county surveyor. The removal of a county elective officer must be under the procedure as set out in Section 12828, R. S. Missouri 1939.

CONCLUSION

In view of the above authorities it is the opinion of this department that the county surveyor has the authority to appoint a deputy but that the county court is not authorized to pay the deputy.

It is further the opinion of this department that it is mandatory for the county court to pay the county surveyor his salary as county surveyor and also his salary as ex officio county highway engineer as set out in the provision in Section 8660, R. S. Missouri 1939.

It is further the opinion of this department that the county surveyor of Scott County can appoint a deputy without the consent and approval of the county court.

It is further the opinion of this department that in order to oust the county surveyor for not performing his duties the procedure to be followed is set out in Section 12828, R. S. Missouri 1939.

It is further the opinion of this department that the County Court of Scott County can pay a road working crew without the approval of the county surveyor as ex officio highway engineer.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

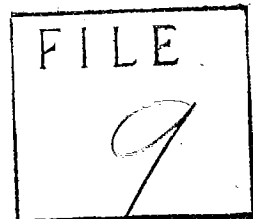
VANE C. THURLO
(Acting) Attorney General

WJB:DA

BOUNDARIES: BANK OF RIVER: Tax meaning of the term "by west bank of Mississippi River" in description of special road district boundary.

December 10, 1941

Mr. David E. Blanton
Prosecuting Attorney of Scott County
Sikeston, Missouri



Dear Mr. Blanton:

This is in reply to your request of recent date, wherein you desire an opinion from this department on the following statement of facts:

"The Scott County Court would appreciate your forwarding us your opinion on the following question at your very earliest convenience, inasmuch as the proposition involved is most pressing.

"On or about June 16th, 1941, there was organized in the north end of Scott County, the Illmo Special Road District, which takes in the town of Illmo, and according to the description set out in the petition filed for the organization of the Road District, the eastern part of the District or that part of Scott County within the District which fronts on the River, is bounded as follows:

"'By the west bank of the Mississippi River'

"The point in question is as to how far out into the River the west bank of the Mississippi River runs; that is, does it go out, and is it coextensive with the boundaries of Scott County to the middle of the current of the Mississippi River, or does it merely run to the west bank or to a point that would be referred to in the popular mind, as the place where the water's edge is ordinarily found.

"There is located in a part of the Illmo Special Road District, and crossing the River at that point, the railroad bridge owned by

the Southern Illinois & Missouri Bridge Company, which has a valuation of over \$1,000,000.00 as far as Missouri is concerned. And, the question before the Court is, who is entitled to the road and bridge tax for the bridge property that extends from the west bank of the Mississippi River out to the east boundary line of Scott County.

"The Tax Commission in its Certificate and Order to the County Clerk did not show any of the property of the Bridge Company in the Illmo Special Road District. The County Clerk has the duty to forward to the Company paying the tax, a statement showing in what District or Districts, the property lies, and until he is favored with an opinion from you, he will be unable to perform his duty which is an essential step towards the collection of the tax."

Since this question involves the right of the taxing authority to levy and collect taxes on property, we think the following rule announced in *State ex rel. Halferty v. Kansas City Power and Light Company*, 143 S. W. (2d) 116, 120 would be applicable:

"It is conceded that under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose. (Citing cases)"

With this rule in mind, the rules which would apply in determining the west bank of the Mississippi River might be different than the rules which would apply in determining this line in case of a riparian owner. In *Words and Phrases*, Vol. 5, Perm. Ed., page 104, the term "bank of a river" has been defined variously as follows:

"The 'bank' of a river or stream extends to the margin of the stream--to that point where the bank comes in contact with the stream. *Morrison v. First Nat. Bank*, 33 A. 782, 784, 88 Me. 155.

"A call in a deed for the west bank of a river, thence with the meanderings of the

bank of the river to stake, is unambiguous and conveys the land to the water's edge, since the bank means the land adjacent to the water. *Graham v. Knight*, Tex., 240 S. W. 981, 983.

"In *Jones v. Soulard*, 65 U. S. (24 How.) 41 16 L. Ed. 604, a boundary of the city of St. Louis, described as on the bank of the Mississippi, was construed to carry the boundary of the city to the center line of the river. *State v. City of Columbia*, 5 S. E. 55, 59, 27 S. C. 137."

In the *Soulard* case, *supra*, it would seem that if that rule were followed, the bank of the Mississippi River, as mentioned in your request, it would carry the boundary line to the center line of the river or to the middle channel thereof. However, referring to that case, we note that the description which was under consideration there altered the general rule as to the definition of the bank of the river. We quote from that case as follows (U. S. Sup., 16 L. Ed. p. 604, 1. c. 608):

"The town of St. Louis was incorporated in 1809 by the common pleas court of St. Louis county, in conformity to an act of the territorial legislature passed in 1808, and the only contested question in the cause is, whether the eastern line of the corporation extends to the middle thread of the Mississippi River, or is limited to the bank of the channel. The calls for boundary in the charter are, 'beginning at Atoine Roy's mill on the bank of the Mississippi; then running sixty arpents west, thence south on said line of sixty arpents in the rear, until the same comes to the Barrieu Donoyer; thence due south until it comes to the Sugarloaf; then due east to the Mississippi; from thence by the Mississippi, to place first mentioned.'"

"The expression used in the designating boundary on the closing line in the charter is an apt to confer riparian rights on the proprietor of the tract of seventy-nine acres as the call could well be, unless the last call had been for the middle of the river."

In this description there was a monument on the bank of the Mississippi River but the last course was "by the Mississippi." It was on account of this course that the court held that the line called for there was the middle of the river. Otherwise, from a reading of this opinion, it would seem that the court would have held the bank of the river to have been the east boundary of the State of Missouri. In the case of *People ex rel. v. Board of Supervisors*, 125 Ill. Rep., p. 1, l. c. 24, this question is discussed as follows:

"In *Howard v. Ingersoll*, 13 How. 381, one of the boundary lines between the State of Georgia and the State of Alabama is described as 'running thence up the said River Chattahoochee, and along the western bank thereof, to the great bend thereof,' etc. The court, in speaking of this language said: 'If the language of the article had been, "beginning on the western bank of the Chattahoochee, and running thence up the river," and no more had been said, the middle of the thread of the river ordinarily, and without any reference to the fact that Georgia was the proprietor of the river, it would have been said to be the dividing line between the two States. But there is added, "running up the said river Chattahoochee, and along the western bank thereof." This last controls any uncertainty there may be, for if the first caller object to locate the line is the bank of the river, it is plain that the western limit of Georgia, on and along the bank of the river, must be where the bank and water meet in its bed, within the natural channel or passage of the river.'

* * * * *

In Vol. 8, Am. Jur., p. 764, par. 27, the rule is announced as follows:

"The courts in many states have recognized a distinction between monuments called for as locating boundaries on land and boundaries along watercourses, in that it is not always practicable to locate monuments in the channels of rivers. Accordingly, the rule

has been established that there is no presumption that monuments mentioned in a deed as occupying the bank of a river are intended by the parties as being exactly located and as standing at the water's edge. Instead the monuments may be referred to as merely indicating the location of lines which intersect the stream and which should be continued beyond the monument to the water's edge. Therefore, the bounding of the land by lines running to a stake on the bank, and thence up or down or by the river, or along the stream 'as it winds and turns,' to another monument on the bank has been held to carry the line to the center of the stream, as being a description made, according to the intent of the parties of the grant, solely for the purpose of convenience and certainty. The running of a boundary line by courses and distances along the bank of a river will not prevent the water from being the boundary in accordance with the normal rules regulating boundary lines on navigable and non-navigable rivers. Indeed, it may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream or its banks and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise. On the other hand, it has been held that where the lines are run from object to object along the bank of a stream, so as to inclose a given quantity of land, the grantee's title will not extend to the center of the stream, although the words 'down the creek' are used in describing the direction of the lines."

Section 13664, R. S. Mo. 1939, is as follows:

"Whenever a county is bounded by a water-course, it shall be construed to be the middle of the main channel thereof; and range, township and sectional lines shall be construed as conforming to the established surveys."

This section would be some authority for holding that the boundary of the district is the middle of the main channel of the river if the description read "bounded on the east by the Mississippi River." But, since the description reads "bounded by the west bank of the Mississippi River" and in view of the rule announced in the Kansas City Power and Light case, we think that the boundary line of the district would be limited to the bank of the river.

CONCLUSION

From the foregoing, we are of the opinion that the boundary line of the Illmo Special Road District on the eastern part thereof, which is described as the "west bank of the Mississippi River" would run to a point that would be referred to in the popular mind as the place where the water's edge is ordinarily found.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

STATE CONSERVATION COMMISSION: Sections 15387 to 15390,
inclusive, R. S. Mo. 1939,
are valid and existing
statutes and do not conflict
with the authority of the
State Park Board.

February 28, 1941

Honorable I. T. Bode, Director
State Park Board
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your letter
of sometime ago, which is as follows:

"We are requested to provide information regarding the application of Article 5, Chapter 129, page 3675, Vol. II, Revised Statutes of 1929.

"This law does not refer to the State parks. However, persons interested in the State Park Program have made inquiry regarding this law and have asked us to advise with them regarding its application, and we have also been asked to help plan county parks.

"In the event this law is now effective, the principal question appears to be, does the county court actually have the authority to levy the five per cent tax to be used for park purposes?

"An opinion regarding Article 5 of Chapter 129 will be appreciated. It is possible that this law might afford some help to the State Department in that counties could be encouraged to maintain their own park systems."

Feb. 28, 1941

Chapter 129, Article 5, referred to in your letter is under the caption of "Parks, Playgrounds and Camping Sites in certain counties" and is now Article 9, Chapter 133, Sections 15387 to 15390, inclusive, R. S. Mo. 1939. The first three sections relate to counties of not less than three hundred thousand nor more than six hundred thousand inhabitants. The first section authorizes such counties to purchase or receive gifts or donations of lands for public parks and playgrounds, etc. The next section empowers the courts of such counties to appoint a board of park commissioners and outlines their duties. Section 15389 empowers the county court to make an annual appropriation for the maintenance and improvement of lands acquired or purchased.

Sections 15387 to 15390, inclusive, were passed by the Legislature in 1925 (Laws of 1925, page 182). According to the population restriction it does not appear that these sections would now apply to any county in the State with the exception of Jackson County. There is no record of these sections having been repealed or having been passed upon by the court. They are therefore valid and existing sections, in our opinion, unless they are repealed by implication, which we will discuss later.

Section 15390, R. S. Mo. 1939, was formerly Section 14268, R. S. Mo. 1929. It was enacted in 1927 by the Legislature in a single section (Laws of 1927, page 141). It is captioned in the act: "County Courts: Providing That County Courts of State May Set Aside 5 Per Cent of Revenue for Purchase of County Parks." The section is as follows:

"County courts in all counties in the state of Missouri may set aside five per cent (5%) of the county revenue fund for the purchase of county parks and the maintenance thereof; titles to land purchased shall be taken in the name of the county, and each court is authorized to set aside a sufficient amount each year for the maintenance of said parks when purchased."

We do not find that it has ever been repealed or passed directly upon by any court.

Feb. 28, 1941

The decision in *Vrooman v. St. Louis*, 337 Mo. 933, does not refer to the section quoted supra, but discusses fully the power of the city to construct parks for public purposes and the taxing power of counties under Section 1 of Article X of the Constitution of Missouri.

We are of the opinion that Section 15390 is a valid and existing law and the county courts of the State may act under the same, provided, that the fund of five per cent, of course, does not violate the constitutional limitation with reference to assessing and collecting taxes.

As to whether or not sections are repealed by implication, direct or otherwise, it is necessary to consult Sections 15328, 15329 and 15330, R. S. Mo., 1939. These sections were passed in 1937 (Laws of 1937, page 520). The first two sections create a state park board and define the powers and duties of said board. The last section repeals all laws in conflict with the same. The terms of the sections do not reveal any conflict in the duties of the State Park Board and Sections 15387 to 15390, inclusive. We think the sections can be considered in *pari materia* and without conflict.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

OWN:CP

CRIMINAL COSTS: Where two defendants are tried jointly on murder and one was convicted and one acquitted the state must pay witness fees of defense witness on acquittal but not on a conviction.

July 9, 1941

7-11

Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri



Dear Sir:

We are in receipt of your request for an opinion dated June 28, 1941, which reads as follows:

"I would appreciate your opinion on the following questions relative to criminal costs.

"First: A murder case was tried and disposed of in this county in January, 1940, resulting in the conviction of one defendant of first degree murder, and a directed verdict of not guilty as to the other defendant, they being charged jointly in the information. Upon appeal to the Supreme Court the conviction was affirmed. The fee bill has not yet been made, but when completed should it be signed by my predecessor in office who prosecuted the case to final disposition, or should I sign the fee bill as the present Prosecuting Attorney?

"Second: In the above mentioned case, one defendant being convicted and the other being acquitted, for what part of the cost incurred on part of the defendants is the State liable, the subpoenas showing the witnesses were directed to appear in behalf of both of the defendants?

"The fee bill is now being made and I would appreciate your opinion as soon as conveniently possible."

July 9, 1941

Section 4220, R. S. Missouri 1939, reads as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Under this section when a person is convicted of any crime or misdemeanor, he must pay the costs and neither the state nor county is compelled to pay the costs incurred on his part except fees for board. Under this section witnesses subpoenaed by the defendant must look to the defendant to receive their witness fees where the defendant has been convicted either of a felony or misdemeanor.

Section 4221, R. S. Missouri 1939, reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each

juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Under the above section where the defendant has been convicted in a capital case, or has been sentenced to imprisonment in the penitentiary, or in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary but has been confined elsewhere on account of his age, the state must pay the costs, except costs incurred by the defendant and in cases where the defendant is insolvent. Under this section the state is not required to pay witness fees to defense witnesses. Witnesses for the defendant must look to the defendant for their fees.

Section 4222, R. S. Missouri 1939, reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Under this section the county must pay the costs where the punishment is imprisonment in the county jail or a fine and not imprisonment in the penitentiary.

Section 4223, R. S. Missouri 1939, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by

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the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Under this section in case a defendant is acquitted on a charge in which the punishment is solely in the penitentiary, the costs must be paid by the state. In all other cases, such as graded felonies upon an acquittal, the costs shall be paid by the county unless the prosecutor or prosecuting witness is adjudged to pay the costs. Under this section the state and county must pay the witness fees of both the state and the defendant, and in case the county is liable, the county must pay both the state and defense witness fees. The above section was construed in the case of State v. Hackmann, 257 S. W. 457, par. 3, where the court said:

"* * * From the record, in the case before us, it can be determined whether the jury ever reached the question of manslaughter at all. They may have found that there was no manslaughter in the case, and yet returned the verdict which was returned. To our mind the statute itself is clear and plain. In fixing the cases for which the state shall be liable for costs, in that it says:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state."

"Note the italicized language 'if the defendant is acquitted.' In such a case it cannot be well said that the charge in the information is not the basis for fixing the liability of the state. The statute is speaking of certain offenses, and says, if the defendant is acquitted of such offenses, then the state shall

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pay the costs. It (the statute) says nothing about what might occur during the trial. It is dealing with the issues made by the pleadings. In this case the pleading upon the part of the state makes the issue that defendant is guilty of murder in the first degree. His plea of not guilty puts that charge in issue. Upon such issue it cannot be said that the state can refuse to pay the costs. Let the writ be made absolute. It is so ruled.

"All concur."

Under the above opinion the question as to the payment of the costs between the state and county depends upon the charge upon which the defendant is acquitted, and even though a manslaughter instruction was given in the trial of the case, the acquittal is construed to be an acquittal of the charge contained in the indictment or information which was in the above opinion murder in the first degree.

Section 13420, R. S. Missouri 1939, partially reads as follows:

"Witnesses shall be allowed fees for their services as follows:
For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, \$1.50. For like attendance out of the county where witness resides, each day, \$2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, \$1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. * * * "

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The Supreme Court of this state in construing the mileage as set out in the above section in the case of State ex rel. v. Wilder, 196 Mo. 418, l. c. 430, said:

"It will not be seriously contended that the subpoenas in this cause which are alleged to have been served upon the witnesses at their places of residence in a foreign State were of any force or vitality. A subpoena issued from the courts of this State cannot have any extraterritorial operation, hence the service of the subpoenas of the witnesses whose claims for mileage are involved in this proceeding in another State were mere nullities and of no obligatory force upon the witnesses to obey the command contained in the subpoena. The rules of law applicable to this subject were fully discussed and announced in State ex rel. v. Seibert, 130 Mo. 202, by the Court in Banc. There were two opinions in that case, but upon the proposition that process served beyond the limits of this State were of no force and effect, there was no division of opinion. SHERWOOD, J., in that case, in treating of process, thus announced the law: 'When the Legislature treats of process and its service and recognizances, it will be intended that such process can only be served within this State and that such recognizances only possess obligatory force within its borders. Neither process nor recognizances can have any extraterritorial operation. * * "

Also, at page 432, the court said:

"There is a marked distinction between a witness who has been duly subpoenaed or recognized in this State and one upon whom the process was served at his place of residence in a foreign State. In the first

place, the service of the subpoena in the foreign State is of no force and effect, and is just the same as if no process at all had been served, and the witness under that sort of service might return to this State and would not by reason of it be subject to the compulsory process of attachment. But on the other hand, a non-resident witness who is duly and legally served with a subpoena in this State, while no compulsory process could be issued for him to his place of residence in a foreign State, yet if he should return to this State he would be subject to such compulsory process the same as any other witness residing in the State, hence it may very well be argued that the non-resident witness who has been duly served in this State with process, attends the trial of a cause in obedience to the commands of such subpoena, for the very reason that the moment he visits this State, it matters not how far distant from the place of trial, he could be compelled to obey the process so served upon him. By service of the process in this State, while the court was powerless to compel obedience to it, as long as the witness remained in a foreign State, yet the court did acquire such jurisdiction over the person of the witness as to enable it to compel obedience to the commands of such process in any county of this State where the witness may be found, hence the witness who has been served with process in this State, though a resident of a foreign State, who attends the trial, may very appropriately say to the court that he did not care to be deprived of his liberty in visiting the State when occasion required in order to avoid the issuance and service of compulsory process, therefore, I am here and have traveled from my

July 9, 1941

residence in a foreign State in obedience to the process which was properly and legally served upon me in this State. It follows under such circumstances as was ruled in *State ex rel. v. Seibert, supra*, the State could not be heard to complain that a witness, though living in another State, had obeyed the commands of its process and submitted to the jurisdiction of the court by reason of the proper and legal service of it in this State.
* * * * *

Under the holding in the above case it was to the effect that service of a subpoena outside of the state was a nullity, but if the witness had been served inside the state and later appeared at the trial of the case from his place of residence in a foreign state, he should be entitled to his mileage. The latter holding followed the case of *State ex rel. v. Seibert*, 130 Mo. 202.

Section 4239, R. S. Missouri 1939, reads as follows:

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are al-

July 9, 1941

lowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

The wording in this section is plain and unambiguous and is not subject to construction. It plainly states, "* * the certificate of the judge and prosecuting attorney * * *." If it had been the intention of the Legislature that the prosecuting attorney who tried the case should make the certificate, it would have been so written in the section, but it plainly says in ordinary words, "prosecuting attorney" and does not say "ex-prosecuting attorney."

The Supreme Court of this state in the case of Artophone Corporation v. Coale, 133 S. W. (2d) 343, pars. 2-4, said:

"* * * Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S. W. 2d 920, 925 (7-10). * * * * *"

In the above section it clearly shows the intention of the Legislature that the present judge at the time of the certificate and the present prosecutor at the time of the certificate should examine and certify the fee bill. The above section also specifically states "that the fees charged are expressly authorized by law," which would be the fees of witnesses for the defendant when there is an acquittal as set out in Section 4223, supra.

July 9, 1941

In your request you state that two defendants were charged jointly in the information and that one was finally convicted and one was acquitted on a directed verdict. We are assuming that both defendants were tried in the same case. In cases where a witness is summoned to appear in more than one case at the same time and same place he would only be entitled to witness fees in one case under Section 13420, supra, and if he shall claim fees for attending in two or more cases on the same day at the same place, he shall not be allowed any fees that day. According to Section 13420, supra, which partially reads as follows:

"* * * but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. * * * * *"

CONCLUSION

In view of the above authorities it is the opinion of this department that where one defendant was convicted in a murder case, the state should pay all costs, but the state should not pay any of the costs incurred by the defendant with the exception of board. Therefore, under Sections 4220 and 4221, supra, defense witnesses, in a murder case in which there is a conviction by the state, must look to the defendant for their fees. Of course, if the defendant is solvent upon a conviction, the state must not pay the costs, but the costs must be paid by the person convicted.

It is further the opinion of this department that where one of the defendants was acquitted upon a charge of murder by way of a directed verdict as set out in your request, the state is liable for all costs, both witnesses for the state and for fees allowed witnesses for the defense except in cases where the prosecutor shall be adjudged to pay them. Therefore, the state is only liable for defendant's witness fees in the case of acquittal on a charge of murder and is only liable for the witness fees of state witnesses in case of a conviction on a charge of murder where the defendant is

Hon. Paul Boone

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insolvent.

It is further the opinion of this department that the fee bill, when examined and certified, should be signed by the present judge of the court and the present prosecuting attorney of the county and not by an ex-judge or ex-prosecuting attorney who participated in the recent trial of the cause.

It is further the opinion of this department that when a witness has been subpoenaed on two or more cases at the same place and at the same time he is only entitled to fees for attendance as a witness for one day's attendance and if he claims witness fees on more than one case for the same day at the same place he is not entitled to any witness fees whatsoever.

Respectfully submitted

W. J. BURKE .
Assistant Attorney General

APPROVED:

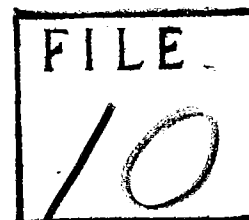
VANE C. THURLO
(Acting) Attorney General

WJB:DA

BOARD OF PHARMACY: It is illegal to use the words "Drug Sundries" as a sign without licensed pharmacists in charge; a license cannot be reinstated when revoked, but applicant may apply for new license. (26)

September 19, 1941

Honorable Charles R. Bohrer, Secretary
State Board of Pharmacy
West Plains, Missouri



Dear Sir:

Sometime ago you submitted to this department for an official opinion two questions pertaining to the Board of Pharmacy. The facts relating to your first question are as follows:

"Throughout the state, we have a number of stores operating as Drug Sundry Stores. In some instances, their signs do not stress the word 'Drug' over any other word in the sign, while in a number of instances the word 'Drug' appears in much larger letters than the other words on the sign. One instance of this is in Excelsior Springs where a man operates a store of this type on the front of which he has a Neon sign carrying the words 'Adams Drug Sundries,' with the 'Adams' above the word 'Drug' and 'Sundries' below the word 'Drug'. Both the top and lower words are in small characters, and are not very brilliantly illuminated, while the word 'DRUG' is in much larger letters, and is very brilliantly lighted, so that at a distance all of these words that are readable is the word 'Drug.' We have had considerable trouble with stores of this type, and quite a few complaints from legitimate drug stores concerning this type of advertising, and we would like an opinion from your department as to whether or not the use of the word 'Drug Sundries' is in any way a violation

of the Pharmacy Law. Also as to the use of this term, when the word 'Drug' does stand out over any other word in the term.

"We find that in most stores of this type they are selling some items in violation of the Pharmacy Law, and, of course, we insisted that they discontinue these practices, and at the present we have been successful in this regard."

We have made diligent search of the statutes, independent of the chapter and article relating solely to the Board of Pharmacy, and we find no statute under Crimes and Punishments that prohibits the using of signs such as "Adams Drug Sundries" in the manner in which you outline in your letter. The only section which we shall consider, and which might be relevant, is Section 10020, R. S. Mo. 1939, which is as follows:

"It shall be unlawful for any person not legally licensed as a pharmacist to take, use or exhibit the title of pharmacist, or licensed or registered pharmacist, or the title druggist or apothecary, or any other title or description of like import."

This section has never been construed by the courts, but we find a somewhat similar section in purport in the State of New York. (People v. Bernstein, 261 N. Y. S. 381) The section in that state reads as follows, l. c. 382:

"No person or corporation shall hereafter carry on, conduct or transact business under a name which contains as a part thereof the words 'drugs', 'medicines', 'drug store' or 'pharmacy',

or similar terms or combinations of terms, or in any manner by advertisement circular, poster, sign or otherwise describe or refer to the place of business conducted by such person or corporation by the terms 'drugs', 'medicines', 'drug store' or pharmacy.'
* * * * *

Section 10020, quoted supra, which was formerly Section 13154, R. S. Mo. 1929, was amended in 1939, Laws of Missouri, 1939, page 375. We do not find that it was amended in such a manner as would have any effect on the question which you present.

In the decision of *People v. Bernstein*, 261 N. Y. S. 381, the statute quoted above was under consideration. Due to the fact that the wording of the Missouri statute and the New York statute was so vastly different, it will not aid us materially in the question under consideration except in so far as the word "sundries" may be concerned. In discussing the word "sundries," the court said, l. c. 384:

"While these articles may be sold by an unlicensed person, they may not be advertised for sale under the generic terms interdicted by section 1355. They may not, therefore, be advertised under the generic words 'drugs' or 'medicines.' The placing of the word 'sundries' after the word 'drug' does not save from the inhibition of the statute. The statute prohibits the use of the word 'drugs' or 'medicines' 'in any manner by advertisement.' Moreover, the word 'sundries' means miscellanies or various items which may be considered together, without being separately specified or identified. The statutory violation is made more clear by transposing the words 'drug sundries.' They would then, in meaning advertise 'various miscellaneous unspecified drugs', a form of advertising within the ban of the statute in a store conducted by an unlicensed person."

And again, at l. c. 385:

"This unlicensed defendant violated Section 1355 in his advertisement which used the word 'drugs' in the phrase 'drug sundries,' even though he be referring to articles which he is permitted to sell under the statute, but which statute limits his privilege to sell them by requiring him to avoid the use of the word 'drug' so that the public may not be misled into thinking that he is a licensed pharmacist or druggist. The statute confines him to the advertising of the sale of these articles in schedule C of section 1364 by their individual names."

The statute prohibits anyone unlicensed as a pharmacist to use or exhibit the title of "Druggist." It is possible that by the term "drug sundries," the public might be misled to think that such a person is a licensed pharmacist or druggist, and hence the same would constitute a violation of Section 10020.

As stated above, the courts have not passed on Section 10020, but we are of the opinion that the statute is broad enough to cover the situation as you present it as it contains the further provision "or description of like import."

II.

Your second question relates to the following matters:

"The other matter concerning which we would like to have an opinion is that of the power of the Board to take action in reinstating a pharmacist whose license has been revoked by the Board. It is

presumptive that the Board having power to revoke a license, they should have the power to reinstate such licenses, and we find some record of the Board having done this in the past, but cannot find any specific authority to take action along this line. We have recently had a request from a man whose license was revoked 9 years ago, for a hearing before the Board to request reinstatement of his license. We informed this man that we would check the matter to your office, and act according to your advice in this matter.

"Should it be within the province of the Board to hold such a hearing, we presume that it should be necessary for him to offer competent evidence of such a nature that the Board should be convinced of the fact that this new evidence was materially in his favor before we could act favorably on his case, or could the Board arbitrarily reverse the decision, either made by itself or by a former Board, if they were convinced that the public health would be properly protected by reinstating such a person as a pharmacist? Should the Board be able to follow this course and reinstate a man whose license has been revoked, what fees would be collectible by the Board? For example, this man mentioned previously, had his license revoked 9 years ago, and it hardly seems fair to pharmacists who have been paying their renewal fees over that period to reinstate him, if possible, without payment of the renewal fees covering that period of time.

"If there are any other angles to either of these questions, of which we should be informed, we would appreciate such advice as you can give us."

We think it necessary to distinguish between power of the Board to reinstate licenses and granting to an applicant a new license.

There is a principle of law laid down in the decision of Garfield v. United States ex rel. Goldsby, 30 App. Cases (D. C.) 177, 1. c. 183, as follows:

"It is * * well settled * *, when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him."

Considering the provisions of Section 10007, R. S. Mo. 1939, we find that the Board of Pharmacy has authority to revoke licenses for certain reasons and under certain conditions, but the statute is silent as to reinstating a license once it is revoked. Therefore, applying the principle mentioned in the Garfield decision above, it would appear that the authority of the Board to reinstate a license, once it has been revoked, is beyond the review or recall of the Board.

The specific instance which you give of a former licensee having had his license revoked nine years ago wishing to have a hearing before the Board for reinstatement, in our opinion cannot be granted, but there is nothing in the statute to prevent the former licensee from applying for a new license, and we think the Board would have authority to proceed in its discretion to consider former licensee's application for a license as pharmacist under the first portion of Section 10007. If the Board now finds that none of the disqualifications of the former licensee, as contained in the statute, exist, he may be granted a license.

The provisions of the statutes relating to the revoking of a license of an intoxicating liquor dealer state that such revocation is final, and that a licensee is precluded from obtaining another license for two years.

Hon. Charles R. Bohrer

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September 19, 1941

But, as stated hereinbefore, we think the Board of Pharmacy has such authority as outlined above due to the fact that there is no prohibition in the statute.

As to the fees, having held that you cannot reinstate the former licensee and having pointed out the procedure in event he files a new application, we think the fee question is eliminated and that he should only pay the fees which are necessary to be paid by a new applicant.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

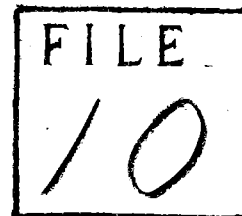
OWN:VC

CONSERVATION COMMISSION: Headings in bold type may be inserted
LEGISLATURES: in regulations without republication
of said regulations. (21)

October 16, 1941

10-17

Mr. I. T. Bode
Director
Conservation Commission
Jefferson City, Missouri



Dear Mr. Bode:

This will acknowledge receipt of your request for an opinion under date of October 16, which reads as follows:

"We have checked further into the matter of adding a 'catch line' to all sections in the Wildlife and Forestry Code, and the Secretary of State's office, where all legislative enactments are prepared for publication in the statutes, thinks that it would be advisable for us to have an official opinion from the Attorney General as to whether or not it would be necessary to publish our entire Code if these 'catch lines' are inserted.

"This is the matter I called you about yesterday, and in view of the fact that there seems to be a question in the minds of several people with regard to the insertion of this 'catch line', we would appreciate it if you would let us have an official opinion on this matter by Monday of next week if possible."

The presumption has always been that the bold type heading chapters, sections, etc., of the law are not any part of the law and have no bearing on the law. It is merely inserted for the purpose of a quick guide or reference, and for no other purpose.

The same presumption, of course, is applicable to rules and regulations promulgated by the Conservation Commission of the State of Missouri.

In State vs. Maurer, Surkamp and Shortell, 255 Missouri 152, l. c. 160, the court in holding such bold type shall not be considered in construing a statute said:

"I. The headings of chapters, articles or sections are not to be considered in construing our statutes; these indicia are mere arbitrary designations inserted for convenience of reference by clerks or revisers, who have no legislative authority, and are, therefore, powerless to lessen or expand the letter or meaning of the law. (Ferguson v. Gentry, 206 Mo. 189, 195; State v. Doerring, 194 Mo. 398, 414; Logan v. Fidelity Co., 146 Mo. 114, 122; Huff v. Alsup, 64 Mo. 51.) This observation is made preliminary to a review of the statutes upon which the informations are based, on account of references in the majority opinion of the Court of Appeals to these headings as aids to construction."

Also, in Bell Telephone Company v. Drainage District No. 8, 215 Missouri Appeal 456, l. c. 458, the court said:

"There is another reason why defendants must fail on this appeal, and that is because the Act of 1917, sections 10737 to 10741, inclusive, nowhere provides for the removal of telephone wires. The act describes

October 16, 1941

electric wires, transmission wires
and trolley wires. The headnote
of the compiler of section 10739
is not a part of the law and in no
way binding."

Also, Sections 685 and 686, R. S. Missouri 1939,
authorizes the revision commission to prepare, among other
things, suitable headnotes to indicate briefly the subject
matter of the sections.

We are unable to find any authority for inserting
headings in the session acts. The presumption is that such
headings in bold type are merely inserted by the Secretary
of State for the convenience of the public.

Therefore, it is the opinion of this Department that
since the bold type heading for such regulations merely is a
guide to what the regulation contains, and in no manner shall
be taken into consideration in construing said regulation that
such bold type heading may be inserted before such regulations
heretofore published without republication of said regulations.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

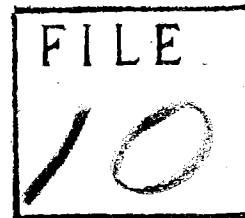
VANE C. THURLO
(Acting) Attorney General

ARR:EAW

CONSERVATION COMMISSION: Conservation Commission may purchase
PURCHASING AGENT: land without the approval of the purchasing agent.

October 25, 1941

Mr. I. T. Bode
Director
Conservation Commission
Jefferson City, Missouri



Dear Mr. Bode:

We are in receipt of your letter requesting an opinion as to whether the Conservation Commission is required to obtain the approval of the State Purchasing Agent when desiring to purchase land for refuge area.

The legislature created the office of Purchasing Agent. Chapter 105, R. S. Missouri 1939, provides what the duties of the Purchasing Agent shall be and Section 14590, R. S. Missouri 1939, provides he shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state.

"The purchasing agent shall purchase all supplies except printing, binding and paper, as provided for in chapter 120, R. S. 1939, for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state."

October 25, 1941

Such a power is granted the Conservation Commission of Missouri by Section 16, Article 14 of the Constitution of Missouri. This constitutional amendment created the Conservation Commission. This amendment in part reads:

"Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder,* * * *
* * * * *"

There is a well established rule of statutory construction that where there is no ambiguity there is no room for construction. We find no ambiguity or conflict in those two provisions, one a statutory provision and one a constitutional amendment.

Therefore, in view of the above statutory provision requiring the State Purchasing Agent to negotiate all leases and purchase of land, except for such departments which derive such power to purchase land by a constitutional amendment, and the constitutional amendment granting such power to the Conservation Commission to acquire by purchase, gift, eminent domain or otherwise, necessary property, it is the opinion of this Department that any purchase of land by the Conservation Commission does not need the approval of the State Purchasing Agent.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

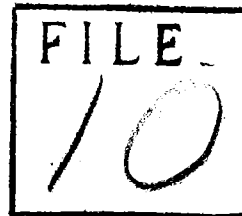
VANE C. THURLO
(Acting) Attorney General

ARR:EAW

STATE PARK BOARD: Legality of paying salaries of technical personnel
APPROPRIATIONS: out of accounts other than personal services.

November 1, 1941

4 1/12
Mr. I.T. Bode
Director
State Park Board
Jefferson City, Missouri



Dear Mr. Bode:

This will acknowledge receipt of your letter of October 22, 1941, requesting an official opinion, which reads as follows:

"Reference is made to the instruction of the State Park Board at the meeting on October 20th. that 'an opinion be rendered as to the legality of paying the salaries of technical personnel out of accounts other than personal services'.

"Reference is made to the 1941 Missouri Laws, page 196, Section 35; also page 222, Section 84. The inquiry is - can salaries or payment for personal services be paid from the following appropriations:

"B - Additions	\$35,000.00
C - Repairs and Replacements	\$10,000.00
D - Operations	\$25,000.00

"\$75,000 to be set aside for the purpose of matching federal WPA funds used in State parks."

"\$25,000 to be set aside for the

use of securing other federal aid services.'

"We are clear on the matter of the payment of salaries out of the Personal Service Appropriation of \$75,000 and clear on the matter of paying for any necessary extra or emergency labor from this same appropriation. In this request we are asking for an opinion on the matter of the payment of salaries, with particular reference to technical personnel, from any or all of the five appropriations which were made for the State Park Board, in addition to the Personal Service Appropriation."

The general rule in construing appropriation acts is that they shall be strictly construed.

59 C. J., Section 401, page 262 - 263, reads in part as follows:

"An appropriation law is to be construed under and by the same rules as other legislation. Where the intention of the legislature is plain and obvious, there is no room for judicial construction of an appropriation. They are to be construed without liberality towards those who claim their benefits; but are not to be construed so strictly as to defeat their manifest objects. The language is to be presumed to have been used in its natural and ordinary meaning, and not to be given a forced and unnatural construction.
* * * * *

Otherwise, an appropriation law shall be construed under the same rules as other legislation. The language is presumed to have been used in its natural and ordinary meaning and not to be given a forced and unnatural construction. (State v. Seibert, 12 S. W. 348.)

This appropriation act, Section 35, Laws 1941, pages 196-197, includes four subsections namely, A. Personal Service, B. Additions, C. Repairs and Replacements, and D. Operation. Since you state that no construction is necessary on the first of these provisions namely, A. Personal Service, we shall commence with:

B. Additions. This provision reads as follows:

"Including labor, supervision, expenses, material and supplies for the erection of buildings, fencing and other land improvement, installation of light plants and water supply and for operative equipment, including educational and recreational equipment, household, kitchen and dining room equipment, production and construction equipment and transportation and conveying equipment.....35,000.00"

One of the cardinal rules of construction is that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein. (State ex rel. Wabash Ry. Co. et al v. Shain et al., 106 S. W. (2d), 898-901.)

Obviously, it was the intention of the legislature in passing this appropriation act that all personal services included under A. Personal Service, was for the purpose of general, all around maintenance in the state parks, which does not necessarily include personal services for new work or additions. "Addition" is usually defined as something added or annexed. Funk & Wagnalls, New Standard Dictionary defines it as "2. Anything added; an annex, accession; as, an addition to a house, or to land laid out in lots, as in a village." As used in this appropriation act for state parks, it apparently was intended to mean any new construction as specifically mentioned in this provision.

Under "Additions" we find words including "labor" and "supervision". Judicial interpretations of "labor" have included architects or other skilled men superintending work. The case of Wandling v. Broadus, 10 S. W. (2d) 651, 1. c. 655, holds that "supervision" is "labor".

"Defendant contends the court was in error in admitting in evidence the testimony of witnesses to the effect that plaintiff supervised and managed certain improvements made at the home of Mrs. Gallop. This supervision was work and labor, and was clearly admissible in evidence on that issue."

Likewise, in the case of Gaastra, Gladding & Johnson v. Bishop's Lodge Co., 299 Pac., 347, 1. c. 349, the court said:

"Many, or at least some, of the jurisdictions which deny to an architect a lien for his services do so upon the conception, as above stated, that his services are not 'labor' within the meaning of the statute. We regard this view as obsolete and inconsistent with that liberal construction of our mechanic's lien statutes to which this court is committed. Lyons v. Howard, 16 N.M. 327, 117 P. 842.

"The appellants say the lien is given only to a person who labors, and the architect and contractor did not labor. If they did not labor, what word will characterized the service they furnished? When the architect idealized the structure and put it upon paper, what was his effort if not labor? When the Master sent out 'other seventy' to do his work, he called them laborers.' Williamson v. Hotel Melrose, 110 S. C. 1, 34, 96 S. E. 407, 415."

See also *Cain v. Rea*, 166 S. E. 478, 1. c. 480;
United States v. Shea-Adamson Co., 21 F. Supp. 831-838.

In view of the above definitions of "addition" and "labor", and taking into consideration the use of such words in this appropriation act it was evidently the intention of the legislature that architects, engineers, supervisors and all such other labor which may be used in constructing additional buildings, fencing, other land improvements, etc., may be paid out of this appropriation.

The next provision under this appropriation act to be construed is subsection C.

C. Repairs and Replacements:

"Including buildings, fencing, roads, and other structures, building equipment, including light plant, water supply and plumbing and other operative equipment, educational and recreational equipment, household, kitchen and dining room equipment, production and construction equipment (non-industrial), transportation and conveying equipment and structures, and other repairs and replacements necessary to maintain and operate the state parks.
.....\$10,000.00"

It is doubtful if any personal services could be paid out of this section if the last few words were not included therein namely, "and other repairs and replacements necessary to maintain and operate the state parks." It is common knowledge that labor is a necessary prerequisite in making any repairs. In fact, as a general rule by far the largest part of the cost of any repair job consists of labor.

In *Barber-Asphalt Co., v. Hezel*, 56 S. W. 449, the court in defining "repair" said:

"To repair" means to restore to a sound or good state after decay, injury, dilapidation or partial destruction. * * * * *

Therefore, since personal service is an integral part of any repair job, all necessary services required in making such repairs in the state parks as specified in this section may be paid out of this appropriation.

The last provision or section under consideration is that of:

D. Operation:

"Including general expenses including communication, regulative transportation of things, travel in and out of the State, travel and other general expenses; also material and supplies, consisting of clothing and dry goods, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies and repairs and special material and supplies, and for bonds for accountable officers.....\$25,000.00"

Apparently, this appropriation was not intended to include any personal services or labor. The words "and repairs" are included therein; however, the writer is of the opinion that under Section C. of this appropriation act the legislature has provided for repair of operative equipment and certainly the general assembly did not intend to make a second appropriation for the same thing or service. Therefore, no services or labor of any kind should be paid out of this appropriation.

Your next inquiry is directed to the appropriation passed by the Sixty-first General Assembly and found in Section 84, Laws 1941, page 222, which reads in part as follows:

"\$75,000.00 to be set aside for the purpose of matching federal WPA funds used in state parks.

"\$25,000.00 to be set aside for the use of securing other federal aid services, and the purchase of additional or adjoining lands for state parks for the years 1941-1942, and that no deduction as provided in Section 73, House Bill 581, shall apply to this appropriation."

Funk & Wagnalls, New Standard Dictionary defines "match" as "1. One similar, or equal in appearance, position, quality, or character; a suitable or fit associate, a possible mate. 2. A person or thing that is the equal of another in ability, strength, character, position, etc., one able to cope with or oppose another; a peer; as he met his match."

Unquestionably, the above appropriation of \$75,000.00, to match federal WPA funds used in state parks, was granted in order to secure WPA work in state parks. It is now and has been the policy of the Works Progress Administration to require the state, as sponsor on all projects in state parks, to furnish at least twenty-five per cent of the total amount of the cost. In fact, an annual contract is entered into, and one was in existence at the time this appropriation was passed and approved. In such agreement, or contract, the state sponsor's share of the cost of said project is specifically set out. That is, the sponsor shall furnish a certain amount of material, technical services, etc.

Ordinarily, words are to be used in their ordinary and everyday use in construing appropriation acts as it is in construing any other legislative act. However, if this were true in this instance such fund could be used only to actually match the same amount of money used by the federal government on WPA projects within state parks. That is, the state sponsor should spend dollar for dollar that is furnished by the Works Progress Administration.

We are of the opinion that since it was commonly known at the time this appropriation was passed that the state is not

required actually to match the WPA fund used for construction work in state parks and, furthermore, that the Works Progress Administration does not require the state to match dollar for dollar for work on WPA projects in the state parks, that it was the intention of the legislature that this fund of \$75,000. should be used as the sponsor's share on such projects, in such proportions as is required by the Works Progress Administration of the state sponsor.

Therefore, we are of the opinion that technical services of engineers, architects and supervisors or labor of any kind which may be required of the state sponsor, as a part of sponsor's agreement or contract on WPA projects in state parks, may be paid out of this appropriation.

As to the \$25,000.00 appropriation for use of securing other federal aid services this Department recently rendered an opinion which is applicable in the instant case. It was held that technical service could be paid out of such appropriation if it was a necessary prerequisite to securing such services of these federal agencies. It has been the usual procedure in the past with such agencies that the state be required to furnish plans, engineering and supervisory services. Therefore, we are of the opinion that the above services may be paid out of this appropriation.

CONCLUSION

(1) Therefore, it is the opinion of this Department that services of such employees as architects, engineers, supervisors and those performing manual labor, as are necessary to fulfill the requirements of Subsection B. Additions, under Section 35, Laws 1941, page 196, may be paid out of that appropriation. However, this appropriation shall in no way be used for personal services or labor used in repairing buildings, fences and equipment already constructed or erected, but must be used for additions thereto.

(2) That under Subsection C. Repairs and Replacements, such services or labor as is necessary to repair those things under this section and no other, may be paid therefrom.

(3) That no personal service or labor may be paid from the appropriation under Subsection D. Operation, under Section 35, supra.

November 1, 1941

4. That such technical services, labor, etc., as is required of the state sponsor on WPA projects in state parks may be paid out of the \$75,000.00, appropriation under Section 84, Laws 1941, page 222.

5. That the same kind of services may be paid out of the \$25,000.00, appropriation in Section 84, supra, as may be required to secure other federal agencies and services as was previously ruled by this Department.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

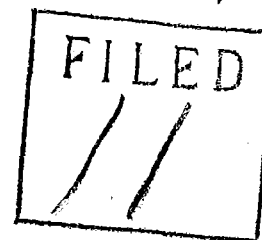
VANE C. THURLO
(Acting) Attorney General

ARH:EAW

✓COUNTY BUDGET ACT: Expense for stenographic hire for prosecuting attorney can only be paid out of surplus, if any exists, or class 6.

March 31, 1941

Mr. Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Sir:

This department is in receipt of your request for an opinion of March 25. The question which you present is in substance as follows:

"Due to the increase in the population of Phelps County at the present time by the construction of Ft. Leonard Wood and as a result of which the prosecuting attorney's duties have multiplied more than three fold, can he now obtain expense for stenographic assistance, the expense of which was not listed in the budget for the year 1941 at the time the budget was approved."

There has always been a question, which has never been decided by the courts, as to the liability of a county for stenographic hire for the office of prosecuting attorney. However, this department has ruled heretofore that the prosecuting attorney may have stenographic assistance, and we assume that you are familiar with the ruling. The fact that you failed to include the same in the estimate of your budget for the ensuing year, as provided in Section 10911 R. S. Mo. 1939, would not necessarily preclude you from receiving the same, under conditions which we will mention later. We assume you failed to include it under Class 4, which refers to the salaries of county officers.

Mr. Llyn Bradford

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March 31, 1941

There is no provision for altering or changing the budget estimate once it is approved by the county court and filed with the State Auditor. In 1937, the legislature amended Section 10911 as to Class 5 and now permits a transfer from Classes 1, 2 and 3, if any surplus, so that the same may be used as contingent and emergency expenses, but there is a prohibition to the effect that none of the funds shall be used for personal services, whether it be salaries, fees, wages or any other emoluments of any kind whatever, which should have been estimated in preceding classes. The Budget Act makes it mandatory that the priority of classes be sacredly preserved. The only reason we mentioned Class 5 as a possibility from which the same may be paid is because Class 5 is the last class. Therefore, if there is any surplus in any other class, which might be transferred to Class 5 without jeopardizing the priorities, it is possible that stenographic expense may be paid when this can be definitely ascertained some time during the year.

However, the only safe legal way in which to pay the expense in the event that the county court should permit the same is from Class 6, which provides that funds in this class may be used for any lawful purpose providing there are no outstanding warrants constituting legal obligations.

If the conditions do not exist as we have mentioned above, we are of the opinion that there is no way by which the county court can be compelled to pay this expense during the ensuing year.

Respectfully submitted,

OLLIVER W. NOLLEN
Assistant Attorney General

APPROVED:

(Acting) Attorney General
OWN:RT

LOTTERIES: Taking pictures of patrons and awarding prize to best picture is lottery.

August 22, 1941

Hon. Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Sir:

We are in receipt of your request for an official opinion under date of August 11, 1941, as follows:

"It has come to my attention that one of the theaters in Rolla is planning on inaugurating a scheme to attract business by a donation of money or defense stamps, the scheme being about as follows:

"As each individual enters the theater his or her picture will be taken on a moving picture machine and the film showing the picture of each customer on that particular night will be sent in to some concern that will pass judgment as to the best picture; and at some later night, perhaps the next week, the chosen picture will be run on the screen and if that individual is in the audience, he will be called up for a stage appearance and will be paid a certain sum of money or defense stamps for his appearance on the stage. As I understand the plan, there will be no lottery in the sense of any drawing or chance proposition but that the selection of the chosen picture will be intrusted to some moving picture concern, and the chosen individual will simply be given a certain sum of money or defense stamps for his appearance on the stage.

* * * * *

Section 10, Article XIV of the Constitution of Missouri provides as follows:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4704, R. S. Mo. 1939, provides as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The word "lottery" has no technical meaning in our law, as said in State ex inf. McKittrick v. Globe-Democrat Pub. Co., 110 S. W. (2d) 705, 1. c. 713:

"* * * Lotteries are judicially denounced as especially vicious, in comparison with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. * * *"

The elements of a lottery are (1) consideration; (2) prize; (3) chance. State ex rel. Home Planners v. Hughes, 299 Mo. 529, 253 S.W. 229; State v. Becker, 248 Mo. 555, 154 S.W. 769. We believe that it is conceded that the first two of these elements are present in the instant case, that is: consideration and prize. See State v. McEwan, 120 S.W. (2d) 1098 (bank night case). The question therefore arises whether, under the present scheme there is chance. From a reading of your request it is seen that a prize is given to the "best picture" of one of the patrons attending the theater. There is no criterion, standard or condition as to what constitutes the "best" picture. The nearest case that we are able to find is that of Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579, which involved a contest for a prize for the "best" essay upon the name of a certain breakfast food, in which the court said:

"It must be held that to offer a prize for the 'best' essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word 'best' means."

Therefore, unless there are certain definite standards and conditions set up in the rules as to what will constitute

Hon. Llyn Bradford

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August 22, 1941

the "best " picture, we deem this scheme a lottery and a violation of the statutes and Constitution of Missouri.

Furthermore, we call your attention to the statement in State v. McEwan, 121 S.W. (2d) 1098, wherein the Supreme Court said:

"As fast as statutes are passed or decisions made, some skillful change is devised in the plan of operations, in the hope of getting just beyond the statutory prohibition; but, so long as the inherent evil remains, it matters not how the special facts may be shifted, the scheme is still unlawful."

Therefore, we would suggest that you scrutinize this scheme closely even though the standard of what is the "best" picture is specific and explicit, in view of the attitude towards lottery as expressed in the McEwan case, supra, and the other cases in this State involving lotteries. See State ex inf. McKittrick v. Globe Democrat Pub. Co., 110 S. W. (2d) 705, supra; State ex rel. v. Hughes, supra; State v. Becker, supra; and State v. Emerson, 318 Mo. 633, 1 S. W. (2d) 109.

CONCLUSION.

It is, therefore, the opinion of this department that a scheme whereby each patron of a theater in entering said theater has his picture taken and a prize is given for the "best picture" is a lottery, because there is no standard or criterion of what conditions the judges will take into consideration in determining what constitutes the "best picture."

Respectfully submitted,

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney-General

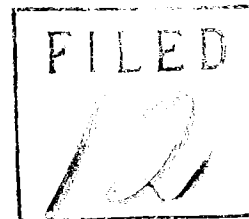
VANE C. THURLO
(Acting) Attorney-General

AO'K:CP

COUNTY SURVEYOR: Person may hold both office of county surveyor
ROAD OVERSEER: and road overseer at the same time.

January 24, 1941

Honorable Tom B. Brown
Prosecuting Attorney
Knox County
Edina, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion under date of December 13, 1940, wherein you state as follows:

"The county surveyor elect for Knox County is now road overseer of a road district in this county.

"Knox County has dispensed with the highway engineer law as provided by Section 8019 R. S. 1929.

"Can the county surveyor elect qualify as such and retain his appointment and act as road overseer?"

You state that Knox County has pursuant to Section 8019, R. S. Mo. 1929 "dispensed with the highway engineer law." Said section is as follows:

"Whenever a petition, signed by at least ten per cent. of the taxpaying citizens and voters representing at least two-thirds of the townships of any county in this state, shall be presented to the county court thereof asking that a proposition be submitted to the qualified voters of the county, to determine whether or not the provisions of this article shall continue

to apply to such county, the court, after due consideration, may order that a proposition for the approval or rejection of the provisions of this article be submitted to the qualified voters of the county at any general election held for the purpose of electing county officers, or upon a petition, signed by at least fifteen per cent. of the tax-paying citizens and the voters representing at least two-thirds of the townships of any county in this state asking that such proposition be submitted, at a special election, the county court shall call the special election for the submission of such proposition within ninety days from the filing of such petition: Provided, such special election shall not be held within ninety days of any general election. The county court shall give notice of such election by publishing the same in some newspaper published in the county. Such notice shall be published for at least two consecutive weeks, the last insertion to be within ten days next before such election, and such other notice may be given as the court may deem proper. The proposition so submitted shall be printed on the ballots in the following form: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.' If a majority of those voting at such election upon the proposition vote for the county highway engineer law, then this article shall remain in full force and effect in such county, but if a majority of those voting at such election upon the proposition vote against the county highway engineer law, then this article and

the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county."

Therefore, Article 8 (Sections 8006 to 8023, inclusive), Chapter 42, R. S. Mo. 1929 "and the provisions of the law" relating to the appointment and duties of the county highway engineer are not to be enforced in your county.

Section 8020, R. S. Mo. 1929, provides how the matters relating to roads and overseers are to be handled where the counties have voted against the county highway engineer law:

"In all counties in this state that may vote against the county highway engineer law in the manner prescribed in section 8019 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than

five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

Under the above section it appears that since the county highway engineer law has been abolished that the duties relating to the county highway engineer devolve upon the county surveyor.

Section 8013, R. S. Mo. 1929, provides that the county highway engineer shall have direct supervision over the road overseer and of the expenditures of all county and district funds made by the road overseers of the county. Furthermore, the county court must not issue warrants to road overseers in payment for work until the claim is examined and approved by the county highway engineer. Said section provides as follows:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any

other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

Section 8016, R. S. Mo. 1929, provides that road overseers must attend the annual meeting called by the county highway engineer and upon failure to attend the county highway engineer may request the county court or the township board to remove the road overseer:

"It shall be the duty of the county highway engineer to call a meeting at the county seat each year of all road overseers of the county, for consultation and conference touching the conditions and needs of the roads and bridges of the county and methods of improving same. Such meeting shall be held at a time designated by the highway engineer, between the first and fifteenth day of March. At such meeting of road overseers the county highway engineer shall instruct the overseers in the best and most economical plans for the working and improving roads, collecting and expending the district road funds, and, if practicable, adopt a uniform system of road work for the county. Any overseer failing to attend any such annual meeting without reasonable excuse shall, upon complaint of the county highway engineer, be removed from office by the county court or by the township board, as the case may be."

Section 8017, R. S. Mo. 1929, provides that the county highway engineer may suspend a road overseer for failure to follow his plans and instructions concerning the expenditure of funds and the improving of roads:

"All overseers shall follow the plans and instructions of the county highway engineer in all matters concerning the expenditure of the funds and

improving the roads, and should any road overseer fail or refuse, without sufficient cause, to follow the plans and instructions of the county highway engineer, the county highway engineer may suspend such overseer, and shall at once report the matter to the county court, and said court, upon hearing, may remove such overseer from office."

We must determine whether from a consideration of the above statutes the duties of the office of county surveyor and those of road overseer are so inconsistent and incompatible as to render it improper that both offices should be held at the same time by one person.

In the case of State ex rel. v. Bus, 135 Mo. 325, 1. c. 338, the court said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

In view of the supervisory powers granted by statute to county highway engineers over road overseers there can be no doubt that the duties of the two offices are so inconsistent and incompatible as to make it improper that both offices should be held at the same time by one

person. Assuming then that the county surveyor inherits all of the duties of the county highway engineer, the same conclusion would be reached as to one person holding at the same time the offices of county surveyor and road overseer.

In the case of *Spurlock v. Wallace*, 204 Mo. App. 677, 218 S. W. 890, 1. c. 891, 892, Spurlock filed a petition for an injunction to restrain the judges of the county court from auditing and issuing warrants to overseers for various services on roads which had been done without any examination by the appellant as county surveyor and ex officio county highway engineer. More specifically Spurlock claimed that by virtue of his office the county court had no authority to draw warrants to road overseers until the claims therefor had been examined and approved by him as provided under Section 10558, R. S. 1909 (now Section 8013, R. S. Mo. 1929, *supra*).

The court held that under Sections 10558, *supra*, 10571, R. S. Mo. 1909 (now Section 8019 R. S. Mo. 1929, *supra*), and Section 10572, R. S. Mo. 1909 (now Section 8020, *supra*), where a county votes not to have a county highway engineer the duties of such office are abolished and the county court may order warrants drawn to road overseers without having them approved by the county surveyor acting as ex officio engineer. The court said:

"If the contention made by appellant should be upheld, then we must necessarily hold that, to vote under section 10571, and to thereunder abolish the highway engineer act meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed, even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and

10572, R. S. 1909, was to permit the people of a county to abolish the office of highway engineer, yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation.

* * * * *

"The duties required of a highway engineer by section 10558, R. S. 1909, are by the very terms of section 10571, when the people have voted against the highway engineer act, abolished, and the county court may, under section 10481, R. S. 1909, order warrants drawn to road overseers. The provision in the last section, that the construction of bridges and culverts shall be under the direction and supervision of the county highway engineer, is by the terms of section 10571 dispensed with when the people vote against the act."

Under the above construction, when the county highway engineer law is dispensed with, the duties of the county highway engineer are abolished. Therefore, when he acts in said capacity, under Section 8020, supra, he does so "under the orders and direction of the county court," and not as an independent statutory agent. This being true, he does not have supervisory control over road overseers by virtue of his office.

Article 3, Chapter 42 of the Revised Statutes of Missouri, 1929, contains Sections 7868 to 7897, inclusive.

Section 7870 provides how road overseers are to be appointed by the Knox County Court:

"All road overseers shall be appointed by the county court of the county at the February term of said court. No person shall be eligible to the office of road overseer, except he be a citizen of the road district for which he may be appointed, or of an incorporated town or village within the bounds of such district and be a practical road builder, or possessed of technical or scientific knowledge of such work (shall be over twenty-one and under sixty years of age and moreover be able to read and write). Such officers shall receive a compensation of not less than two nor more than three dollars per day for each day actually and necessarily employed as such overseer, to be fixed by the county court annually in the month of March, by order of record."

Section 7872 provides that the road overseer shall give bond approved by the county court:

"Before entering upon his duties each road overseer shall execute to the county a bond in such sum as may be fixed by the county court, with good and sufficient security to be approved by the court, the condition of such bond to be that he will faithfully discharge his duties as such road overseer, and that he will account for all sums of money received by him as such overseer, and that he will account to the county highway engineer, at the expiration of his term of office, for all tools, machinery, books, papers and

other property belonging to the county or district, and such bond may be sued upon by the county to the use of the road district or any person injured by a breach thereof."

Said section provides that one of the conditions of the bond is that the road overseer account to the county highway engineer. Section 7874 provides that the road overseers shall conform to the instructions of the county highway engineer. The question then arises whether the duties of the county highway engineer that are abolished relate only to Article 8, supra. We have previously pointed out that they are not so restricted but are applicable to " * * * this article (8) and the provisions of the law relating to the appointment and duties of the county highway engineer * * *."

The duties of road overseers are set out substantially in subsection (a) of Section 7876:

"It shall be the duty of the road overseer to keep the roads in his district in as good repair as the funds at his command will permit, to have all brush and weeds found growing along the roadside of the public highway cut and removed during the month of August of each year, and whenever there is a square corner or sharp turn in the road that in any way hinders progress or obstructs the view and by such obstruction endangers the life and limb of those traveling thereon, to have such corners rounded, and if necessity demands it shall have such land as may be required to round corners condemned in accordance with section 7840, and he shall have the road drag or harrow used upon the public highway when the road would be improved thereby."

And the duties of county surveyors are set out substantially in Sections 11579 and 11580, R. S. Mo. 1929, respectively, as follows:

Jan. 24, 1941

"The county surveyor shall execute all orders to him directly by any court of record, for surveying or resurveying any tract of land, the title of which is in dispute before such court, and all orders of survey for the partition of real estate."

"The county surveyor shall, within ten days, when called upon, survey any tract of land or town lot lying in his county, at the expense of the person demanding the same; Provided, that his legal fees are first tendered, or that he and his deputies are not engaged in executing previous orders of survey."

There is nothing in the general duties of the county surveyors and road overseers that is so inconsistent and incompatible as to render it improper that one person should hold both offices at the same time.

We are, therefore, of the opinion that a county surveyor may also hold the office of road overseer.

Respectfully submitted,

MAX WASSERMAN

Assistant Attorney-General

MM:EG

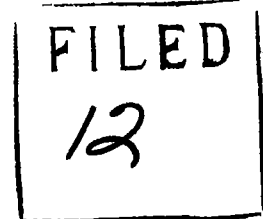
APPROVED:

(Acting) COVELL R. HEWITT
Attorney-General

STATE SEAL: Use of by Secretary of State.

* * - - - - -

March 4, 1941.



Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

Replying to yours of recent date wherein you requested an opinion from this Department on the question of the use of the Great Seal of the State and the field in which the seal of the Secretary of State belongs, we find that Section 20 of Article V of the Constitution provides for the Great Seal of the State and the use thereof and who shall be custodian. This section is as follows:

"The Secretary of State shall be the custodian of the seal of the State, and authenticate therewith all official acts of the Governor his approval of laws excepted. The said seal shall be called the 'Great Seal of the State of Missouri,' and the emblems and devices thereof, heretofore prescribed by law, shall not be subject to change."

Section 12996 R. S. Mo. 1939, which apparently was enacted as an enabling act to the foregoing section of the Constitution, provides as follows:

"He shall affix the seal of the state to and countersign all commissions and other official acts required by law to be issued or done by the governor, his approbation or disapprobation of the acts of the general assembly excepted, and all other instruments, when required or authorized by the governor."

Section 12997 R. S. Mo. 1939 applies to copies of public acts and the affixing of the seal of the Secretary of State thereto. This section is as follows:

"He shall make out and deliver to every person requiring the same copies of any act, resolution, order of the general assembly, commission or other official act of the governor, roll, record, document, paper, bond or recognizance, deposited in his office by law, and shall certify such copies, under his hand, and affix thereto the seal of his office; and such copies shall be admitted as evidence in all courts of this state."

There may be other instances wherein the General Assembly has authorized the Great Seal of the State to be used for instance, Section 12700 R. S. Mo. 1939 provides that the Great Seal of the State shall be attached to deeds executed by the Governor under Article II, Chapter 81, R. S. Mo. 1939; under Section 13120, the General Assembly provided that the Great Seal of the State attached to bonds and state certificates of indebtedness and under Section 5322 R. S. Mo. 1939, the Great Seal of the State may be attached to certified copies of articles of association of corporations. There may be other sections of the statute in which the General

March 4, 1941

Assembly has authorized the Great Seal of the State to be used, but without such authority the Secretary of State is only authorized to use the Great seal of the State as is provided by said Section 20 Article V of the Constitution and Section 12996 R. S. Mo. 1939 which is an enabling act to the aforesaid constitutional provision.

As to your suggestions for the form of the seal of the office of the Secretary of State will say that we do not find any statute prescribing a form, and personally think the one formerly used by that office would not be inappropriate. From our research of the statutes we fail to find where the lawmakers have definitely provided for a seal for that office, but by implication they have intended that the office have a seal because in said Section 12997, R. S. Mo. 1939, they have directed that the seal of the office of the Secretary of State be affixed to certified copies which are made by that office. We are therefore of the opinion that the Great Seal of the State should only be affixed to commissions and other official acts required by law to be issued or done by the governor, and all other instruments when required or authorized by the governor, or by statute.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

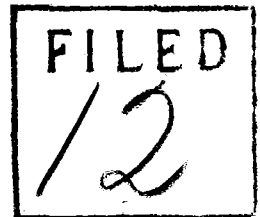
VANE C. THURLO
(Acting) Attorney-General

SECRETARY OF STATE: Proposed plan approved of handling service of process on nonresident operators of automobiles, growing out of civil actions in this state.

July 8, 1941

49-9

Honorable Dwight H. Brown
Secretary of State
State Capitol Building
Jefferson City, Missouri



Dear Sir:

We are in receipt of your letter of July 3, 1941, wherein you state as follows:

"Please find attached copy of Senate Bill 67, which was approved by the Governor on June 26th, and bears an emergency clause. There seems to be an error in punctuation on page 3, Sec. 5, line 10. It is thus in the original bill, signed by the Governor.

"Inasmuch as the law is in effect, I want to prepare a routine of handling such service of process. I plan to have a book printed with copy such as attached hereto. At the time I am served, I will fill out the three copies, two on detachable white paper and the third our permanent bound-in record. I will detach and mail the top copy. Later, if the case actually goes to trial, I will use the second white copy, executing the affidavit. The yellow copy, containing notice and affidavit, will be the permanent record and sole record.

"May I request your informal advice as to above plan? If you approve, I shall order the printed book."

July 8, 1941

The proposed plan, which you enclosed in your letter, reads as follows:

"(EMBLEM)

OFFICE OF SECRETARY OF STATE
JEFFERSON CITY

To	<u>Name of defendant</u>	<u>Last known residence or place of abode</u>
	<u>Name of defendant</u>	<u>Last known residence or place of abode</u>
	<u>Name of defendant</u>	<u>Last known residence or place of abode</u>
	<u>Name of defendant</u>	<u>Last known residence or place of abode</u>

"You will take notice that original process in suit against you, a copy of which is hereto attached was duly served upon you at Jefferson City, Cole County, Missouri, by serving same on the Secretary of State of the State of Missouri, or his Chief Clerk.

"Dated at Jefferson City, Missouri, this
___ day of _____, 194__.

(SEAL OF
SECRETARY
OF STATE)

Plaintiff

By Attorney for Plaintiff

Mailed by restricted registered United States mail "Deliver to Addressee Only". Process was served on Secretary of State or Chief Clerk on _____ at _____
date hour

" A F F I D A V I T

"State of Missouri)
County of Cole) ss

"The undersigned, Dwight H. Brown,
Secretary of State of the State of
Missouri, or his Chief Clerk, J. R.
Holman, hereby makes oath and certifies
that the original of above notice to
defendant was mailed at the United
States Postoffice in Jefferson City,
Missouri, by restricted registered
mail which carried on the face thereof
in a conspicuous place where it will
not be obliterated the endorsement,
'Deliver to Addressee Only', and which
also required a return receipt or a
statement by the Postal authorities
that the addressee refused to receive
and receipt for such mail, and that
said notice was thus mailed on
_____, 194_. Attached
hereto is the return receipt therefor,
or the notice of refusal of addressee
to receive and receipt for such mail,
or the statement from postal authorities
that addressee could not be found.

"Subscribed and sworn to before me at my
office in Jefferson City, Cole County,
Missouri, this ____ day of _____,
194_.

Notary Public.

Form SB-67. Law approved by Governor of
Missouri, June 26, 1941, Senate Bill."

July 8, 1941

The relevant portions of Senate Bill 67 are herein set out:

"Section 5. Service of process under this act shall be made by serving a copy thereof, together with a copy of the petition, upon the Secretary of State of the State of Missouri at his office in Cole County, Missouri, or in the absence of the Secretary of State, upon his Chief Clerk at his office in Cole County, Missouri, together with a fee of \$1.00 and such service shall be sufficient service upon said non-resident, provided that within fifteen days after said service upon the Secretary of State, or upon his Chief Clerk, as herein provided. The Secretary of State shall immediately mail to the defendant, and to each of the defendants, if there be more than one by restricted, registered mail, addressed to the defendant at his last known address, residence, or place of abode, a notification of said service of process upon the Secretary of State, or his Chief Clerk as herein provided; provided, however, that the court, or judge thereof in vacation, may, upon good cause shown, by order extend such time for notification.

"Section 6. The notification provided for in Section 5 hereof shall be substantially in the following form, to-wit:

"To (here insert the name of each defendant and his residence, the last known place of abode as definitely as known,) You will take notice that original process in suit against you, a copy of which is hereto attached was duly served

July 8, 1941

upon you at Jefferson City, Cole
County, Missouri, by serving same
on the Secretary of State of the
State of Missouri, or his Chief
Clerk. Dated at,
Missouri, this day of,
19...

.....
(Plaintiff)

.....
(By Attorney for Plaintiff)

"Section 7. The term 'Restricted,
Registered Mail' means mail which
carries on the face thereof in a
conspicuous place, where it will not
be obliterated, the endorsement,
'Deliver to Addressee Only', and
which also requires a return receipt
or a statement by the Postal authorities
that the addressee refused to receive
and receipt for such mail.

* * * * *

"Section 9. Proof of the mailing or
personal delivery of said notification
to such non-resident by an adult person
not an officer serving same shall be
made by affidavit of the party doing
said acts. All affidavits of service
shall be endorsed upon or attached to
the original papers to which they relate
and including the returned registry
receipt shall be forthwith filed with
the Court in which such action is filed
and pending.

* * * * *

"Section 13. It shall be the duty of
the Secretary of State to keep a record

Hon. Dwight H. Brown

-6-

July 8, 1941

of all process served upon him, or his Chief Clerk, under the provisions of this act, which record will show the day and hour of service of every such process."

We have examined your proposed plan, as hereinabove set out, for handling service of process on nonresident owners, users and operators of motor vehicles and trailers having civil actions brought against them in this state, and are of the opinion that said proposed plan is in conformance with Senate Bill 67 of the Sixty-first General Assembly.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

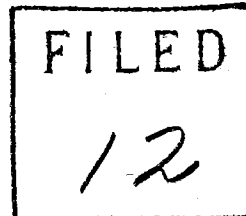
VANE C. THURLO
(Acting) Attorney General

MW:VC

INSURANCE: Approval of Articles of Agreement of Old Reliable Atlas Life Society of Springfield, Missouri, under Article 4, Chapter 37, R. S. 1939.

July 22, 1941

7-22



Honorable Dwight H. Brown
Secretary of State
State Capitol Building
Jefferson City, Missouri

Dear Mr. Brown:

We have examined the Articles of Agreement of the Old Reliable Atlas Life Society of Springfield, Missouri, and find the same to be in accordance with Article 4, Chapter 37, Revised Statutes of Missouri, 1939.

Yours very truly

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG



LEGISLATURE: Laws enacted by the 1941 Legislature and approved by the Governor without an emergency clause go into effect October 10, 1941.

July 31, 1941

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:



We are in receipt of your request for an opinion from this department under date of July 28, 1941, which reads as follows:

"Please give us an official opinion regarding the date on which laws passed by the 1941 General Assembly without an emergency clause, and approved by the Governor, become effective."

Article IV, Section 36 of the Constitution of Missouri reads as follows:

"No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

This section is purely prohibitory, and we find that the Legislature has enacted Section 659, R. S. Mo. 1939, which is consistent with the above section of the Constitution and gives all legislation positive effect ninety days after adjournment of the enacting session.

Section 659, R. S. Mo., 1939, reads as follows:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:

"(a) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval.

"(b) In case the general assembly, as to a law not of the character hereinbefore specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days hereinbefore mentioned, said law shall take effect on the date thus fixed by the general assembly.

"(c) Laws not of the nature hereinbefore specified enacted by the general assembly at its regular session in 1939 and each ten-year period thereafter, and except as otherwise provided by law, the Revised Statutes of 1939 and each ten-year period thereafter, shall take effect on the first

July 31, 1941

day of November in the year of their enactment or authorization: Provided, that unless suspended under the referendum or unless otherwise provided by law, laws changing the time of holding court shall take effect in ninety days after the adjournment of the session at which such laws may have been enacted."

It is obvious from the foregoing statute that laws passed by the Sixty-first General Assembly without an emergency clause, and which do not in themselves fix a later effective date, become effective ninety days after adjournment after approval by the Governor. The House and Senate Journals disclose that the Legislature adjourned July 12, 1941.

Section 655, R. S. Mo. 1939, contains several rules for the construction of statutes, among which we find the following:

" * * * fourth, the time within which an act is to be done shall be compute by excluding the first day and including the last, if the last day be Sunday it shall be excluded; * * * "

Applying this rule of construction, the bills mentioned by you will become effective October 10, 1941.

CONCLUSION

It is therefore the opinion of this department that laws enacted by the Sixty-first General Assembly, which have been approved by the Governor and do not bear an emergency clause, become effective October 10, 1941, unless a later effective date is fixed in any of such laws.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

ROBERT L. HYDER
(Acting) Attorney General

WJB:DA

Members of the Highway Commission may attend a meeting of Highway officials, outside of the State and have the expenses therefor paid by the State.

September 3, 1941

✓ 10 ✓ 6
Mr. C. W. Brown
Chief Engineer
State Highway Department
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

"Would you please give me your opinion as to whether the members of the Missouri State Highway Commission may attend the Mexico Road Convention to be held in Mexico City, and have the expense therefor paid by the State."

Article IV, Section 44a, of the Constitution of Missouri, provides for the State Highway System, and therein it is stated that "the cost of maintaining the State Highway Department and the State Highway Commission" shall be paid out of the funds provided for in the section.

The word "maintain" has been defined in Lucas v. St. Louis and Suburban Railway Co., 73 S. W. 589, 174 Mo. 270, as:

"To bear the expense of; to support; to keep up; to supply with what is needed."

Therefore, the cost of supporting and keeping up and supplying to the Highway Commission what is needed may be paid out of the Highway funds.

We next look to the statutes to determine whether the Legislature has given the right to the Highway Department

to travel outside of the State and for what particular instances this right may be so exercised.

In State ex rel. Lankin v. Hackmann, 204 S. W. 513, the Supreme Court ruled that the State Superintendent of Public Schools could have his traveling expenses paid in attending educational conferences outside the State because it is part of his official duty. The court pointed out that the Legislature had provided that the Superintendent should attend and assist in the meetings of teachers and do everything to elevate the standard and efficiency of the instruction given in the public schools of this State. Furthermore, the Legislature in its appropriation act had provided for traveling expenses. The court so ruled that since these educational conferences tended to assist him in carrying out his duties that such expenses could be paid.

In the later case of State ex rel. Bradshaw v. Hackmann, 208 S. W. 445, the court held that the State Warehouse Commissioner was not authorized to attend a conference of Warehouse Commissioners in Washington because there is nothing in his statutory duties which requires him to travel outside of the State.

In the Bradshaw Case, supra, the court said:

"No officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment."

However, the court noted the exception in this rule in that:

"Whenever a duty or power is conferred by statute upon a public officer all necessary authority to make such powers fully efficacious or to render the performance of such duties effectual is conferred by implication."

The appropriation act passed by the General Assembly in 1941 for the Highway Department (House Bill No. 15, Section 1, sub-section (d)) provides money to be used for "travel expenses within and without the state." This, as was said in

the Lamkin Case, supra, is a legislative construction of the powers of the Highway Commission in so far as traveling expenses are concerned. In Hite v. Keene, 137 Wis. 625, 119 N. W. 303, it was held that a foreign country was included in the phrase "without the state."

Furthermore, a reading of the statutes relating to the Highway Commission discloses the following:

Section 8743, R. S. Mo. 1939, provides that the members of the Commission shall receive:

"their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties."

Their official duties as provided for in Section 8752, R. S. Mo. 1939, are:

"(4) Cause standard plans, specifications and estimates to be prepared for the repair and improvement of highways and the construction and repair of bridges by civil subdivisions.

"(5) Investigate and determine upon the various methods of road and bridge construction adapted to different sections of the state and as to the best methods of construction and maintenance of highways and bridges.

"(6) Compile statistics relating to public highways throughout the state and collect such information in regard thereto as it shall deem expedient.

"(7) Aid at all times in promoting highway improvement throughout the state.

"(8) Prepare plans, specifications and estimates for all state highways."

Sept. 3, 1941

The duties imposed by the statute above require the Highway Commission to have "standard plans, specifications and estimates" and require them to investigate and determine the various methods of road and bridge construction adapted to the different sections of the State. They must also compile statistics and collect such information as they deem expedient, and are required to aid in promoting highway improvement. We believe it is obvious that information can well be obtained at various meetings with highway officials of other states which will assist the Missouri Commission in carrying out efficiently these duties.

As was said in the Lamkin Case, supra (1. c. 515):

"It is, we think, necessary if standards and efficiency in education in this State are to be kept abreast of the progress in other states, that the head of the public school system should be advised as to what educators elsewhere are doing. No better way, perhaps, for doing this has been devised than by conventions and conferences of the leaders in educational progress."

From the facts submitted in your request we are unable to ascertain the type of meeting that is to be held in Mexico City, but, in view of the rules laid down above, we believe that you should be able to ascertain whether such meeting is one which will enable the members of the Commission to carry out the duties of their office or not.

Conclusion

Therefore, in view of the above authorities, it is the opinion of this Department that the members of the Missouri State Highway Commission may attend a conference held outside of the State, if, at said conference, discussions are held relating to highway matters, which will enable the members of the Commission to carry out the duties of

Mr. C. W. Brown

-5-

Sept. 3, 1941

their office, and that the expense of attending such conferences may be paid by the State.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

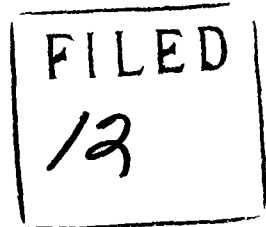
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

STATUTES: A statute amended by different acts of
AMENDMENTS: the same general assembly should be
REPEALS: construed so that all amendments may have
force and effect.

September 6, 1941



Mr. Dwight H. Brown
Secretary of State
Jefferson City
Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether Section 571 R. S. 1939 is amended by adding the proviso contained in Senate Bill 70 and by the proviso contained in Senate Bill 85, both passed by the Sixty-first General Assembly. The statement of facts furnished you by the Commerce Clearing House, Inc. pertaining to this question and which accompanied your request are as follows:

"Chapter 1, Article 21 revised statutes of 1939, Section 571 is amended by both Senate Bill 70 and Senate Bill 85 of the 1941 Missouri regular session. Senate Bill 85 added a proviso at the end of Section 571 which read 'provided further that nothing herein contained shall be construed as imposing a tax upon any transfer as defined in this Act, of intangibles, however used or held, whether in trust or otherwise, by a person, or by reason of the death of a person, who was not a resident of this state at the time of his death.' Senate Bill 70 provides for the addition of the following proviso at the end of Section 571; 'and provided further that nothing herein contained shall be construed as imposing a tax upon any transfer as defined in this Act, on a trust or any distributee thereof, created as a part of a stock bonus plan,

pension plan, disability or death benefit plan or profit sharing plan, for the exclusive benefit of employees, to which contributions are made by an employer or employees, or both, for the purpose of distributing in accordance with such plans, the earnings or principal, or both the earnings and principal of the trust fund.' The procedure for adding the provisos by both bills was to provide that Section 571 was to be read as set forth in bill texts themselves. In neither case did one bill include the proviso intended to be enacted by the other. That is, Senate Bill 70 which was approved by the Governor August 4, 1941 restated Section 571 but did not include the amendment which was made by Senate Bill 85 approved by the Governor June 26, 1941. According to our records, both measures are to become effective October 10."

"We would be pleased to have you advise us whether the amendments made by Senate 85 and Senate Bill 70 both will take effect from and after October 10 or whether the amendment made Senate 85 is by inference repealed because it is not restated in Section 571 as set forth in Senate 70, the Act with the latest approval date. It is our conclusion that since there is no conflict between the two added provisions that both will take effect and be incorporated as part of Section 571, however, we would appreciate your confirmation of this conclusion."

In 1933 the General Assembly of Missouri enacted two laws pertaining to the same section of the Revised Statutes, namely 9952 R. S. 1929, and the question of the construction of these two acts were before the Supreme Court in the case of the State et rel. vs. Bader et rel. 78 S.W. (2d) 835. In speaking of the rule of construction that the courts should place upon

statutes passed under such circumstances, the court said: l.c. 839:

"We think the applicable rule is:
'That where two acts are passed at the same session of the Legislature, relating to the same subject-matter, as here, they are in *pari materia*, and, to arrive at the true legislative intent, they must be construed together. *Forry v. Ridge*, 56 Mo. App. 615; *State ex rel. v. Klein*, 116 Mo. 259, 22 S.W. 603; *St. Louis v. Howard*, 119 Mo. 41, 24 S.W. 770, 41 Am.St. Rep. 630. The law does not favor repeals by implication. If by any fair interpretation all the sections of a statute can stand together, there is no repeal by implication.' *Gasconade County v. Gordon*, 241 Mo. 569, 145 S. W. 1160, 1163. The opinion in which case says further:

"In *Black on Interpretation of Laws*, in speaking of statutes in *pari materia*, it is said: "Especially is it the rule that different legislative enactments passed upon the same day or at the same session, and relating to the same subject, are to be read as parts of the same act."

"To like effect is 2 *Lewis' Sutherland on Statutory Construction* (2d Ed.) p. 845, whereat it is said: 'It is observed that in the comparison of different statutes passed at the same session or nearly at the same time this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended.'"

"It is easy to see why the rule of construction pertaining to statutes in *pari materia* applies with peculiar force to statutes passed at the same session of a legislative body. In such case

we have, in fact, the same minds acting upon the same subject. It is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is that they had in mind the whole subject under consideration; that, whilst the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. In such case, it is the duty of the courts to so construe all the act in such manner that each and every part thereof may stand, if such construction can be attained, without doing violence to the language used in the several acts."

Said Section 571 R. S. 1939 is amended by two acts of the General Assembly by adding proviso clauses to the original act. The provisions of the two proviso clauses are not conflicting, and applying the rules of construction stated in the Bader case *supra*, it seems that they are in *pari materia* and in order to arrive at the true legislative intent they must be construed together. The fact that one act is passed after the other act and the first act is not restated in the later act would not alter the foregoing rule.

On the question of the duties of the Secretary of State in relation to the publication of these two acts in the session Laws for 1941 will say that under Section 663 R. S. 1939 the original roles of these two acts after having been approved by the Governor, would be deposited in the office of the Secretary of State. Then under Section 665 R. S. 1939, the Secretary of State shall deliver copies of these two bills to the public printer. He directs and superintends the printing of them which are finally published in the session Laws. We do not find where the Secretary of State would be authorized to consolidate these two bills for the purpose of being printed in the session Laws.

Hon. Dwight H. Brown

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September 6, 1941

CONCLUSION

From the foregoing it is the opinion of this department that since there is no conflict between the proviso clause to Section 571 R. S. 1939 which were enacted by Senate Bills 70 and 85 of the Sixty-first General Assembly, that both of said proviso clauses will take effect and be incorporated in the session Laws for 1941.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TWB:DJ

STATE PRINTING COMMISSION: Has the authority to set aside order of July 11, 1940, rejecting all bids. May now make new contracts as to binding and printing.

September 12, 1941

9-15

Honorable Dwight H. Brown
Chairman
Commissioners of Public Printing
Jefferson City, Missouri



Dear Mr. Brown:

You submit to this Department for official opinion questions which have arisen with reference to State printing and binding contracts as a result of mandamus suits by taxpayers against the Commission. We shall quote the first portion of your letter and then answer your questions in their numerical order.

"The Commissioners of Public Printing are informed that the two suits in mandamus instituted in the Supreme Court of Missouri by certain taxpayers against the Commission, with respect to which you are fully advised, will shortly be dismissed with prejudice. If such action is taken it will be incumbent upon the Commission to let contracts for state printing for the remainder of the statutory two year term which began July 1, 1940. Assuming, therefore, that the above facts are true, we desire your opinion on the following legal questions:

I

"1. Has the Commission the legal right, if it deems such action otherwise advisable, to set aside its order of July 11, 1940, rejecting all bids for the

State Printing contracts for the two year term above mentioned, when the mandamus suits are actually dismissed?

"2. Has the Commission the legal authority, upon the dismissal of said suits, to reinstate the bids made for State Printing which were rejected on July 11, 1940, and to award the contracts for State Printing thereon for the remainder of the two year term, expiring June 30, 1942?"

In the mandamus actions which were filed in the Supreme Court, and you refer to the fact that this Department is fully advised as to the contents of the same, the answer to the alternative writ filed on behalf of the commission alleged that all bids were rejected, in effect, because they were not the lowest and best bidders obtainable within the meaning of Section 14977, R. S. Mo. 1939. We assume that whatever objections the Commission may have raised as to the lowest and best bidders for the State printing contracts, have now been removed, hence, the reason for the Commission desiring to know whether it can legally set aside its order of July 11, 1940, rejecting all bids.

Reviewing the pertinent provisions of Section 14977, supra, it will be seen that it is the duty of the Commission to enter into contract with a responsible person or persons for printing certain classes of matter for a period of two years. The Commission shall give notice by advertisement for at least thirty days in two newspapers, stating the date and the hour in which the bids are to be opened. The contracts are to be let to the lowest and best bidder or bidders. The Commission is further invested with the authority to reject any and all bids. The mere fact that a bid or bidder may have the lowest bid from a pecuniary standpoint does not necessarily mean that he shall be awarded the contract. The term "the lowest and best bidder" includes other elements such as the ability, the standing of the bidder, equipment, convenience, or other elements which the Commission may deem or think expedient in carrying out the contract. (State v. Herman, 59 N. E. 104, 63 Ohio St. 440.)

We are not attempting to settle or give an opinion with respect to the legal questions which were involved in the mandamus suits, except in so far as the Commission's action in rejecting all bids is concerned. As the matter now stands, granting that the mandamus suits are to be or will be dismissed with prejudice, the Commission, in effect, has made no contract for the biennium and has not completed its duties under Section 14977, supra, the situation now being the same as when the Commission rejected all bids.

In the decision of *Garfield v. United States ex rel. Goldsby*, 30 App. Cases (D. C.) 177, 1. c. 183, we find this principle of law:

"It is * * well settled **, when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him."

But, has the Commission completely exercised its discretion in the performance of its specific duty? The ultimate duty of the Commission is to follow the procedure as set forth in Section 14977, supra, and award a contract to the lowest and best bidder. This, the Commission has not done. Having not performed its full function, its desire to set aside the order of July 11, 1940, does not contravene the principle as set forth in the above quoted decision. Its acts would probably be beyond recall or review if the contract had been awarded and their duties fully performed under said section.

From the case of *Cress v. State*, 152 N. E. 822, the same being an Indiana decision, we quote the following statement:

"And power to undo an act once done will not be implied from the mere grant of power, in the exercise of a sound discretion, to do the act."

The same principle is enunciated in Throop's Public Officers, Section 564, page 534. But, as stated above, the acts of the Commission with reference to the printing contract have not been completely exercised in the performance of their duty, to-wit, the consummation and the completion of a contract for two years under the provisions of Section 14977, supra.

There is a further reason why this action of the Commissioners would be proper in the instant case. We are aware of the general rule as stated in 46 C. J., page 1033, that:

"When the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, although the statute conferring authority expressly makes the determination discretionary."

In support of this statement the writer cites Garfield v. United States, ex rel. Goldsby, 30 App. Cases (D. C.) 177, l. c. 183; People v. Cantor, 180 N. Y. S. 153; and Cress v. State, 198 Ind. 323, 152 N. E. 822. However, a reading of those cases discloses that the facts therein are in no way analogous to the facts in the instant case. The Garfield decision involved a suit to restore an Indian to the rolls after his name had been stricken by the Indian Commission. The Cress case dealt with the selection of a school site; while the Cantor case involved a tax assessment.

The nearest case in point that we are able to find is that of Ross v. Stackhouse, 114 Ind. 200, which involved a bid to the City Council for the work of street improvement. The letting of the work was duly advertised and all the bids including one made by one Ross were by the Council rejected. Subsequently, the Council reconsidered its action and let the contract to Ross. It will be noted that the court in the first part of the opinion quoted below, recognized the general rule which has been stated above, but holds that it is not applicable

under the facts in the case. The court said (1. c. 203):

"It is settled that where the act or decision of a common council, or other similar body, is done or made in pursuance of notice which the law requires, and is in its nature such as to adjudicate upon, or determine, or affect the substantial personal or property rights of those notified, a decision once rendered can not ordinarily be rescinded or set aside. City of Madison v. Smith, 83 Ind. 502. This rule has no application, however, to matters of a merely administrative or legislative character. Bodies having cognizance of such subjects may modify, repeal or reconsider their action in regard to matters of that nature, at any time, provided the vested rights of others are not thereby affected. Over such matters they exercise a continuing power. Welch v. Bowen, 103 Ind. 252; Board, etc., v. Fullen, 111 Ind. 410.

"The purpose of requiring the letting of contracts for street improvements to be advertised is to secure fair competition, and to enable the common council to let the contract upon the most advantageous terms. 1 Dill. Munic. Corp., section 468. The advertisement is not to give notice to the property-holders, nor does the letting of the contract adjudicate upon or determine in any degree their personal or property rights. The matter of accepting or rejecting bids, and of letting the contract, is purely administrative in character, depending entirely upon the discretion of the common council. Platter v. Board, etc., 103 Ind. 360."

This view is recognized in the case of Springfield v. Weaver, 137 Mo. 650, in which our Supreme Court said (1. c. 671):

"The council had the undoubted power at a subsequent meeting to reconsider and rescind the order rejecting the bid of Reilly, and thereafter to accept his bid and let the contract to him. It had acquired jurisdiction over the parties interested and the subject-matter. The bids were before it; the bid of Reilly was within the estimate of the engineer; the acceptance or rejection of the bid and making the contract were mere matters of business detail intrusted to the council and over which it had power to act in such a manner as it might consider to be for the best interest of the city."

In view of the above authorities we are therefore of the opinion that the Commissioners of Public Printing, who have rejected all bids for the contract of public printing, may subsequently set aside such rejection. In answer to your second question, if you set aside your order of July 11, 1940, rejecting all bids for the state printing contracts for the two-year term ending June 30, 1942, such action, in effect, would automatically reinstate the bids.. Upon their reinstatement, it is our opinion that you have the legal right to award the contracts for state printing thereon for the remainder of the two-year term expiring June 30, 1942, in the same manner and to the same extent that you had before the rejection of said bids. However, we point out that if you deem it advisable to exercise such right, the manner in which you exercise it and the persons, if any, to whom you award such contracts, are matters solely resting within the discretion of the commission.

II

"On June 30, 1941, the Commission entered into a contract for state binding for a term expiring June 30, 1942, said contract containing a clause which gives the Commission the right to cancel same on thirty days' notice. If the Commission should deem it advisable to exercise its right to cancel such contract, with or without the consent of the holder of the same, would it then have the legal right to award a contract for binding for a period expiring June 30, 1942, without advertising for bids therefor?"

The duty of the Commissioners of Public Printing to provide for the necessary binding for the State is found under

the provisions of Section 14986, R. S. Mo. 1929. This section gives the Commissioners authority to make such a contract as they may deem best and upon such terms as shall be most advantageous to the State for a period not exceeding one year. By the provisions of the contract now in force the Commission has the authority to cancel the same with thirty days' notice. If the Commission exercises its right to cancel the contract according to the terms of the contract, then the effect will be that the State will not have a contract for binding.

We are of the opinion that under the provisions of Section 14986, supra, the Commissioners of Public Printing may then make a contract for binding for the period expiring June 30, 1942, as they deem best and most advantageous to the State, without the necessity of requiring bids because the statute does not require notice or advertisement for bids.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

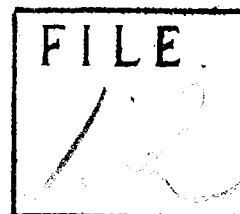
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SECRETARY OF STATE: Limited to statutory fee of \$1.00 for notification of service of process.

September 23, 1941

9-24

Honorable Dwight H. Brown
Secretary of State
State Capitol Building
Jefferson City, Missouri



Dear Sir:

We are in receipt of your letter of September 18th wherein you state as follows:

"With my letter of July 3, 1941, I sent you copy of Senate Bill No. 67, approved by the Governor on June 26, 1941. You returned an opinion dated July 8, 1941, signed by Mr. Wasserman.

"Another question has arisen in connection with this new law. The law provides that a fee of \$1 is to be paid to the Secretary of State when such process is served upon me.

"The law instructs that I mail the notice and copy of the petition and summons to the defendants by registered mail, deliver to addressee only. This method of mailing costs 31¢ or 34¢ per defendant, depending upon the number of pages in the petition.

"I have been served with a process directed to three individual defendants, with fee of \$3. In another instance I have been served with similar process against three defendants and the fee paid

was \$1. Study of the law does not make clear to me whether it is intended that I handle a process against three or four or even more defendants for \$1 fee."

Section 5 of Senate Bill 67 provides as follows:

"Service of process under this act shall be made by serving a copy thereof, together with a copy of the petition, upon the Secretary of State of the State of Missouri at his office in Cole County, Missouri, or in the absence of the Secretary of State, upon his Chief Clerk at his office in Cole County, Missouri, together with a fee of \$1.00 and such service shall be sufficient service upon said non-resident, provided that within fifteen days after said service upon the Secretary of State, or upon his Chief Clerk, as herein provided. The Secretary of State shall immediately mail to the defendant, and to each of the defendants, if there be more than one by restricted, registered mail, addressed to the defendant at his last known address, residence, or place of abode, a notification of said service of process upon the Secretary of State, or his Chief Clerk as herein provided; provided, however, that the court, or judge thereof in vacation, may, upon good cause shown, by order extend such time for notification."

Under the above section, upon the receipt of a fee of \$1.00, the Secretary of State is required to immediately mail to the defendant, "and to each of the defendants, if there be more than one," notification of service of process. There is nothing in the language of the above section which would authorize a graduation of fees depending upon the number of defendants in the case.

Section 14 of said bill provides as follows:

"The fee of \$1.00 paid by plaintiff to the Secretary of State under Section 5 at the time of service of such process shall be taxed as part of plaintiff's costs if he prevails in the action or proceeding."

The above section again contemplates that the fee to be paid by the plaintiff to the Secretary of State, be only \$1.00.

We appreciate the fact that the number of defendants in a case may be such that the cost of postage may far exceed the \$1.00 fee tendered to the Secretary of State. However this may be, we have no authority to broaden the plain meaning of the language in the above sections to require a fee of \$1.00 for each defendant notified by the Secretary of State.

In the case of *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S. W. (2d) 920, 1.c. 931, the court said:

"It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction."

Again in the case of *State v. Thatcher*, 338 Mo. 622, 92 S. W. (2d) 640, 1. c. 643, the court said:

"We are not persuaded that the law-makers intended to make any provision for St. Louis county in this particular act: First, because the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied. *"

Hon. Dwight H. Brown

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Sept. 23, 1941

From the foregoing we are of the opinion that, irrespective of the number of defendants the Secretary of State is required to notify of the service of process upon him, said Secretary of State is limited to the statutory fee of \$1.00 for each case.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

ME:EG

SECRETARY OF STATE: Official Manual should contain names and salaries of employees during the preceding biennium. (30)

✓ / ✓ 2
October 21, 1941

Honorable Dwight H. Brown
Secretary of State
Capitol Building
Jefferson City, Missouri



Dear Mr. Brown:

We are in receipt of your letter of September 10, 1941, submitting several questions concerning your duties in preparing the Missouri Manual. You also request our interpretation of Section 15002, Revised Statutes of Missouri, 1939, as amended by House Bill 230, passed by the recent General Assembly.

Your first question is as follows:

"We would like to know whether the heads of departments, boards, bureaus, commissions, etc. are expected to report to us the employment of a person and the detailed data required before that person is eligible to the payroll."

We think this question is specifically answered by Section 15002, Laws of Missouri, 1941, page 690, which we quote:

"There shall be published in said manual the name, salary and post office address, and previous occupation, including street and number, of every officer and employee, of this state, and it shall be unlawful for any officer of this state to pay or authorize the payment of a salary to any appointee or employee unless

October 21, 1941

he shall first file with the secretary of state, for publication in the manual, the name, salary, post office address and previous occupation of such employee."

Generally, the word "shall" is mandatory. State ex rel. McKittrick v. Wymore, 119 S. W. (2d) 941, 343 Mo. 98, 119 A. L. R. 710. By its use of the word "shall" throughout the above section, we must conclude that the Legislature intended that no employee of the State of Missouri, or of any department, board, bureau or commission, constituting a part of the state executive or administrative government, who receives a salary may receive such salary unless his name, amount of compensation and previous occupation shall be first submitted to the Secretary of State for publication in the Manual.

Your second question is as follows:

"We would like to know whether this law contemplates this same officer reporting to us any change in the status of the employee. For instance, if the salary is changed, then the information given to the department originally does not agree with the later facts, -- the facts, for instance, at the time the Blue Book is being prepared for publication."

In construing statutes, the primary rule is to ascertain the lawmakers' intent and to promote the object and manifest purpose of the statute. Artophone Corporation v. Coale, 135 S. W. (2d) 343. The original purpose for the publication of the Missouri Manual was to give the people of this state historical, political and statistical information with regard to the state and national governments. By the amendment in 1941, in which the Legislature inserted the word "salary" in Section 15002, supra, it is clear that the intent was to permit the people of the state to be advised as to the disposition of all money disbursed for salaries to the employees of the state. The language

used is clear and unambiguous, and it is therefore our opinion that if the salary of any employee is increased or decreased, the proper officer must file a report of such change with the Secretary of State for publication in the Manual before such change may become effective.

Your third question is as follows:

"We would like to know whether the departments are expected to report to us the regular personnel which is employed at a per annum salary, payable monthly, or should also report every person who at any time, under any circumstances, for any period is employed. Charged as we are with the responsibility of the publication of the Blue Book, we are mindful that if it is necessary to publish the name of every temporary employee, the Blue Book will become very voluminous and a very costly publication. To illustrate; I am told that at the peak the Highway Department may have as many as 5,000 laborers, and, counting the labor turnover, in the period of a year the total may be 8,000 to 10,000. These persons may be employed for one or more days, a period of weeks, or a few months."

The title of House Bill 230, which announces its evident purpose, is as follows:

"AN ACT to amend Section 15002, Article II, Chapter 120, of the Revised Statutes of Missouri, 1939, relating to certain information in the official manual and providing that the salaries of all state employees be published therein."

The word "employee" is general, and has been held to include all classes of workers (Volume XIV, Words and Phrases, page 456), but the word "salaries," as used in both Section 15002 and the title to said section in the amendment made by House Bill 230, has been given a definite meaning by our Supreme Court and courts in many other jurisdictions.

In *Henderson v. Koenig*, 168 Mo. 356, 1. c. 367, we find the following:

"Salary is defined to be: 'A periodical allowance made as compensation to a person for his official or professional services or for his regular work.' (Standard Dict.)

"Salary is regarded as a per annum compensation. (Bouvier Law Dict.) And to the like effect see an exhaustive review of the subject in *People ex rel. v. Myers*, 42 Alb. L. J. 332." (Italics ours)

In other jurisdictions, the distinction between a salary and a wage has been even more clearly defined. We believe the following definitions found in Words and Phrases, Volume XXXVIII, clearly illustrate this distinction, 1. c. 51:

"'Salary' refers to a superior grade of services and implies a position or office, and suggests something higher, larger, and more permanent than 'wages.' First Nat. Bank v. Barnum, 160 P. 245, 247.

"The word 'salary' imports a specific contract for a specific sum for a specified period of time, while 'wages' are compensation for services by the day or week. *Blick v. Mercantile Trust & Deposit Co.*, 77 A. 844, 846, 113 Md. 487.

October 21, 1941

"Under Income Tax Act 1931, Section 2B, 38 Stat. 167, providing that net income shall include income from salaries, wages, or compensation for personal services, 'salaries' indicates a periodical payment as compensation for regular employment, while 'wages' generally applies to manual labor. Merriam v. United States, C. C. A. N. Y., 282 F. 851, 855.

* * * * *

"'Wages' is usually restricted to sums paid as hire or reward to domestic or menial servants and to sums paid to artisans, mechanics, laborers, and others employed in various manual occupations, while 'salary' has reference to the compensation of clerks, bookkeepers, other employees of like class, officers of corporations, and public officers. Fitzgerald Furniture Co. v. Metropolitan Life Ins. Co., 272 Ill. App. 138.

* * * * *

"'Wages,' in its ordinary acceptation, has a less extensive meaning than 'salary,' and is usually restricted to sums paid as hire to domestic or menial servants and to artisans, mechanics, laborers, and others employed in various manual occupations, while 'salary' has reference to the compensation of clerks, bookkeepers, other employees of like class, officers of corporations, and public officers. Massie v. Cessna, 88 N. E. 152, 154, 239 Ill. 352, 130 Am. St. Rep. 234.

October 21, 1941

"Salary is the compensation given to a hired person for service, and is a synonymous convertible term with 'wages,' though use and acceptance have given to the word 'salary' a significance somewhat different from the word 'wages,' in this: that the former is understood to relate to position or office -- to be the compensation given for official or other services as distinguished from wages, the compensation for labor. Bell v. Indian Live Stock Co., Tex., 11 S. W. 344, 346, 3 L. R. A. 642."

While it is impossible to lay down a rule which would govern every instance, we think it clear that the temporary laborers described in your question undoubtedly receive wages rather than salaries and do not receive an annual compensation. They should not, therefore, in our opinion be included in the Missouri Manual as employees receiving fixed salaries.

Your last question follows:

"We are also confronted with this question; whether or not the current Blue Book should contain all of the personnel of the previous administration who continued under employment into the present biennium as well as their successors. You can see that in some instances there would be a virtual duplication of job listings in some of the departments."

Since, as we have pointed out above, the salaries, addresses and previous occupations of all employees shall be filed "with the secretary of state, for publication in the manual * * *," we are of the opinion that the names and salaries, with the other information required by the

Hon. Dwight H. Brown

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October 21, 1941

statute, of all employees during the biennium immediately preceding the publication of each official Manual must be included in such Manual. However, due to the fact that House Bill 230, which requires the publication of salaries of employees, did not become effective until October 10, 1941, it is the opinion of this office that you are required to publish only the salaries of such employees of the state as have been certified to you since the effective date of House Bill 230, and such as may be furnished you in time to be included in the next publication of the Missouri Manual.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

RLH:VC

MISSOURI SCHOOL FOR THE BLIND: (1) Compulsory attendance law applies to blind children. (2) Questions relating to rules are admissible. (3) Missouri School for the Blind is a charitable institution in so far as income tax deductions are concerned.

October 30, 1941

Mr. R. Wilson Brown
Superintendent
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri



Dear Sir:

You submit to this Department for official ruling, three questions which we shall answer in their numerical order.

"(1) Does the compulsory school law (Chapter 72, Article 12, Section 10587) apply to the Missouri School for the Blind? (Chapter 72, Article 25)"

Section 10587, R. S. Missouri, 1939, is so general in nature that it can be construed to cover Chapter 72, Article 25, relating to the Missouri School for the Blind and Deaf, as it makes no exception to the fact that a child may be deaf or blind. It has further provisions permitting the court, if necessary, to excuse a child mentally or physically incapacitated.

By the terms of Section 10845, R. S. Missouri, 1939, the Missouri School for the Blind at St. Louis is made a part of and to be conducted as an educational institution of the State of Missouri.

Section 10854, R. S. Missouri, 1939, compels the parents or the guardian of every deaf child between the ages of six and seventeen years to cause the child to attend regularly some recognized school for the deaf, but permits a child to be excused from attending school for the deaf if it is mentally

or physically incapacitated to attend.

Under Section 10856, R. S. Missouri, 1939, it is provided that upon the petition of any person a blind or deaf person is entitled to advantages of the Missouri School for the Blind and Deaf, and the parents or guardians are unable to pay the expenses of such child at the local school, the county court shall order the child sent to the proper school at the expense of the county for clothing and traveling expenses.

We are therefore of the opinion that it is compulsory for a blind child to attend school in accordance with the provisions of Section 10587, R. S. Missouri, 1939, unless excused due to the child being mentally or physically incapacitated to attend.

II.

"(2) Is it the opinion of the Attorney General that the application for admission to this school, copy of which is attached, is in order from a legal standpoint? In considering this matter, please give attention to the following points:

"(a) The school feels it can better give individual attention when it has a great deal of information regarding the individual. Thus, is it proper for us to expect new students to supply us with the information requested on this blank.

"(b) Inasmuch as the State of Missouri does not make provisions for personal expenses of the students--these expenses include such items as hair cuts, toilet articles, shoe repair, etc.--is it within the right of the school to require parents or guardians to furnish each child with \$5.00 per school year as found on page 9?

"(c) Is it within the right of this school to require the parents or guardians to agree that the students, while enrolled in this school, are subject to the rules and regulations of the school? This is on page 12 of the attached blank. The purpose of this has been to impress upon parents the fact that while their children are here those children are expected to follow the usual procedure of the school including the regulations governing it and to thus avoid any misunderstanding if and when the students disregard of such regulations makes it necessary to dismiss him."

Section 10853, R. S. Missouri, 1939, is as follows:

"All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively. All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

(a) You will note that all admissions and discharges are to be determined by the board of managers, and further, by the provisions of Section 10847, R. S. Missouri, 1939, the school is under the jurisdiction of a board of managers. Therefore, we are of the opinion that the board of managers has the authority to exact the data from the parents and guardians or the court that is attached to your request for an opinion. We have read the form attached "Application For Pupil Enrollment," and we find nothing unreasonable or illegal contained therein.

(b) By the provisions of Section 10853, quoted supra, all blind persons under the age of twenty-one (21) years, are entitled to admission to the school for the blind, subject to the action of the board. By the provisions of Section 10856, referred to above, a blind child is entitled to advantages of the Missouri School for the Blind or the Deaf, if the parents or guardians are unable to pay the expenses, the county Court can order the expenses for clothing and traveling to be paid by the county. As a result, all blind children subject to the action of the board are entitled to attend the Missouri School for the Blind, irrespective of their financial condition.

Powers and duties of a county court are of statutory origin. The statute, in referring to the traveling expenses to be paid by the county, we think refers to the expenses of the child to and from the school. We do not think that the county court has the authority to pay for more than one trip, that is, the trip of the child to attend in the beginning and its return at the close of the school. We think the term "expenses" as used in the statute, is broad enough to include the distribution of Five Dollars (\$5.00) per year for the incidental expenses that arise, such as hair cuts, toilet articles, shoe repairs, and that such a charge is not unreasonable.

(c) By the provisions of Section 10853, as mentioned and quoted above several times, all admissions and discharges are to be determined by the board of managers, and we are of the opinion that the rules and regulations of entrance and the conduct of the child while attending Missouri School for the Blind is under the control of the board of managers and the superintendent, and that it is not unreasonable to have the parents sign the enclosed form on page 12, except for any injury which might arise to the child due to carelessness and negligence or any other unreasonable injury to the child on the part of the school.

III.

"Does the State of Missouri recognize private gifts to this school as being contributions to charity? It has been brought to my attention that certain

other schools for the blind are considered to be charitable institutions and therefore individuals may make private donations of money, consider such donations as charitable gifts, and exclude such gifts in their income tax exemptions to the extent of the law."

By the provisions of Section 10864, R. S. Missouri, 1939, the property of a school shall be under the care and control of the board of managers and there is a further provision as to the investment of the personal property "or donations to such school shall be vested in such board of managers of the respective schools for the use and benefit of the said schools." As mentioned above, the Missouri School for the Blind is designated as a part of the public school system of the state and, irrespective of whether the school be charitable or otherwise, by the provisions of Section 10887, R. S. Missouri, 1939, it is made lawful for any person to grant, give and devise to the public school fund of the State any money or property, real or personal.

Therefore, we are of the opinion that the school has authority to accept gifts or contributions. It is an institution maintained by the state, the same as all other schools of the state, and can be classified as a part of the free public school system. We are unable, in our research, to determine whether the courts of Missouri have ever classed the school for the blind as a charitable institution.

In the State of Illinois, in the decision of *Summers v. Chicago Title and Trust Company*, 335 Ill. 564, it was held that, even though students paid tuition, it does not change the character of the school as a charitable institution. It was held in the State of New York that New York University is a semi-public institution and a charitable institution. *New York University v. Taylor*, 296 N. Y. S. 848.

Mr. R. Wilson Brown

(6)

October 30, 1941

We are of the opinion that it can be classified as a charitable institution. However, we suggest that you consult the Collector of Internal Revenue in St. Louis, as to the status of such gifts, and whether or not they can be deducted on the donor's income tax, as no doubt he has passed upon the actual or similar question.

Respectfully submitted,

OLLIVER W. NOLAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

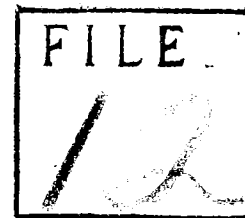
OWN/rv

MOTOR VEHICLES: Service of process, Laws of Missouri, 1941, page 435, 'the word "person" includes corporations.

November 15, 1941

11-19

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your letter of November 8, 1941, wherein you request an opinion involving the following facts:

"Under SB-67 approved June 26, 1941, appearing in Session Laws, 1941, at page 435, I have been served by the sheriff with summons directed to a corporation located in Dallas, Texas. The law does not seem to include artificial persons.

"Will you please favor me with an opinion as to whether service upon non-resident corporations, owners of vehicles driven on Missouri highways, is within this new law?

"If your answer be affirmative, is there any other envelope inscription to be placed on my mailing, than "Deliver to Addressee Only"? It occurs to me that the letter carrier might require more definite instructions."

The Act passed by the General Assembly in 1941, Laws of Missouri, page 435, relates to civil actions against non-resident owners, users and operators of motor vehicles and trailers in the State of Missouri.

You desire to know, in the first instance, whether or not the manner of service, as imposed on you under Section 5, includes corporations as well as individuals. The Act, at page 436, Section 3, defines the term "person" as follows:

"The term 'Person' as used in Section 1, hereafter shall mean:

"a. The owner of the motor vehicle or trailer, whether it is being used and operated personally by said owner or by his agent.

"b. An agent using and operating the motor vehicle or trailer for his principal.

"c. Any person who is in charge of the motor vehicle or trailer and of the use and operation thereof with the express or implied consent of the owner."

The word "corporation" is not used in any place in the Act. There is nothing to indicate one way or the other as to whether or not the Legislature intended to include corporations.

It was held in the decision of City of Webster Groves v. Smith, 340 Mo. 798, that the statute defining person to include any individual, firm, corporation, et cetera, did not apply to a municipal corporation. In the decision of State ex rel. Burnes National Bank v. Duncan, 302 Mo. 130, it was held that in many instances where the word "person" is used in a statute, it is construed to include corporation. The use of the term applies particularly to criminal statutes; that it depends upon the context and the intent with which the term is employed. There are numerous decisions in foreign states (Words and Phrases, vol. 32,

p. 222), holding that the word "person" includes corporations. The decisions refer to civil as well as criminal cases (City of St. Louis v. Rogers, 7 Mo. 19).

We think the matter can be decided by referring to the statutes of Missouri. Under Section 3209, R. S. Missouri, 1939, referring to definitions of terms, the word "person" is defined as "including a body of persons whether incorporated or not."

Under the motor vehicle chapter, Section 8367, the word "person" is defined as including "firm, corporation, partnership or association." In defining the term "person", Section 3 uses the expression "or by his agent," "or trailer for his principal." We are of the opinion that the statute is broad enough in using the term "person" to include corporations as well as individuals.

You next inquire that if our ruling to the above question be in the affirmative, whether or not it is necessary to inscribe any additional direction on the envelope containing the service.

Section 7, page 436, is as follows:

"The term 'Restricted, Registered Mail' means mail which carries on the face thereof in a conspicuous place, where it will not be obliterated, the endorsement, 'Deliver to Addressee Only', and which also requires a return receipt or a statement by the Postal authorities that the addressee refused to receive and receipt for such mail."

It appears that the only requirement made by the Legislature is to the effect that you should mark the envelope "Deliver to Addressee Only."

Hon. Dwight H. Brown

(4)

November 15, 1941

We suggest that when the petition, in addition to the name of the corporation involved in the litigation, includes the names of the officers of the corporation, said names of the officers may be included on the face of the envelope.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN/rv

SCHOOL FOR THE BLIND: Under Chapter 72, Article 25, R. S. Missouri, 1939, if no separate school is provided for colored, blind children, such children are entitled to attend the Missouri School for the Blind.

November 24, 1941

Honorable R. Wilson Brown
Superintendent
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri



Dear Sir:

This department is in receipt of your letter of November 18th, wherein you make the following inquiry:

"The Board of Managers of the Missouri School for the Blind has asked me to get an opinion from you regarding the admission of negro children in the Missouri School for the Blind.

"Chapter 72, Article 25, Section 10853 of the Revised Statutes of the State of Missouri make no mention of the segregation of races. While the Board is opposed to mixing negro pupils with white pupils, the Board prefers to have your advice on the legality of making any discrimination."

Section 3, Article XI of the Constitution of the State of Missouri states that:

"Separate free public schools shall be established for the education of children of African descent."

By the provisions of Section 10350, Revised Statutes of Missouri, 1939, when there are eight or more colored children of school age within any district in this state,

the Board of Directors is authorized and required to establish and maintain within the school district a separate free school for colored children.

Section 10349, Revised Statutes of Missouri, 1939, is a reiteration of the constitutional provision, but contains the additional statement to the effect:

" * * * and it shall hereinafter be unlawful for any colored child to attend any white school, or for any white child to attend a colored school."

Referring to Section 10853, Revised Statutes of Missouri, 1939, the same being under Chapter 72, Article 25, entitled "Missouri School for the Blind, and Missouri School for the Deaf," we find that said section does not specifically exclude colored children, but states that:

"All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively.
* * * "

We are unable in our research to find any section or authority wherein a separate School for the Blind has been established for colored children. It was held in the case of State ex rel. Canada, 305 U. S. 337, 83 L. Ed. 208, that it was not unconstitutional for the State of Missouri to separate the races in the establishment of schools, but the same facilities accorded to a white student must be accorded within the state to a negro student.

In view of the fact, as stated above, that Missouri has not established any separate school for blind negro children, and that said children are entitled to the benefits

Hon. R. Wilson Barrow

-3-

November 24, 1941

of free learning for the blind, we are of the opinion that unless provision be made for separate education for negro blind children, they are entitled to attend the Missouri School for the Blind.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN:VC

ELECTIONS: Size of ballots on constitutional convention
and retaining of a judge.

December 19, 1941

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of December 15, 1941, which is as follows:

"In accordance with the laws and constitution, I shall certify the above question to the county clerks and boards of election commissioners to be voted upon in the general election to be held in November, 1942. This is made mandatory by Art. XV, Sec. 4 of the constitution, submitted by initiative and adopted Nov. 2, 1920.

"Art. XV, Sec. 4 does not go into detail, requiring this question to be submitted on a separate ballot, separate from any other constitutional amendments or initiated laws which may be voted upon next November, nor does it specify the size of the separate individual ballot. I am attaching hereto a ballot, size 2-3/4" x 4", which was found in the old files of this Department and is evidently the one used at voting at the time the last constitutional convention was authorized by popular vote.

"Art. XV, Sec. 2, provides the General Assembly may propose constitutional amendments, to be voted upon 'on one independent and separate ballot'. Sec. 3 permits the General Assembly to authorize a vote of the electors of the state on the question of holding a

convention to revise and amend the constitution, 'which shall be submitted to the electors on a separate ballot'. I assume that the word 'independent' in Section 2 means that we will have a ballot for this constitutional convention question, one for the initiated measures and amendments and amendments proposed by the general assembly, and at least one ballot for the election of candidates for office. One will be provided for the voting on question of retaining certain judges.

"Sec. 11680 R. S. Mo., 1939, instructs that the constitutional ballot, i.e., the ballot containing the proposals of the general assembly and initiated laws or amendments, shall be not less than four inches wide and ten inches long. This provision seems to have been in effect at the time the attached ballot was voted. Please advise whether in your opinion the 4" x 10" minimum applies to the individual separate ballot on the question, shall there be a convention to revise and amend the constitution. Please also inform me whether in your opinion the same minimum size should apply to the separate ballot on question of retaining certain judges."

Article XV, Section 4 of the Constitution of Missouri provides as follows:

"The question 'Shall there be a convention to revise and amend the Constitution?' shall be submitted to the electors of the state at a special election to be held on the first Tuesday in August, one thousand nine hundred and twenty-one, and at each general election next ensuing the lapse of twenty successive years since the last previous submission thereof, and in case a majority of the electors voting

for and against the calling of a convention shall vote for a convention, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates, and the assembling of such convention, as is provided in the preceding section."

This section was placed in the Constitution by initiative and was adopted November 2, 1920, appearing in the Laws of 1921, page 711. At the time this section was placed in the Constitution there was in effect at that time a section which is now Section 11676, R. S. Missouri 1939.

Section 11676, R. S. Missouri 1939, provides as follows:

"Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than twenty days before the election, certify the same to the clerk of each county court of the state, and the clerk of each county court shall include the same in the publication provided in section 11542."

Under the above section it is the duty of the secretary of state to certify the election to the clerk of each county court of the state. It is also very noticeable under the above section that the first election on the question of "Shall there be a convention to revise and amend the Constitution?" must be submitted first at a special election and that within twenty years thereafter at a general election only.

Article XV, Section 2 describes how the proposed amendments shall be published and submitted to a vote. It covers not only amendments proposed by the General Assembly but also amendments by initiative petition.

Article XV, Section 3 of the Constitution of Missouri only applies to amendments by convention as proposed by the General Assembly and not by an order of the secretary of state

as set out in Section 4, Article XV, supra.

By reason of the above constitutional sections the Legislature enacted Section 11680, and Section 11682, R. S. Missouri 1939. Section 11680, supra, was originally enacted in the Laws of 1909 and amended by the Laws of 1913, page 326 and repealed and reenacted in the Laws of 1919. Section 11680, supra, was held to be invalid as to that part which refers to the question "Shall there be a convention to revise and amend the Constitution?" It was so held in *State v. Imhoff*, 238 S. W. 122, paragraphs 8, 9, where the court said:

"We have so frequently construed that portion of our Constitution (section 28, art. 4) which provides that no bill, except as therein provided, shall contain more than one subject, which shall be clearly expressed in its title, that, in view of the inescapable conclusion flowing from the reading of the title and the provision of the act under review, a discussion of same would seem to be unnecessary. It may therefore be sufficient to say that the purpose to be subserved by the Constitution in regard to the title of an act is that by its terms it must be such as to serve as a clear and comprehensive indicator of the purpose of the act. While it may be so general as to omit matters germane to the principal features of the statute, if it sufficiently indicates the substantial purpose of the law, it will not be violative of the Constitution. *State v. Span*, 258 Mo. 305, 167 S. W. 500. While, therefore, the title in this case is sufficiently comprehensive to indicate that the act is in regard to the submission of constitutional amendments, there is an utter absence of any reference to the submission of any other proposition such as is contemplated by the provision. So far, therefore, as this act attempts to regulate the submission of other propositions than constitutional amendments, it must be held to be invalid. We discussed this

question, with the citation of apposite authorities in the case of State v. Sloan, supra, and in the later cases of State v. Crites, 277 Mo. 194, 209 S. W. 863, and Vice v. Kirksville, 280 Mo. 348, 217 S. W. 77, with a like conclusion to that reached in the present case. There is neither reason nor authority for departing therefrom."

Section 11682 was enacted in the Laws of 1921, First Extra Session, page 182. Section 11682 only applies where the constitutional convention is voted upon at a special election and since by your request you intend to submit the question at the general election this section is not applicable.

Section 11680, R. S. Missouri 1939, provides "The constitutional ballot shall not be less than 4" wide and 10" long, of the same kind of paper, color and of equal size." Since this section has been declared invalid as to the question of a constitutional convention, this limitation is of no effect on the size of the ballot upon that question.

The ballot which you have attached to this request was one that was used in compliance with the mandatory instructions as set out in Article XV, Section 4 of the Constitution of Missouri which provided for a special election at that time. We find no law that specifically describes the size of the ballot on the question of "Shall there be a convention to revise and amend the Constitution?" and for that reason we hold that it is in the reasonable discretion of the secretary of state to furnish a ballot of any size.

Your second question as to the size of the ballot used on the question as to whether or not a judge may continue to retain office is covered by the constitutional amendment as set out in the Laws of 1941, page 722. Section 3 of that amendment partially reads as follows:

"Whenever a declaration of candidacy for election to succeed himself is filed by any judge under the provisions of this section, the Secretary of State shall not less than thirty (30) days before the election certify the name of said judge and the official title

of his office to the clerks of the county courts, and to the boards of election commissioners in counties or cities having such boards, or to such other officials as may hereafter be provided by law, of all counties and cities wherein the question of retention of such judge in office is to be submitted to the voters, and, until legislation shall be expressly provided otherwise therefor, the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

The above partial section specifically provides that ballots prepared, printed, published and distributed shall be the same as upon voting of measures proposed by the initiative. The initiative is set out in Article IV, Section 57 of the Constitution of Missouri. By reason of this constitutional section, Section 12291 of the Revised Statutes of Missouri 1939 was enacted. Under that section the secretary of state shall certify a copy of the ballot title and numbers of civil measures to be voted upon to the county clerks of each county and since Section 11680, supra, which applies to the method of voting and form of ballot of the constitutional amendment, specifically states "The constitutional ballot shall not be less than 4" wide and 10" long of the same kind of paper, color and of equal size," then the ballot, upon the question of whether or not a judge shall be retained in office, must be not less than 4" wide and 10" long and of the same kind of paper, color and of equal size.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

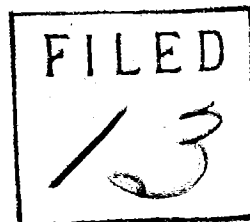
VANE C. THURLO
(Acting) Attorney General

WJB:DA

COUNTY COURTS: County court can refuse to pay for
OFFICERS: publishing notice to delinquent
COUNTY COLLECTORS: personal taxpayers that a suit would
be filed against them for personal taxes.

August 6, 1941

Mr. Bill Burke
Collector of the Revenue
Stone County
Galena, Missouri



Dear Sir:

We are in receipt of your request for an opinion dated August 4, 1941, which reads as follows:

"Early in the summer of this year I carried notices in the County papers, instructing the personal taxpayers of Stone County that suit would be started on all unpaid personal taxes, July 15th, 1941.

"The Stone County Court has refused to pay the publishers for the notices, and included in my 1941 budget is-- \$100.00 advertising.

"Is there any law in the Missouri statutes that compels the County to pay for such notices?"

Section 11110 R. S. Missouri 1939, sets out that delinquent taxes should be placed in two separate books; one book shall contain the personal delinquent list, and the other book shall contain the land delinquent list.

Section 11112, R. S. Missouri 1939, sets out the method of collecting delinquent personal taxes. This section partially reads as follows:

"Personal taxes assessed on and after June 1st, 1887, shall constitute a debt for which a personal judgment may be recovered before a justice of the peace or in the circuit courts of this state against the party assessed with said taxes. All actions

August 6, 1941

commenced under this law shall be prosecuted in the name of the state of Missouri, at the relation and to the use of the collector and against the person or persons named in the tax bill, and in one petition and in one count thereof may be included the said taxes for all such years as may be delinquent and unpaid, and said taxes shall be set forth in a tax bill or bills of said personal back taxes duly authenticated by the certificate of the collector and filed with the petition; and said tax bill or tax bills so certified shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suits under this law shall be sued and served in the same manner as in civil actions before justices of the peace and in circuit courts, and the general laws of this state as to practice and proceedings and appeals and writs of error in civil cases shall apply, as far as applicable, to the above actions. Said actions shall be prosecuted by attorneys employed as provided in article 9 of this chapter of the general statutes, and the fees and compensation allowed in said article shall apply to the above actions:

* * * * *

Nothing is stated in the above partial section as to the requirement of a notice in any manner to a person who owes delinquent personal tax. No notice is required before the suit is filed under this section.

Section 11113, R. S. Missouri 1939, provides for a notice by registered mail before a suit shall be brought to recover delinquent personal taxes, but this section only applies to counties having a population of more than eighty thousand and less than one hundred fifty thousand, in which circuit court is held not more than one place.

This section does not apply to Stone County.

Section 11079, R. S. Missouri 1939, does not apply to delinquent taxes but merely provides that the collector shall give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes. This notice may be given by posting up at least four written or printed handbills in different parts of each municipal township in said counties, and by publication for two weeks in a newspaper, if one be published in the county which notice shall specify the places and the number of days that he will remain in each place. Under this section the county court may relieve the collector from visiting any municipal township in the county by an order of record before the notice is given. This section does not apply to delinquent personal taxes but only applies to taxes due that are not delinquent.

Section 11126, R. S. Missouri 1939, partially reads as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.: * * * * *

The above section does not apply to personal property and only applies to delinquent land taxes.

Since it is not the duty of a county collector to

publish notice of personal delinquent property taxes any contract for the publishing would be void and the county court cannot be compelled to pay for such publishing.

Article VI of Section 36 of the Constitution of Missouri reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

In construing this section the Supreme Court of this state in *Nodaway County v. Kidder*, 129 S. W. (2d) 857, paragraphs 2-4, said:

"County courts are courts of record, created and given jurisdiction to transact all county business, and to audit and settle all demands against the county. Article 6, section 36, Constitution of Missouri, Mo. St. Ann. Sec. 2078, R. S. Mo. 1929, Mo. St. Ann. section 2078, p. 2658. The above statute providing for settling and auditing claims against the county applied only to lawful demands and does not authorize the county court to audit and settle claims arising on void contracts. *Hillside Securities Co. v. Minter*, 300 Mo. 380, 397, 254 S. W. 188, 193. A County Court does not act judicially in auditing and approving claims presented against the county, or in auditing warrants issued in payment thereof, and its action is not final in the sense that a judgment of a court is final. *Jackson County v. Fayman*, 329 Mo. 423, 44 S. W. 2d 849, 852; *State ex rel. West v. Diemer*,

August 6, 1941

255 Mo. 336, 351, 164 S. W. 517, 521. The fact that said statements, presented by Judge Kidder, were audited and allowed by the County Court, and that warrants were ordered to be issued in payment of said statements, was not binding on plaintiff."

Under the above holding it specifically held that the statute providing for settling and auditing claims against the county applied only to lawful demands and does not authorize the county court to audit and settle claims arising on void contracts. The court in that case in paragraphs 5-7, further said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

The above holding specifically held that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. Under the facts stated in your request there was no provision

authorizing the publishing of delinquent personal taxes and any contract made by the collector of revenue would not be binding upon the county court. In the case of Jackson County v. Fayman, 44 S. W. (2d) 849, paragraph 1, 1. c. 852, the court said:

"By our Constitution, county courts are created and are given jurisdiction to transact all county business. Article 6, section 36. By statute, section 2078, R. S. 1929, such courts are given power 'to audit and settle all demands against the county.' And section 12162, R. S. 1929, provides that 'the county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts.' The county court, when it ascertains any sum of money to be due from the county, shall order the clerk to issue a warrant in a prescribed form. Section 12163, R. S. 1929. And the county treasurer 'shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court.' Section 12136, R. S. 1929."

The above holding construed Article VI, Section 36 of the Constitution as to the power of the county court to audit and settle all demands against the county.

In your request you state that One Hundred Dollars was allowed in your 1941 budget for advertising. It is presumed that the One Hundred Dollars allowed in your budget for advertising was for lawful advertising, such as notice to taxpayers whose taxes are not delinquent to appear at a certain place and time to pay the collector, and is also for the purpose of paying the legal advertisement of delinquent land taxes.

Mr. Bill Burke

-7-

August 6, 1941

CONCLUSION

In view of the above authorities it is the opinion of this department that the Stone County Court cannot be compelled to pay the publishers of a notice to delinquent personal taxpayers that a suit would be started on all unpaid personal taxes July 15, 1941.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

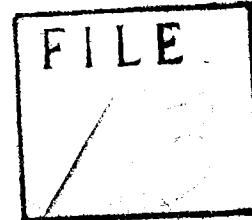
WJB:DA

BILLS AND NOTES:
BANKS:

A bank who is holder of a check in due course is not liable for an account of the payee in the misuse of the money.

August 15, 1941

Honorable Charles B. Butler
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Sir:

We are in receipt of your request for an opinion dated August 13, 1941, which reads as follows:

"I would like to have your opinion based on the following facts:

"Bessie Moore was County Clerk here until removed in this year by the County Court for failure to make a new bond.

"At the time of her removal she had embezzled funds belonging to the State, County of Ripley and Doniphan Consolidated School District.

"Mr. Williamson was prosecuting attorney at the time she embezzled more than one thousand dollars from the sale of hunting and fishing licenses. The bonding Company paid the shortage and no prosecution was had.

"After I was elected prosecuting attorney the State Treasurer sent Bessie Moore, County Clerk, five hundred dollars for Doniphan Consolidated School District. Mrs. Moore took this check to Poplar Bluff, Missouri, and cashed the same at the Bank of Poplar Bluff, received two hundred fifty dollars in cash and depositing the remainder to her personal account, which she later

August 15, 1941

drew out on personal checks.

"The check issued by the State Treasurer was made to Bessie Moore, County Clerk.

"I would like to have your opinion as to the liability of the Bank of Poplar Bluff to Doniphan Consolidated School District."

I am presuming that Bessie Moore, the County Clerk of Ripley County, endorsed the check described in the request in the same way that the check was made payable, that is, "Bessie Moore, County Clerk."

A check is defined under Section 3200, R. S. Missouri 1939, as follows:

"A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

It has been held in this state that a check is a negotiable instrument. It was so held in John P. Mills Organization v. Bell, 37 S. W. (2d) 680, 1. c. 682, pars. 1-4, where the court said:

"* * * It is the law that a check is a negotiable instrument and imports a valuable consideration. Nelson v. Diffenderffer, 178 Mo. App. 48, 51, 163 S. W. 271. * * * * *"

It was also so held in the case of Schroeder v. Seittz, 68 Mo. App. 233.

The fact that the check was payable to Bessie Moore, County Clerk, did not charge the bank with notice that the payee held the check for the Doniphan Consolidated School District. The mere description did not notify the bank that she had no right to cash the check or that the maker was under no obligation to pay it. It was so held in an

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action on a negotiable note where the word "trustee" followed the name of the grantee. The court in *State v. Cox*, 30 S. W. (2d) 462, 1. c. 466, said:

"We do not understand that in this proceeding we can quash a former opinion of the Court of Appeals. We are asked to quash only the present opinion. The former opinion is not involved. However, we may as well dispose of the point briefly. The ruling in that regard is said to be in conflict with the case of *Sanford v. Van Pelt et al.*, 314 Mo. 175, 282 S. W. 1022. What was held in that case was that a conveyance of real estate with the word 'trustee' following the name of the grantee was not mere *descriptio personae*, but was notice that the grantee held the property in trust for some other person, whose name was not disclosed. The word 'trustee' in the note here may be said to charge the purchaser of the note with notice that the payee held it in trust for some other purpose than for its own benefit, but it would not charge him with notice that the payee had no right to the note, or that the maker was under no obligation to pay it. It is immaterial to the maker who is beneficiary in the note so long as he is liable. That is the distinction drawn by the Court of Appeals on that point (222 Mo. App. 1194, 4 S. W. (2d) 864), and it does not conflict with any ruling of this court."

It has also been held in this state that the doctrine of notice, as it affects good faith of transactions generally, does not apply to negotiable commercial paper, such as a check. It was so held in *Dull v. Johnson*, 106 S. W. (2d) 504, 1. c. 508, pars. 4, 5-7, where the court said:

"To constitute notice of infirmity or defect of title, the person to whom a note is negotiated must have had actual

knowledge of the infirmity or defect or knowledge of such facts that his action in taking the note amounted to bad faith. Section 2684, R. S. Mo. 1929 (Mo. St. Ann. section 2684, p. 676), Union National Bank v. Fox (Mo. App.) 9 S. W. (2d) 1070.

"What defense do plaintiffs interpose against the note for \$38.63? Apparently, in the trial court they proceeded on the theory that, since Thomas B. Johnson purchased said note the following morning after it was executed, and that since C. L. Prock stayed in the office of Ralph Johnson a part of the time and frequently dealt with the Johnsons, the presumption arose that defendants and C. L. Prock were partners or were acting in concert. The only testimony that we are able to find in the record upon which such assumption might be based is that of I. E. Dull, when referring to a trade that he had made, as follows: 'Mr. Prock represented me in the deal and Ralph Johnson represented the other party. Mr. Prock stayed up there in Johnson's office.' This statement is too vague to have any probative force. The good faith of the transaction is the only subject of inquiry. In the case of Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 149, 40 Am. St. Rep. 373, the court said:

"In general one will be charged with notice of a fact who has information which should put him upon inquiry if, by following up such information with diligence and understanding, the truth could have been ascertained. It is now well settled in this state, however, that the doctrine of notice, as it affects the good faith of transactions generally, does not apply to negotiable commercial paper. "Both upon principle

and authority," says Wagner, J., "and from the experience of jurists and commercial men, and the interests of the affairs of business life, it is safe to say that the liberal doctrine which promotes the free circulation of negotiable instruments is the best, and that the good faith of the transaction should be the decisive test of the holders of rights." *Hamilton v. Marks*, 63 Mo. (167) 178. Since the decision in that case it has been settled law in this state "that the consideration of negotiable paper in the hands of a bona fide holder for value before maturity cannot be inquired into. Mala fides alone can open the door to such inquiry. Gross negligence even is not sufficient; actual notice of the facts which impeach the validity of the note must be brought home to the holder." *Mayes v. Robinson*, 93 Mo. (114) 122, 5 S. W. 611.'

"Mere knowledge of facts which would ordinarily put one on inquiry will not do * * * and it is well settled that mere suspicion that a negotiable note is without consideration, or was obtained by fraud, brought home to the transferee before he acquires the note, will not be sufficient to defeat a recovery.' *First National Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636, 638; *Reeves & Son v. Letts*, 143 Mo. App. 196, 128 S. W. 246."

One of the earliest cases in this state in reference to the descriptive name of the payee on a promissory note was the case of *Fletcher v. Schaumburg*, 41 Mo. 501, where the court said:

"This was an action brought by the plaintiff against the defendant on a negotiable promissory note. The note was given by the defendant for the purchase of land sold in partition

by the sheriff, and made payable two years after date to 'James Castello, Shff.,' and negotiable and endorsed by the payee before maturity. The endorsement on the back of the note had the designation 'Shff.' appended to Castello's name, but there was nothing to show that the plaintiff as endorsee had any other notice that the payee held it in a fiduciary capacity, or that in its sale he was committing a breach of trust. The defendant resisted the payment of the note and claimed an interest in the proceeds as one of the distributees for whose benefit the land was sold. In the Circuit Court, the defendant's counsel asked the court to declare the law to be that the note itself with the endorsement thereon was sufficient to impart notice to the plaintiff that the money was payable to the sheriff Castello in his official capacity as such, which declaration the court refused to give, and then found for the plaintiff.

"The instrument sued on is simply a negotiable promissory note made payable to Castello, and the abbreviation 'Shff.' added to his name is merely descriptive. There is nothing in the body of the note or the endorsement to apprise any one that it belonged to any other person than the payee, or that he held it in any capacity other than as his individual property. To have given the instruction prayed for by the defendant would have been going farther than any case that we are aware of has ever gone, and would have overturned principles of law long settled."

The bank in this case was a holder in due course of a check made payable to Bessie Moore, County Clerk, and so endorsed by her. The fact that she received Two Hundred Fifty Dollars in cash and deposited Two Hundred

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Fifty Dollars to her personal account cannot be used against a holder of a check in due course. The statutes of the State of Missouri, especially Section 3067, R. S. Missouri 1939, define a holder in due course. The transaction in your request, under the above definition, shows that the bank took the check as a holder in due course.

The St. Louis Court of Appeals in the case of United States Fidelity & Guar. Co. v. Mississippi V. T. Co., 153 S. W. (2d) 752, in paragraphs 6, 7, 1. c. 757, in defining a holder in due course, said:

"The relationship between a depositor and a bank or trust company is ordinarily that of debtor and creditor. At least since the case of Paul v. Draper, 158 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296, the legal effect of a deposit is a loan to the bank, and this is equally so whether the deposit is of trust moneys or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund. If the deposit is of trust funds, the bank simply becomes indebted to the depositor in his fiduciary capacity. This is not only the law in our State but prevails generally. 3 R. C. L. section 149 p. 521. And it has been repeatedly held by our courts, as in the case of Farmers' Trust Co. v. Tootle-Lacy Nat. Bank, 332 Mo. 82, 56 S. W. 2d 769, that the deposit of trust funds creates only the relation of debtor and creditor between the bank and the trustee.

"And while commenting on these general principles of law it is well to bear in mind the provisions of our negotiable instrument statutes, Chapter 14, section 3016 et seq., R. S. 1939, Mo. St. Ann. section 2629 et seq., p. 643 et seq., and especially the following sections:

"Sec. 3067 (section 2680). Holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

In the same case the court cited a case decided by our Supreme Court which was the Gate City Bldg. & Loan Ass'n. v. National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 47 Am. St. Rep. 633, 27 L. R. A. 401, wherein the facts of the case were commented upon as follows, page 759:

"In the case of Gate City Bldg. & Loan Ass'n v. National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 47 Am. St. Rep. 633, 27 L. R. A. 401, we have a decision of our Supreme Court which we think controls. The secretary of the building and loan association received \$4,000 by way of a check from a customer, payable to the association. The secretary, Harris, indorsed the check, and deposited it to his personal account in the Bank of Commerce. The bank credited his account, collected the check from the clearing house, and thereafter Harris drew out the money on his personal checks, embezzled the money, and absconded. The loan association made demand on the bank for the return of the money, and sued for its recovery in an action for money had and received. There the court said:

"The law of the case seems to be within a narrow compass. There is not a

particle of evidence tending to prove that the bank did not act in perfect good faith in this transaction, in respect of which it occupied no fiduciary relation to plaintiff. It does not appear from the evidence to what purpose the proceeds of the check were ultimately applied by Harris--it may have been to his own or to those of the association--nor is this a matter of any importance upon the present issue. The bank was not responsible for the proper application of those proceeds by him. R. S. 1889, section 8691. The check was a negotiable instrument. Famous, etc., Co. v. Cross-white, 124 Mo. 34 (27 S. W. 397, 26 L. R. A. 568, 46 Am. St. Rep. 424). The credit given to the account of Harris was the same as if the money had been paid him on the check and had been immediately placed back by him and credited on his own account. Benton v. German American Nat. Bank, 122 Mo. 332 (26 S. W. 975); Oddie v. (National City) Bank, 45 N. Y. 735 (6 Am. Rep. 160); 2 Morse on Banks and Banking (3d Ed.) section 451. The bank thereby became a purchaser for value, in the ordinary course of business, of the instrument, and entitled to collect the proceeds thereof to its own account if it acquired plaintiff's title by indorsement. So that the only question is: Did Harris in his official capacity as secretary have power to transfer the check by indorsement. * * * If the association has met with any loss by reason of a misapplication of that fund, it must be charged to a breach of the trust imposed in one of its officers, and the neglect of duty by the others."

The holding in the case cited was to the effect that where the bank acted in perfect good faith in the transaction it occupied no fiduciary relation to the plaintiff, which under the facts in your request, would have been the Doniphan Consolidated School District.

Hon. Charles B. Butler

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CONCLUSION

In view of the above authorities it is the opinion of this department that the Bank of Poplar Bluff, not benefiting or being a part of the fraudulent transaction set out in your request, is not liable in any way to the Doniphan Consolidated School District by reason of cashing a Five Hundred Dollar check from the state treasurer payable to Bessie Moore, County Clerk. The fact that the check was originally sent by the state treasurer for the Doniphan Consolidated School District does not alter the situation.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

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SCHOOLS: A person elected director is entitled to serve if he paid state and county taxes before qualifying.

October 3, 1941

Mr. J. A. Burnside
County Superintendent of Schools
Carrollton, Missouri



Dear Sir:

This department is in receipt of your request for an opinion several days ago, in which you make the following inquiry:

"I have a rural school board member who was elected at the April 1st school election. He had not paid his taxes for 1940 at the time. He paid a personal property tax on April 21, 1941, which covered his personal tax for 1940. He was sworn in within 4 days of the annual meeting and another board member protested the legality of his serving. He paid his tax and was sworn in again by the clerk before another witness on April 21st. Is he eligible to serve as director?"

This question involves an interpretation of Section 10420, R. S. Missouri, 1939. The pertinent part of this section is as follows:

"The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next

preceding his, her or their election,
and who shall have resided in this
state for one year next preceding his,
her or their election or appointment,
and shall be at least twenty-one years
of age. * * * * *

It appears to be no disqualification of the director in question except as to the payment of taxes. Therefore, we are concerned with the clause, "who shall have paid a state and county tax within a year next preceding his, her or their election." This section was construed by the Supreme Court of Missouri. In the liberal decision of the case of State ex rel. v. Heath, 132 S. W. (2d) 1001, We herewith quote from the decision, l. c. 1005:

"It is clear that, under the rule of State ex inf. Bellamy ex rel. Harris v. Menengali, supra, respondent was a resident tax payer of the district because he had paid taxes for 1935 (based on June 1, 1934, assessment) and continued to own the same taxable property in the district at all times thereafter. Even though the assessor failed to include him in his assessment of June 1, 1935, this omission did not relieve him of his obligation to pay the 1936 taxes, and these taxes could be collected by following the statutory procedure. Secs. 9788, 9789, 9810, 9816, and 9979, R. S. 1929; Mo. St. Ann. Secs. 9788, 9789, 9810, 9816, 9979, pp. 7896, 7909, 7914, 8018. Surely sec. 9287, Mo. St. Ann. Sec. 9287, p. 7148, was not intended to make eligibility depend upon the payment of any state and county tax within one year's time before the date of the election. To so construe it would make one eligible, who paid, within such period of one year, a tax three or four years delinquent, even though he had paid no taxes

for any other year after such tax paid became delinquent and had no taxable property thereafter. In view of our method of assessing and collecting property taxes and the time when common school elections are held, we think it contemplated the payment of the current taxes payable during the calendar year preceding the school election since no other property taxes could become due between the end of that year and the school election. We, therefore, hold that the reasonable construction of the statutory requirement, 'shall have paid a state and county tax within one year next preceding his * * * * * election,' is that a person, to be eligible to serve as a common school director, shall have paid the state and county tax which was due and payable within the calendar year next preceding his election. See sec. 655, R. S. 1929, Mo. St. Ann. Sec. 655, p. 4899. We further hold that a person who owns taxable property and owes taxes on it which are due and payable during the calendar year preceding his election, would be eligible to take the office of common school director if he pays such taxes at least prior to the time prescribed for taking his oath of office. It follows that the statute did not prevent respondent from taking office under the circumstances shown by the agreed facts."

It appears from your letter that the director paid the taxes on his personal property before being sworn in as a director. He later paid another tax or, we assume, a property tax and was again sworn in by the Clerk as a director. If the personal property tax was paid before he was sworn in as a director, then we are of the opinion, according to the above decision, that he was eligible to serve as a director. The payment of a personal property tax, in our

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opinion, would qualify him as the payment of personal property taxes, if on an assessment, constitutes the payment of a state and county tax within the meaning of the statute. The decision, from which a portion is quoted above, also states that Section 10420 should receive a liberal construction in favor of the right of the people to exercise the freedom of choice in the selection of officers.

In view of the above decision, we are further of the opinion that in either event, the director in question is now eligible to serve on the school board.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

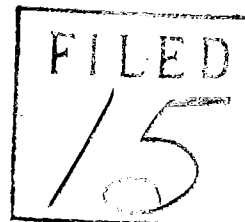
OWN/rv

TAXATION: Regulation of State Auditor imposing a use tax on
SALES TAX: property bought outside the State of Missouri and
on property bought in Missouri by non-resident,
where property is not consumed in Missouri but is
bought with intention of transporting to another
state for use is invalid.

February 8, 1941

Mr. George A. Catts
Executive Manager
Kansas City Chamber of Commerce

Mr. Thomas N. Dysart
President
St. Louis Chamber of Commerce



Gentlemen:

Your inquiry of January 2, 1941, is acknowledged,
wherein you state:

"The Kansas City and St. Louis
Chambers of Commerce have had
hundreds of calls from members
relative to the rule of the State
Auditor, administering official
of the two per cent Missouri Sales
Tax, broadening the taxable base
of interstate transactions under
that law. The rule, which the
State Auditor says is based upon
a decision of the Supreme Court
of the United States in the case
of McGoldrick against the Berwind-
White Coal Mining Company, in sub-
stance levies a use tax upon
Missouri business complementary
to the sales tax.

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"In view of the fact that the Missouri Legislature in 1939 considered and refused to pass a use tax law, in addition to considering and passing a sales tax act, the rule of the State Auditor applying a use tax by regulation creates a question which can be settled only by the Attorney-General.

"The members of both the Kansas City and the St. Louis Chambers have asked whether a regulation of the State Auditor is sufficient to enforce collection of a use tax which had been rejected by the law-making body of the state.

"Because of this situation, the two Chambers of Commerce jointly are desirous of ascertaining whether or not you, as Attorney-General, have ruled on the question. If you have, is a copy of your opinion on the subject available? If you have not ruled on the question, and it is proper to do so, the two Chambers will appreciate it if you can indicate in an opinion whether the State Auditor is within his authority in enforcing a use tax which has been rejected by the Legislature. An opinion by you will be of vital concern to thousands of taxpayers throughout Missouri.

"The Kansas City and St. Louis Chambers of Commerce make this inquiry and request jointly."

While Section 11274, R. S. Mo. 1929, requires this office to give written opinions to certain public officials

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only, but due to the wide-spread effect and public interest in the ruling referred to in your letter, this Department feels it proper to comply with your request.

Effective as of October 1st, 1940, Honorable Forrest Smith, State Auditor, promulgated the following "Rule and Regulation":

"1. Goods coming into this State.

"When tangible personal property is purchased for use or consumption in this state and (1) the seller is engaged in the business of selling such tangible personal property in this state for use or consumption and (2) delivery is made in this state, such sale is subject to the sales tax. Such sale is taxable regardless of the fact that the purchaser's order may specify that the goods are to be manufactured or procured by the seller at a specified point outside this state and shipped directly to the purchaser from the point of origin.

"If the conditions above are met it is immaterial (1) that the contract of sale is closed by acceptance outside the state or (2) that the contract is made before the property is brought into the state.

"Delivery is held to have taken place in this state (1) when physical possession of the tangible personal property is actually transferred to the buyer within this state or (2) when the tangible personal property is placed in the mails at a point outside this state directed to the buyer

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in this state or placed on board a carrier at a point outside this state (FOB or otherwise) and directed to the buyer in this state.

"Engaging in business in this state shall include any of the following methods of transacting business; maintaining directly, indirectly or through a subsidiary an office, distribution house, sales house, warehouse or other place of business or having an agent, salesman or solicitor operating within the state under the authority of the seller or its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this state."

The Missouri Sales Tax Act has, since its inception in 1934 (Laws of 1933, Extra Session, page 156) and does now levy and impose a tax "(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged," and provides (Laws of 1939, page 861) as follows:

"The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. * * *".

A "Sale at retail" is defined as:

"'Sale at retail' means any transfer made by any person engaged in business

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as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. * * *

Section 7 of the Act (Laws of 1939, page 861) provides:

"For the purpose of more efficiently securing the payment of and accounting for the tax imposed by this Act, the State Auditor shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this Act, and may employ such employees and attorneys as may be necessary to carry out the provisions of this Act, and shall fix their duties, titles, expenses and compensation within the limits of the appropriation acts. * * *

When the Act was amended in 1937 the exemptions (Laws of 1937, page 558) from the tax included "retail sales as may be made between this state and any other state of the United States * * *."

Section 3 of the present statute (Laws of 1939, page 860) in part provides:

"There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be

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made between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. * * *

The above "Regulations" have never been passed upon by a court of last resort in this State. They present a question that cannot be answered by the decisions of other forums, due to the difference in the various statutes and ordinances levying the tax. An examination of the statutes of twenty-eight states and several city ordinances, including an ordinance of New York City, discloses only one state other than Missouri that has exempted from the tax "transactions between this state and any other state." The above words are used in a statute of West Virginia, and, while the exemption clause of that statute has evidently never been passed upon, the statute was considered by the Supreme Court of the United States, as will be presently noted.

The usual exemption provision found in sales tax laws saves from taxation "retail sales which the state is prohibited from taxing under its Constitution and the Constitution and laws of the United States." It is apparent that such an exemption is much more restricted than the Missouri exemption.

In addition to a sales tax law at least eighteen states have enacted so-called "use tax" laws whereby the use, storage and consumption of tangible personal property was taxed. This tax was, no doubt, designed to supplement sales

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tax incomes by exacting a tax from tangible personal property sold in interstate commerce, after the goods have come to rest within the taxing state.

The "Regulation" above set out is an apparent attempt to impose a "use" or "consumption" tax and its effectiveness of necessity must be gaged by the Missouri Sales Tax law and its proper construction.

The construction of a statute involves, among other things, the intention of the Legislature in passing the Act.

"* * * 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically", is properly given consideration.' * * *"

(Artophone Corporation v. Coale,
133 S. W. (2d) 343, 1. c. 347.)

In this connection it is well to bear in mind that the Sixtieth General Assembly amended the Sales Tax Act in 1939, but refused to pass Committee Substitute for House Bill No. 2, which sought to impose an excise tax "upon the storage, use, or other consumption in this state of tangible personal property."

It is a well settled rule in this State that "the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and all such laws are to be construed strictly against such taxing authority," (State ex rel. Ford Motor Co. v. Gehner, 27 S. W. (2d) 1, 3 (Mo. Sup.)) and that "generally it may be said that

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taxing statutes are to be strictly construed in favor of the taxpayer and the fact that a particular subject of taxation, claimed to be taxed, is within the purview and intendment of the taxing statute must clearly appear from the statute so to be." (Artophone Corporation v. Coale, 133 S. W. (2d) 343, 347 (Mo. Sup.).)

The Missouri Sales Tax is an excise tax (State ex rel. Missouri Portland Cement Co. v. Smith, 90 S. W. (2d) 405) upon "every retail sale in this state" and is not a so-called "use" tax.

In passing upon a sales tax statute similar to ours, when an attempt had been made to collect a tax on certain articles purchased by a resident in a foreign state and brought into the State of Arkansas, the Supreme Court of Arkansas in the case of Mann v. McCarroll, 130 S. W. (2d) 721, held such property not subject to the tax and said, 1. c. 726:

"* * * But it is a fact, not now open to controversy that if the legislature did intend to levy and provide machinery for the collection of a use tax that fact was so hidden and concealed as not to be readily discoverable. As we have heretofore stated, it is conceded that if this provision of the act must be treated as a sales tax on sales made in other states, it is illegal and unenforcible. It is on that account that the commissioner of revenues now argues that it is a use tax, although the language used in this provision refers only to a sales tax.

"It may be said in passing that a sales tax and a use tax are by no means identical. The rule is that in a sales tax the property sold changes hands. There is a change of ownership.

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The new owner who purchases pays the sales tax to the seller who becomes the agent for the state for its collection.

"The buyer pays the tax as an incident to the price. In a use tax there is no change of possession, no change of ownership, but the owner pays this tax which is an excise or exaction charged because of the owner's privilege to exercise or assert some of the elements of ownership over the property. In the use tax the seller does not collect the tax as an agent for the state, but the buyer, according to the contention made here, must account for the property which he actually owns and pay a tax allegedly of the same percentage as a sales-tax. * *"

The distinction was made in New York between a sales tax and a use tax in the case of Williamsburg Power Plant Corporation, 7 N.Y.S. (2d) 326, 330, holding as follows:

"A tax on personal property situated or owned within New York City at rate of 2 per cent of value of property as determined by actual price paid for property was an 'indirect tax,' and to that extent an 'excise tax,' and was a tax upon the consumption of or the opportunity to 'use' property and was not a tax on the 'transaction' of purchase, * * * *."

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As the Missouri sales tax is an excise tax the Constitutional provision against exempting property from taxation does not apply and the Legislature may exempt any sale from the tax that it cares to exempt. State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093; Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S. W. 196; Bacon v. Ranson, 331 Mo. 985, 56 S. W. (2d) 786; State v. Parker Distilling Co., 236 Mo. 219, 139 S. W. 453 and State ex rel. Missouri Portland Cement Co. v. Smith, 338 Mo. 409, 90 S. W. (2d) 405, 1. c. 407.

The Missouri law requires the transaction to be a complete transaction within its confines before the transaction is taxable, as the tax imposed is one "upon every retail sale in this State of tangible personal property" and exempts "sales * * * made between this state and any other state of the United States."

The Supreme Court of the United States in passing upon a West Virginia statute in the case of James v. United Artists Corporation, 305 U. S. 410, 59 Supreme Court Rep. 272, that imposed a tax "upon every person engaging * * * within this state in the business of collecting incomes from the use of real or personal property * *" held:

"* * * We are not here concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it, or whether the solicitation of the contracts may be taxed. No such taxation is attempted by Sec. 2-(1). The taxing provisions of Sec. 2 are restricted in their application to various enumerated classes of activities within the state, one of which, specified in Sec. 2-(1), is that of engaging there in the business of collecting incomes. The conduct of such a business or activity by appellee requires its presence

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there, or that of its agent, and the collection of income within the state by the one or the other. As it is stipulated and found that appellee carries on no business within the state, except such as is involved in solicitation of the contracts, and has no collection agent there, and as the exhibitors there are bound to and do pay all sums due under their contracts to appellee at points outside the state, we can find no basis for saying that it is engaged in collecting income within the state, either as a business or otherwise.

* * * * *

"* * * The emphasis placed by Sec. 2 and its various subsections on the carrying on of business or other specified activities within the state as the condition of laying the tax, and the fact that the exhibitors' receipts are taxed in their hands under Sec. 2-(g), lead to the conclusion that there was no legislative purpose in cases like the present to tax gross receipts apart from the business or activity of collecting them, carried on within the state. * * *"

In the above case it was sought to tax the corporation whose agent solicited for orders within the state, which orders were accepted by the office of defendant in another state and collections were remitted to that office.

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The words of exemption: "such retail sales as may be made between this state and any other state of the United States" means "sales between citizens of this state and citizens of any other state of the United States" - in short, interstate sales. This wording is comparable to the wording of Clause 3 of Section 8 of Article I of the United States Constitution. It has been uniformly ruled that the latter provision means: "commerce with the citizens of foreign nations, among the citizens of the several states * * *" - interstate commerce. An attempt to limit the above exemption clause of the Missouri statute to "sales made between the State of Missouri and any other state" would be absurd. It is common knowledge that one state rarely sells property to another state, while citizens of one state continuously trade with citizens of other states.

The "regulations" attempt to tax property transported from another state or nation to a resident of Missouri upon an order accepted in the foreign state or nation, although solicited in Missouri, and is ineffective as such transactions are "sales * * * between this state and any other state" and do not constitute a "retail sale in this state". State ex rel. Telegraph Co. v. Markay, 110 S. W. (2d) 1118, 341 Mo. 980; State ex rel. Parish v. Young, 327 Mo. 909, 1. c. 915, 38 S. W. (2d) 1021; State v. Best & Co., 194 La. 918, 195 So. 356; Artophone Corporation v. Coale, 133 S. W. (2d) 343; Waseca v. Brauer, 288 N. W. 229 (Minn.); James v. United Artists Corp., 305 U. S. 410, 59 Sup. Ct. Rep. 272 and Mann v. McCarroll, 130 S. W. (2d) 721.

Due to the particular wording of the Missouri Sales Tax Act we are not concerned with the right or power of Missouri to tax interstate commerce, or the storage, use or consumption of personal property in Missouri. The right to tax interstate commerce is one question and whether the Legislature in fact laid a tax upon interstate transactions is another and distinct question.

This distinction has been pointed out by the Supreme Court of Missouri. In the case of Artophone Corporation v. Coale, 133 S. W. (2d) 1. c. 347, in passing upon a provision

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of the income tax law, it was held:

"We need not here discuss or consider the question whether or not the Legislature could tax the entire net income from all sources of a domestic corporation. The question is, does the present law do so?"

Again, in State v. Shell Pipe Line Co., 139 S. W. (2d) 510, 1. c. 519, it is said:

"It is of slight consequence that the state may have the power to levy a franchise tax on a foreign corporation authorized to transact business in Missouri, but which may not be doing so, unless the state has exercised that power by appropriate legislation."

The "regulation" is evidently based upon the holding of the United States Supreme Court in the case of McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33, 84 L. Ed. 565. In that case the court considered and held good an ordinance of the City of New York imposing a tax "upon purchasers for the consumption of tangible personal property" in the City of New York. While the decision is far-reaching the ordinance involved is so different from the Sales Tax Act of Missouri that it affords little support to the "regulations" here involved. The decision turns upon the right of a state or city to tax tangible personal property brought into such state or city from another state upon a contract entered into with a resident agent of the seller in the taxing state or city, which contract provides for the delivery of the property in the territory of the taxing power. The ordinance does not exempt interstate commerce and the tax was imposed by legislation (a city ordinance) and not by rule or regulation of an administrative officer.

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While Missouri's sales statutes provide that the State Auditor may make rules and regulations for the enforcement of the act, such provisions do not authorize the Auditor to collect a tax not specifically laid by the Legislature, as the Legislature only may impose a state tax. Article X, Section 1, Constitution of Missouri; State ex rel. Parish v. Young, 38 S. W. (2d) 1021, 327 Mo. 909 1. c. 915.

The right to levy a tax may not be delegated by the Legislature to an administrative officer. Merchants Exchange v. Knott, 212 Mo. 616; State ex rel. Field v. Smith, 329 Mo. 1019, 1. c. 1027; Little River Drainage District v. Lassater, 325 Mo. 1. c. 502-3.

CONCLUSION.

It is the conclusion of this Department that the above quoted "regulation" in so far as it attempts to tax the sale of tangible personal property outside the State of Missouri and delivered in Missouri to the purchaser, even though purchased upon an order given to an agent of the seller in Missouri, but where the order is finally accepted in a foreign state, and also sales of tangible personal property in Missouri to a citizen of another state and where such property is not purchased for consumption in Missouri but for the purpose of being transported by the seller to the other state is invalid.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

VCT:CP

CONVICTS: Citizenship not lost by conviction subsequently
held void.

July 7, 1941

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Honorable Patrick J. Cavanaugh
Assistant Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri



Dear Sir:

Under date of June 27, 1941, you wrote this office
requesting an opinion as follows:

"At the request of a certain
individual in the City of St. Louis,
I am writing you asking you for an
opinion relative to this individual's
status.

"On March 19th, 1925 this man was
arrested in St. Louis, and taken back
to St. Genevieve, Missouri charged
with burglary in the second degree
and larceny. He at that time was about
20 years of age, and he informs me that
the Prosecuting Attorney there assured
him that if he would plead guilty and
save the State time and trouble that
he would give him a small sentence, that
is, two years. Instead of that however,
it develops that after pleading guilty,
his punishment was assessed at seven
years for burglary and five years for
larceny, a total of twelve years. Follow-
ing this, he engaged counsel, sued out
a writ of error to the Supreme Court
to the Circuit Court of St. Genevieve
County. Upon the matter being heard
by the Supreme Court the judgment of the
Circuit Court of St. Genevieve County

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was reversed, and following that no further action was taken by the Prosecuting officials of that County against this defendant. During the time that this matter was pending before the Supreme Court, this defendant was unable to make bond, and as a result he served more than eighteen months in the Penitentiary pending a hearing on his appeal in the Supreme Court.

"The point in question is this: With the facts that have been related to you, is this man's status that of an ex-convict?"

In response to a letter from this office requesting additional information, under date of July 1, 1941, you furnished us with the additional information that the person was Thomas E. Jordan, and that the case was No. 27515, decided at the October term, 1926, of the Supreme Court. This case is reported in 289 S. W. 540, and was reversed and remanded, and the last paragraph is herein set out:

"The information does not state whether the Grass & Greminger Mercantile Company was a copartnership or a corporation or the trade-name of an individual. Plaintiff in error assigns this as a fatal defect. The state concedes error, citing State v. Hurt (Mo. Sup.) 285 S. W. 976; State v. Henschel, 250 Mo. 263, 269, 157 S. W. 311; and State v. Jones, 168 Mo. 398, 68 S. W. 506. These and other cases hold that the information is fatally defective for the reason indicated and that the defect may be raised for the first time in this court.

"The judgment is accordingly reversed, and the cause remanded."

Section 4561, Article V of Chapter 31, R. S. Missouri, 1939, relates to the disqualifications of persons convicted of burglary and larceny and certain other offenses. This section is as follows:

"Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years: Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."
(Underscoring ours)

There is an additional section of the statutes relating generally to persons sentenced to the penitentiary. This is Section 9225, Article I of Chapter 48, R. S. Missouri, 1939. However, as this section deals generally with the subject and section 4561 deals specifically with the subject of the offense involved in your opinion request, this last section is not set out.

In the early case of Ritter v. The Democratic Press Company, 68 Mo. 458, the Supreme Court had before it the question of the competency of a witness who had been convicted of a felony by the trial court, but whose appeal is pending at the time he was offered as a witness. The court said, at l. c. 460:

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"One of the principal grounds of complaint here; is that Saunders, one of the co-defendants of plaintiff in the former action, was not allowed to testify. He had been indicted for obtaining money under false pretenses, and had been convicted by a jury, but had appealed to this court and obtained a supersedeas. He was brought to court, on the trial, by the sheriff, and offered as a witness, but the court excluded him. Our statute (Wag. St. 67, p. 465) provides that 'every person who shall be convicted of arson, burglary, robbery or larceny in any degree in this chapter specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter shall be incompetent to be sworn as a witness, &c.' Section 47 provides that 'every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument or obtain from any person any money, &c. shall, upon the conviction thereof, be punished in the same manner and to the same extent as for feloniously stealing the money, &c.' The only question is whether Saunders, sentenced as he had been to the penitentiary, though he had appealed to this court, where the judgment was reversed, was at the time he was offered as a witness, a competent one. We think the circuit court properly excluded him. He was convicted of a crime which disqualified him as a witness, and the subsequent reversal of that judgment by this court, could not be anticipated by the circuit court." (Underscoring ours)

In the case of Scott v. American Express Co., decided by the Springfield Court of Appeals, 233 S. W. 492, the question was presented to the court as to the effect of the death of one who had been convicted by the trial court during the pendency of an appeal. This was a case involving the payment of a reward. At pages 492-493, the court said:

"If the appeal of Buntyn and his death pending that appeal to the Supreme Court abated the proceedings in such a sense as to take away from the verdict of the jury and the sentence of the trial court thereon their character as a conviction of Buntyn under the terms of the offer of reward, then plaintiff's cause of action never accrued, and the judgment should have gone for defendant in this case. In civil actions, the judgment of the trial court remains in force as a valid judgment, though its enforcement may be suspended by giving bond, and the death of a party pending an appeal does not ordinarily abate or destroy the cause of action. In criminal cases, however, the death of the defendant pending an appeal from a judgment of conviction abates the prosecution or cause of action entirely. Town of Carrolltown v. Rhomberg, 78 Mo. 547; State v. Perrine, 56 Mo. 602.

"Buntyn's death pending his appeal from a judgment of conviction against him abated the prosecution and cause of action against him for the alleged crime of which he had been convicted in the trial court, and for that reason, plaintiff's cause of action never finally accrued. The offer of the reward and plaintiff's services in procuring the arrest and conviction of Buntyn constituted a contract which is to be construed by the

same rules as any other contract.
Hoggard v. Dickerson, 180 Mo. App.
70, 165 S. W. 1135."

And further, on page 493:

"The Supreme Court of Kentucky held in *Stone v. Wickliffe*, 106 Ky. 252, 50 S. W. 44, that liability on an offer of reward for arrest and conviction did not attach until after the affirmance of the judgment by the Supreme Court. The party claiming the reward in that case brought suit while the appeal in the criminal case was pending, and the court held he could not recover, for the reason that there had been no final conviction such as to make the party offering the reward liable therefor. In the case of *Baker v. M. W. A.*, 140 Mo. App. 619, 121 S. W. 794, an insurance policy had been issued on the life of Baker, who was a member of the fraternal order, and this policy, as well as the by-laws of the order, provided that any member and policy holder who should be convicted for felony should be automatically expelled, and his policy become null and void. Baker, who was a member and policy holder, was convicted of a felony, and appealed to the Supreme Court of this state, and pending that appeal he died. The widow, who was the beneficiary in the policy, brought suit, and the defense was made that Baker had been convicted of a felony, and for that reason, his policy had been annulled. The St. Louis Court of Appeals, held, however, that the conviction was not final, and that the policy must be paid. These cases uphold appellant's contention in this case, and we think rightly so."

This case was later before the Supreme Court upon a writ of certiorari and the judgment of the Springfield Court of Appeals was upheld.

In the case of State ex rel. Scott v. Cox, 243 S. W. 144, at l. c. 146, the Supreme Court used the following language:

"It will be observed that we did not attempt to define the word 'convicted' as used in the statute to which reference is made in the opinion. We assumed that it meant an adjudication of guilt, a judgment based on a plea of guilty, or a verdict of guilty; and we further assumed that upon the pronouncement of such judgment the civil disabilities imposed by the statute immediately followed as an inevitable sequence. What we did decide was that such a judgment remains in full force and effect, notwithstanding an appeal and a supersedeas bond, unless and until it is set aside or reversed by the appellate court. We are unable to see anything in the decision with which that of the Court of Appeals under review is in conflict. Assuming that it contains an implied adjudication of 'convicted' as used in the statute to which reference is made, still the word 'convicted' or 'conviction,' when used in a statute or contract, may have any one of several meanings, dependent upon the context, the subject-matter, and the purpose to be effected. In these respects the statute involved in that case and the contract of reward in this have nothing in common. The ruling in the former case cannot, therefore, be said to be upon a state of facts similar to that upon which the ruling under consideration was made. Putting aside, however, a mere superficial view

of the facts and looking to the underlying principles of law that were accepted as controlling in each of the two decisions we find that the rulings were these: In the Ritter Case we held that judgments of circuit courts in this state remain in force and effect, notwithstanding an appeal and supersedeas bond, unless and until reversed by the appellate court; and in this connection it should be noted that we have also held that a judgment upon reversal becomes not only non-existent, but as though it had never been. Hanser v. Bieber, 271 Mo. 326, 341, 197 S. W. 68. In the case under review the Court of Appeals ruled, following our decisions in State v. Perrins, 56 Mo. 602, and Carrollton v. Rhomberg, 78 Mo. 547, and that of the St. Louis Court of Appeals in Baker v. Modern Woodmen, 140 Mo. App. 619, 121 S. W. 794, that the death of a defendant in a criminal case, pending an appeal, with supersedeas, from a judgment of conviction, abates the proceeding, overthrows and destroys the cause of action, so that the judgment becomes not only nonexistent, but as though it had never been. There is no conflict. This assignment is therefore ruled against relator." (Underscoring ours)

A New York Case, People v. Van Zile, 141 N. Y. S. 168, seems to have presented a similar question for determination. We also quote from that case, at l. c. 169-170:

"The reversal of a judgment places the parties where they were before the commencement of the action. Hayden v. Florence Sewing Machine Co., 54 N. Y. 221; People v. McLaughlin, 150 N. Y. 365, at page 376, 44 N. E. 1017. The judgment of

conviction against the defendant for the crime of abortion some 20 years ago having been set aside by the Court of Appeals, there was no conviction against him, and he was justified in answering, as he did, that he had never been, convicted of a crime. The word 'conviction' in the question means conviction pursuant to law, not illegal conviction. I think it was prejudicial error for the court to allow the district attorney to show that the accused at one time had been illegally and wrongfully convicted of crime. This former conviction (?) could not have been proved in the ordinary way of introducing in evidence a certificate of conviction of defendant. The clerk of the court could have issued no such certificate, because of the fact that the conviction had been annulled.

"But it is urged that defendant opened the door to his evidence by reason of his being examined in his own behalf as a witness, and being asked and answering in the negative the question:

"'Have you ever been convicted of a crime, Doctor?'

"The argument advanced being that:

"'Past acts cannot be obliterated, but the legal effect of them can be.'

"The quotation just made is from the opinion in the case of People v. Price, 53 Hun, 185, 6 N. Y. Supp. 833. In that case it was held that the penalty for a second offense, prescribed by section 688 of the old Penal Code, could not be defeated by showing that defendant was pardoned after such previous conviction. The

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essential difference between a pardon and a reversal of judgment is that a pardon is not inconsistent with a conviction in fact and in law; whereas a reversal of a judgment of conviction is not only inconsistent with the conviction, but absolutely nullifies it, and places the accused in the position where he was before the trial, clothed with the presumption of innocence. And so in the case of *People v. Carlesi*, 154 App. Div. 481, 139 N. Y. Supp. 309, the court said:

"(The Pardon) did not obliterate the record of his conviction, or blot out the fact that he had been convicted."

"Of course not, because the pardon did not import, as the reversal did, nullification of the judgment of conviction."

CONCLUSION.

Under the statement of the facts contained in your two letters, it is the opinion of this Department that by entering a plea of guilty to an indictment or information, which was subsequently held invalid, and no further proceeding had in the matter, that the person referred to in your letters did not lose his citizenship.

APPROVED:

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

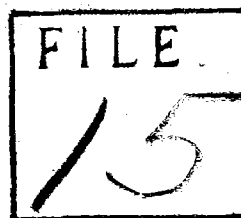
WOJ/rv

TAXATION AND REVENUE: Right of redemption of owner
after two year redemption
period.

✓ 1/2
August 28, 1941 4-24

Mr. W. H. Carney, Collector
Phelps County
Rolla, Missouri

Dear Mr. Carney:



We desire to acknowledge your letter request-
ing an opinion in regard to the Jones-Munger law, on Aug-
ust 26, 1941, which is as follows:

"I have a matter that has come up here in
which I am asking for an opinion from your of-
fice construing the Jones-Munger Tax Law.

"On the first Monday in November, 1937 I
held a sale as required under this law on de-
linquent land for taxes. At that sale, there
was a tract of 120 acres of land sold for the
back taxes amounting to \$164.35. The pur-
chaser bought the land for \$2.50. A certifi-
cate was issued to him calling for a deed at
the expiration of two years. At the end of
two years, he did not present his certificate
for his deed. Recently the owner of this land
appeared and offered to redeem the land from
the sale of taxes. He deposited with me the
amount of the bid together with the interest as
required by the statute and I notified the
holder of the certificate who had not yet pre-
sented his certificate for a deed and he refused
to accept the amount deposited with interest
and is now demanding his deed.

"Section 11,137, Revised Statutes of 1939
provides that in cases where lands have been
or may hereafter be sold for delinquent taxes,
penalty, interest and costs and a certificate

of purchase has been or may be issued, it is hereby made the duty of such purchaser, his heirs or assigns to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale. This said statute provides that on the failure of such purchaser, his heirs or assigns to do so, that the amount due the purchaser shall cease to be a lien on the lands purchased.

"Section 11,145, Revised Statutes of Missouri, 1939 provides that the owner or occupant of any land or lands sold for taxes or any other person having an interest in said lands may redeem the same at any time during the two years next ensuing in the following manner: By paying to the County Collector for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all costs together with interest not to exceed 10% annually and that he shall deposit the amount of money necessary with the Collector and it shall be the duty of the Collector to give the purchaser or his heirs or assigns notice of such deposit.

"The latter part of these sections provides, however, that in case the party purchasing such land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of two years following the sale, no interest shall be charged or collected from the redemptioner after that time.

"The owner of the land contends that he had a right to redeem this land at any time after two years until there was a deed issued on the certificate. On the other hand, the purchaser contends that he had a right to call for his deed at any time within four years. The purchaser has refused to accept the deposit made by the owner and is demanding a deed from

me while the owner is demanding that he be given a certificate of redemption.

"I would appreciate it very much if you would give me an opinion as to these two statutes above quoted and as to what course I should pursue in this matter."

Section 11137 Revised Statutes of Missouri, 1939, is as follows:

"In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs and a certificate of purchase has been or may hereafter be issued it is hereby made the duty of such purchaser, his heirs or assigns to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale: Provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided."

Section 11145, thereof, is as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall

pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

The right of the certificate holder under the provisions of former procedural statutes for the enforcement of delinquent taxes on real estate is established by the Supreme Court of Missouri in the case of *Hilton v. Smith* 134 Mo. 499, 509 in the following language:

"What title to, interest in, or lien upon land a certificate of purchase secures to the holder is a question upon which there is a difference of opinion. It may be said generally that the right is no larger than the statute gives. The law of 1872 only gives the right to the redemption money in case the land is redeemed, and to a deed when the time of redemption has expired.

" In the absence of provisions of law defining the rights of the holder of a certificate of purchase the generally accepted rule is that, until the delivery of a deed, he takes no title to the land, either or equitable. *Black on Tax Titles*, sec. 322; *Burroughs on Taxation*, p. 321.

"The rule is announced by this court in Donohoe v. Veal, 19 Mo. 335, 336, as follows: 'If the law did not propose to give the purchaser the title to the land until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period, and the right of the purchaser was to receive his money, with a high penal interest, during the delay of redemption. It appears very clearly to be the design of these two acts, that the title of property sold for taxes shall remain undisturbed, until the deed is actually executed by the register; and that, until that act is performed, the title is in the former owner.' * * *

"The law of 1857 made the certificate prima facie evidence of title, yet the court held that it never intended to confer title; but was mere evidence of title authorizing the purchaser to take possession of the premises for a limited period. Clarkson v. Creely, 40 Mo. 114.

"In Parsons v. Viets, 96 Mo. 413, this court, in considering the rights of one holding a certificate acquired under a sale made pursuant to the laws of 1872, held that he acquired thereunder no right to the possession of the premises, and in taking possession he was a trespasser and disseizor.

"After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector. The law thereafter gives him no lien upon the land for any sum, except that, in case his title fails, he may secure a lien under section 219, 2 Wagner's Statute, page 1206. Pitkin v. Reibel, 104 Mo. 511."

Mr. W. H. Carney.

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August 28, 1941.

While the appellate courts of this State have not passed on such question after the passage of the Jones-Munger Act, it seems that such reasoning is sound in its applicability to such summary procedural act.

CONCLUSION

Therefore, there being no statutory provision defining the property rights of a holder of a certificate of purchase, it seems that the rule is that, until the delivery of a deed, he takes neither a legal nor an equitable title in and to the land.

Therefore, until the delivery of such deed the owner would have the right of redemption in the manner provided by the statutes relating to such subject.

Respectfully submitted,

APPROVED:

S. V. MEDLING
Assistant Attorney General.

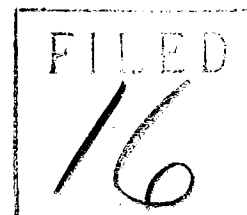
VANE C. THURLO
(Acting) Attorney General

SVM/mc

COUNTY BUDGET ACT: Sheriff's expenses for conveying inmates to the hospital should be paid out of class 5;
(2) Sheriff whose term expires before date of sale under trustee deed should conduct the sale.

February 7, 1941

Mr. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Sir:

In reply to your request for an opinion of some time ago, in which you present two questions, the first portion of your letter being as follows:

"1. Section 2, page 422, Laws of Missouri for 1937 provides:

The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.

Under the authority of this section the Reynolds County Court has each year set aside not only an amount sufficient to pay the expense of each insane pauper patient in state hospitals, but also an amount sufficient to pay the expenses of the Reynolds County sheriff, in transporting such patients to such hospitals during the year. All such expenses (both for patient and the sheriff) have been paid out of class 1.

Recently my attention was called to the fact that the sheriff's expenses are not

Mr. Paul N. Chitwood -2- February 7, 1941

covered by this section of the budget law, but should be classified under class number 5. Since the incoming tax collections in this county are so small the court has failed to appropriate any funds in class number 5. By experience they have found that in view of the finances of the county, that there is hardly enough to take care of class number 4.

Section 10911 R. S. Mo. 1939, which relates to the county budget law, and which was formerly, as stated in your letter, Laws of 1937, reads as follows:

"The court shall classify proposed expenditures in the following order:

Class 1: The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes."

Section 10914 R. S. Mo. 1939, also contains the following provision:

"Class 1: Care of paupers declared by lawful authority to be insane (in state hospitals)."

There is no provision, nor is the section broad

Mr. Paul N. Chitwood

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February 7, 1941

enough in its terms to include the expenses and fees of the county sheriff. As stated in your letter, these expenses should be paid from Class 5. The only suggestion that we have to offer is to the effect that at the present time Class 5 permits the transfer of any surplus funds from any of the prior classes.

We are of the opinion that you are correct on the law regarding this question, but as to the question of finances, you cannot alleviate that condition.

II.

Your second question reads as follows:

"Today our outgoing sheriff, whose term of office expired on December 31st, 1940, offered for sale certain real estate under a deed of trust foreclosure, at the instance of the beneficiary. Our present sheriff believes that he should have been allowed to have sold this property, as the trust deed provides for a sale by the then acting sheriff in event of foreclosure and the trustee refuses to act. The ex sheriff was willing for the present sheriff to act but the beneficiary refused to let him do so. As a matter of fact I do not believe the ex sheriff had any legal authority in the matter, but since I could not find any law directly in point, the parties suggested I write you for your opinion, which will be very much appreciated."

It would appear under the authorities that the sheriff, who had advertised the property under the deed of trust

Mr. Paul N. Chitwood

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February 7, 1941

was entitled to consummate or carry out the sale even after the expiration of his office. Most states have statutes which are apparently designed to take care of such a situation. We are unable to locate any statute directly on this point in Missouri. However, you are respectfully referred to the decisions of Porter vs. Mariner 50 Mo. 364; Bradley vs. Smith 190 Pac. 1087 and 10 A.L.R. 1339.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

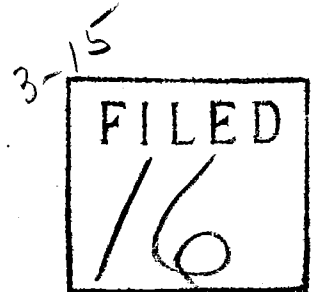
COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

CHAUFFEURS: May operate on certificate furnished by Commissioner of Motor Vehicles pending issuance of metal tags. Metal tags, when issued must be conspicuously displayed.

March 14, 1941

Hon. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated March 10, 1941, which reads as follows:

"Section 8372, R. S. Missouri, 1939, paragraph (a) 7(b) sets out the procedure for registration of chauffeurs in this state. Paragraph (c) states that the Commissioner of Motor Vehicles shall, upon acceptance of an application, and the fulfillment of the other necessary requirements, mail the applicant a metal chauffeur's badge, with certain inscriptions. This badge must be worn or displayed on the person of the applicant while he is driving or operating a motor vehicle, as chauffeur.

"Recently our sheriff has demanded of some drivers of motor trucks here in this county, to see their badges, but he has been shown a receipt from the Commissioner of the Motor Vehicle Department, showing the applicants have paid their money, and that while their applications and pictures have been

March 14, 1941

accepted, yet their chauffeurs badges have not been received.

"Now, I would like your opinion as to whether or not these truck drivers are violating the law by not having chauffeur's badges upon or about their persons at the time they are operating trucks. It may be true that it is not their fault that they do not have the badges to display when requested, but it appears that the law makes no provision for such matters; at least they should refuse to drive until they had received their badges.

"Your opinion on this matter is requested at your earliest possible convenience, as we have a case now pending wherein these points have been raised."

If a person desiring to operate a motor vehicle as a chauffeur makes an application under provisions of Section 8372 R. S. Missouri, 1939, and is furnished a badge, there can be no question that he is required to wear the same "upon his clothing in a conspicuous place at all times when he is operating a motor vehicle on the highway." Such requirement is clearly and unequivocally expressed in the statute.

However, the question now under consideration, is the situation where the applicant has complied with all the requirements of Section 8372, supra, but the Commissioner has failed to furnish such applicant a metal badge.

It is the well settled rule in this State that if a person makes an application for a license and such license is wrongfully refused, he cannot set

out the wrongful refusal as a defense in a prosecution for operating without a license. State v. Meyers, 63 Mo. 324; State v. Skinner, 119 S. W. (2d) 82.

Under the provisions of Section 8372, supra, the Commissioner is required to issue first a certificate of registration, upon being satisfied as to the competency and good character of the applicant, as well as the payment of a fee of three dollars, and secondly, after the issuance of the certificate of registration he is required to furnish a badge without further charge.

Therefore, we are not confronted with the situation where the officer has wrongfully refused to issue a certificate, but having issued the certificate, he has failed to furnish the applicant with a badge. Thus the rule set out above relating to the wrongful refusal of a license, although it might apply in a situation where the Commissioner refused to issue the certificate, it would have no application to the present inquiry. That is, if the Commissioner wrongfully refused to grant a certificate to an applicant who had duly complied with the provisions of Section 8372, supra, he could not set up, as a defense in a prosecution for driving without a certificate of registration, the fact that he had done all that was required of him. However, as stated heretofore the further duty of the Commissioner after he issues the certificate of registration, is to provide a badge. The statute then requires the applicant to display such badge but only after same is furnished him.

The rule pertaining to the display of motor plates is set out in 42 C. J., Sec. 1328 at page 1340, and reads as follows:

"When the owner of a motor vehicle has complied with every requirement of the statute necessary to entitle

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him to receive the number plates from the proper official, and he fails to receive them only because such official is unable to furnish them, such facts constitute a defense to a charge of operating the vehicle without having the number plates displayed." State v. Gish, 168 Iowa 70, 150 N. W. 37, Ann. Cas. 1917 B. 135.

See also 5 Amer. Jur. Sec. 779, p. 920.

Likewise, in the present situation, if the official is unable to furnish the badges, the applicant, having been granted his certificate of registration, should be allowed to operate.

CONCLUSION.

Therefore, it is our opinion, that if the Commissioner of Motor Vehicles is unable to immediately furnish a metal chauffeur's badge he may issue a certificate which will entitle the holder thereof to operate on the same pending the issuance of a metal badge. When such metal badge is received by the applicant the same must be worn or conspicuously displayed on his person.

Respectfully submitted,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

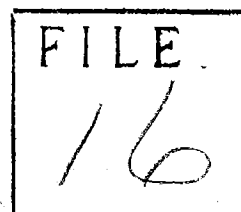
VANE C. THURLO
(Acting) Attorney General

LMB:RW

SCHOOLS: When consolidated districts close outlying rural schools districts, board should transport children under Section 10946, R. S. Missouri, 1939.

November 25, 1941

Honorable G. R. Chamberlain
Prosecuting Attorney
Cass County
Harrisonville, Missouri



Dear Sir:

This Department is in receipt of your letter of some time ago, in which you make the following inquiry:

"Miss May Bowlin, the County Superintendent of Schools, has asked me to request your valued opinion on the following question, to-wit:

"Some two years ago the members of a Consolidated Town School Board decided to close two outlying districts within the consolidation and transport the students to the central school. They at no time voted on the matter of transportation in this consolidated district, the Board merely closed the schools and transported the children of the districts where the schools were closed. I assume the schools were closed on account of the low attendance, however, there was no controversy about the reason for closing.

"There is one family who lives in one of the outlying districts above mentioned that the children at all times before closing these schools went to the central school which is at Strasburg. Since the

closing of the schools the parents now insist that the School Board is obligated to furnish transportation for his children to the central school, which is a distance of approximately one mile.

"Since this Board has closed this outlying rural school and promised that the children would be transported in such outlying district, are they now duty bound to pick up these children who live about a mile from the central school and who formerly attended the central school by choice?

"Whether or not the school bus passes by the house of the children in question I do not know, but the facts that the school board and the County Superintendent are worried over are that there are other children more remote who have not demanded transportation, who the board anticipate will demand transportation if these children above mentioned should be transported.

"The real issue, as I see it, is, when a rural school in a Consolidated District, is closed by the Board, are they duty bound to transport every child within that District regardless of the distance that they are to be transported?

"It is my understanding that this exact question has not been passed upon by your office, to-wit: What right and how far does the right extend to the patron who demands transportation by Consolidated Districts."

We think the answer to your inquiry is contained in Section 10496 R. S. Mo. 1939, which relates to consolidated

school districts and which is as follows:

"The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 10493 to 10500, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 10493 to 10500, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided, however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 10461: Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the dis-

district: Provided further, that if transportation is not provided for, any consolidated district may, by a majority vote at any annual or special meeting, decide to have all the seventh and eighth grade work done at the central high school building: Provided, fifteen days' notice has been given that such vote will be taken. Such seventh and eighth grade work at the central high school may be discontinued at any time by a majority vote taken at any annual or special meeting."

You state in your letter that there was no vote or election held as to transportation, but that the board merely closed the school. We assume that this came within the provision of the section quoted, supra, to the effect that the board has such authority due to the fact that the average daily attendance falls below ten. The third proviso in said section further contains the statement that "the school board shall have authority to close such elementary school for the remainder of the term and, provide transportation for the pupils of such elementary school to some other elementary school or schools in said district." It does not appear that an election is essential for the board to carry out the provisions mentioned above. The consolidated district, by the succeeding proviso, can, if no transportation is provided for, hold an election at an annual or special meeting.

We are of the opinion that the children in question are entitled to be transported to the central school. Of course, the question of transportation aid would arise as to the distance the children reside from the school. Irrespective of this feature, it does not prevent the board from transporting the children.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General
OWN:CP

MONOPOLIES: To maintain prosecution the paying of a higher price in one place than in another place, there must be an intention to suppress competition.

December 2, 1941

Hon. G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of November 26, 1941, which reads as follows:

"I have an insistent complaint from a merchant at Main City in this County, one Endicott, and his complaint is as follows:

"That the Harry Taylor Company, Incorporated, of Kansas City, who are dealers in cream and perhaps milk through the local man who is just across the street or road from Endicott, is paying 40¢ a pound, or some unit used by the cream dealers, and that price is above the Chicago price and more than he, Endicott, can pay without losing money.

"Endicott insists that such paying of price by this company is an offense under the Discrimination Law.

"I had run the Statutes in the matter and do not myself find anything that would show this undue discrimination, but he insists that he is informed that your office has given an opinion to that effect.

December 2, 1941

"I am therefore writing you in order to make certain whether or not a company in Kansas City paying more than the local price or even more than the cream is worth would come within the Undue Discrimination Law, and would be an offense that might be issued against."

In the above request you state that this office has rendered an opinion upon this matter. I find that we have not rendered an opinion, but that in several instances letters have been written by this office which are not to be considered as official opinions.

Under the facts in the above request we find that the section applicable to a prosecution, if such is had, is Section 8318, R. S. Mo. 1939. This section has only been construed in one instance by the Supreme Court of this state. In that case a poultry corporation had been filed on by the Attorney General's office in a quo warranto proceeding for the violation of this section. The court in that case, on the question of whether or not the corporation had violated this section in paying higher prices for eggs in the city of Mexico than the price paid for eggs in the city of Wellsville, held that the main question was the intent to suppress competition. In that case, which was State v. Blattner Bros, 226 S. W. 253, Para. 2, the court said:

"While there may be some isolated expression of the officers of the respondent, if considered alone, which might point to an intent to discriminate for the purpose of destroying competition, yet when read and considered in connection with the entire evidence in the case, we are of the opinion that Commissioner Cave properly found that there was no intent shown on the part of the respondent to destroy competition. At

Hon. G. R. Chamberlin

(3)

December 2, 1941

most, said expressions must be construed in the light of attempts to boost respondent's business, which is not prohibited by any law of which I know."

So, the real question is a question of fact which this office cannot pass upon. If it can be proven that it was the intent of the Harry Taylor Company, Incorporated, by paying more than the market price for cream to suppress competition of another concern they can be prosecuted under this section.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

WJB:CP

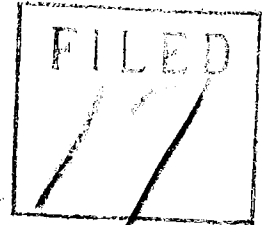
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

COUNTY COURTS:	The power of the County Court to
SOLICITORS ON	make orders relating to trespassers
PUBLIC GROUNDS:	on county property and to prohibit
JUSTICE OF PEACE	persons from performing such acts.
SOLICITING MARRIAGES:	

January 20, 1941

Mr. James D. Clemens
Prosecuting Attorney
Pike County, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you set out the following statement of facts and questions:

"The facts of the situation are these:
A certain Justice of the Peace here in this county habitually spends his time in the halls of and about the entrances to and side-walks around the courthouse, soliciting couples for permission to perform marriages for them. He does not enter the offices of any of the county officials for this purpose. On October 30, 1938, the County Court made an order prohibiting persons from interfering with the operation of the office of any county official, and further declaring:

"It is hereby ordered by the Court that no loafing, loitering, soliciting or peddling shall be allowed in the courthouse of Pike County, Missouri, or on the grounds adjacent to said Courthouse, and that any person found loafing, loitering, soliciting or peddling in said Courthouse or on Courthouse grounds shall be considered a trespasser

and the Sheriff of Pike County, Missouri, and any officer of the State Highway Patrol, is hereby ordered and directed to immediately remove and arrest such trespasser."

"The questions upon which I would like to have your opinion are (1) Has the County Court the right to prohibit persons from soliciting in and about the courthouse? and (2) Is a Justice of the Peace soliciting marriages in and about the courthouse a trespasser, when such solicitation has been so prohibited?"

County courts are given the control and management over the property of the county by virtue of Section 2078, R. S. Mo. 1929. This section provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Section 12071, R. S. Mo. 1929, provides as follows:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings,

which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

The last sentence of this section directs the court to take necessary steps to preserve buildings and property of the county.

In the case of Sparks v. Purdy, 11 Mo. 142, 1. c. 144, the question of just how much authority the county court had under the provisions of the statute which gives it control and management over the county property was before the court, and there the court said:

"The law intrusts the County Court with the control and management of the property, real and personal of the county; and under this power the court superintends the public buildings. Public convenience requires that a summary power to prevent the illegal occupation of, and to eject trespassers from the places designed for the transaction of the business of the county should exist in some body. It could never have been the intention of the Legislature, that the County Courts in the State should proceed by ordinary suit at law in order to obtain possession of the public buildings or parts of them."

This case, however, was dealing with a trespasser. The party who had been ejected there was one who was trying to occupy one of the offices of the court house and the foregoing rule was announced as to that particular case.

In the case of Morgan v. Owen, 193 Mo. 587, 1. c. 596, the court followed the rule announced in Sparks v. Purdy, supra, and said:

"The county court was entitled to the free and unconditional access to and use of its records and it was entitled to treat any one as a trespasser who, without official authority, obstructed its access to or use of the same. * * * * *

In the case of Walker v. Linn County, 72 Mo. 650, the question of the power and duty of the county court with reference to insuring county buildings was before the court and the court said, 1. c. 653:

"That a county court is invested with such powers only as are expressly conferred upon it by statute, and such as may be fairly or necessarily implied from those expressly granted, we think cannot be questioned. It, therefore, follows that the question of the power of the county court to bind the county in a contract such as is here sued upon, must be solved by the statute. The statutory provisions bearing upon the subject, are as follows: 'County courts shall, moreover, have the control and management of the property, real and personal, belonging to the county.' Wag. Stat., 441, Sec. 9. 'The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the

county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage.' Wag. Stat., 404, Sec. 17. 'County courts may appoint an agent to make any contract on behalf of such county for erecting any county buildings; or for any other purpose authorized by law; and the contract of such agent duly executed on behalf of such county, shall bind such county.' Wag. Stat., 408, Sec. 3.

"The duty devolved upon county courts in the foregoing sections of taking such measures as shall be necessary to preserve all buildings and property belonging to a county carries with it the power to bind the county in a contract which, in the exercise of the judgment of the court, may seem to be necessary to consummate the object for which the duty was imposed, and which, in point of fact, tends directly to consummate the object. The contract in question is, we think, of this character, and is, therefore, binding on the county, provided it is shown by the evidence that it was either made, or ratified and approved by the court."

The statutes hereinbefore cited have the same provisions in them as to the control and management of the county property as did the Wagner Statute referred to in the Linn County case, *supra*.

If a person is actually a trespasser on county property, then, by virtue of the authority imposed in the county court to control and manage such property, we think the county court would be authorized to eject such person

from the buildings or public places in which he is trespassing. We think the rule announced in the case of *Morgan v. Durfee*, 69 Mo. 469, would be applicable, wherein the court held that every man has a right to defend his premises from intrusion as well as his person from attack, and for that purpose to employ such force as may reasonably appear to him to be necessary. The court house is county property and belongs to the county and the lawmakers have delegated the duty to the county court to control and manage this property and we think that the county court, as the agent for the county, would be authorized to defend the premises of the county and to eject trespassers the same as a private individual would his premises.

In Volume 15 C. J. page 536, at Section 220, the rule is stated in the following language:

"The control and management of all property, real and personal, for the use of a county, is usually expressly vested by statute in the county board or county court of each county, and in such control and management the board occupies a position of trust, and is bound by the same rules of fidelity as a trustee of an express trust. Such board cannot, however, authorize the use of county property for purposes other than those provided by law, as declared by statutes in effect at the time, the legislature having power, on account of a county being but a mere agency of the state, to control the use, management, and disposition of county property, except where the property has been acquired by a grant limiting its use to certain specified purposes. * * * * *

It will be noted that the rule is announced here that county property may not be used for any other purpose than

that provided by law. It cannot successfully be contended that the court house of the county may be used for other purposes than for public use. In other words, no one is authorized to carry on a private business in a court house in this State. The term "public use" is discussed in Volume 50 C. J. at page 864, paragraph 94, as follows:

"* * * In general it may be said that a public use is one which concerns the general public or a portion thereof as distinguished from particular individuals or estates. * * *"

In the case of State ex inf. McKittrick v. Wymore, 132 S. W. 979, 1. c. 987, the court, in discussing the implied powers of public officials quoted the rule announced in Corpus Juris and stated as follows:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes.' 46 C. J. Sec. 301, p. 1035.

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, p. 515.

"Necessary implications and intendments from the language employed in a statute may be resorted to to ascer-

tain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose. That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication.' * * * *"

When your County Court made the rule which is set out in your request, evidently it had in mind the rule announced in the Wymore case, that is, that because it had control and management of county property it was authorized to provide that loafing, loitering, soliciting, or peddling on the court house grounds would be deemed trespassing. Since court houses and court house grounds are public grounds and the entire public is permitted to go into and upon them, it would be a question of fact whether or not a person is a trespasser thereon, and we do not think that the county court would have the implied power to make such parties trespassers. If a person either by soliciting, peddling or loitering, or by any other action, conducts himself so that he becomes a nuisance or so that he interferes with the public officials in the performance of their duties then, we think the county court, under the rules hereinbefore stated, would be authorized to eject him as a trespasser.

We are also further of the opinion that since court houses and court house grounds are only for public use that the county court would be authorized to make the rule hereinbefore referred to, because the general public is not required to furnish an office and space for a person to conduct a private business.

Jan. 20, 1941

CONCLUSION.

Answering your questions, it is the opinion of this Department that:

(1) The County Court, as the agency which is placed in control and management of county property, is authorized to prohibit persons from soliciting in and about the court house, providing such solicitation prevents the public officials from performing their official duties or interferes with the general public in its free access to, and use of, of the public grounds.

(2) We are further of the opinion that if a Justice of the Peace, in his soliciting of marriages, conducts himself so that he becomes a nuisance to the public and to the public officials in the performance of their official duties then, we think the County Court would be authorized in ejecting such person from the premises. The question of whether such Justice of the Peace so conducts himself in soliciting marriages that he becomes a nuisance and, therefore, would be a trespasser, would be a question of fact in each particular case, and this Department would not be in a position to say definitely whether in any, and all, cases such person would be a trespasser.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

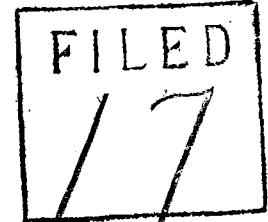
COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

MOTOR VEHICLES: Trucks belonging to a corporation with
headquarters in Ohio and stationed and
FOREIGN CORPORATION: registered only in the State of Illinois
must also register in the State of Missouri.

February 24, 1941

Mr. E. P. Clark
Sergeant-Major
General Headquarters
Missouri State Highway Patrol
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of January 31, 1941, which reads as follows:

"1. The driver of a truck belonging to the Kroger Grocery and Baking Company was arrested in Cape Girardeau, Missouri, recently for failure to have Missouri registration plates on his vehicle.

"2. The Kroger Grocery and Baking Company has its head quarters in the State of Ohio, while some of the trucks belonging to this company are stationed at Carbondale, Illinois, and are domiciled and registered in that state. These trucks do not bear Ohio license.

"3. It is the opinion of the arresting officer that these Kroger trucks registered in Illinois are not included in the reciprocity agreement with that state. This conclusion is drawn by reversing the meaning of the Illinois reciprocity agreement as written in the Motor Vehicles Law. It is also the opinion of the arresting officer that, should the reciprocity agreement with the State of Ohio apply in this case, it

will not be necessary for these trucks to be registered in Missouri.

"4. It is requested that the Attorney General's Office be consulted to determine whether or not Missouri registration will be required on these trucks."

Of course, the answer to this request depends to a large extent upon the reciprocal provisions of the respective states. Here we have a nonresident corporation of this state and such corporation is a resident of the State of Ohio. However, said corporation owns some trucks which are stationed in the State of Illinois and have been registered in Illinois. The question is -- Can these trucks belonging to this corporation, the Kroger Grocery and Baking Company, a resident of Ohio, which are only registered in Illinois, operate in this State without first registering same in the State of Missouri?

In construing statutory provisions the cardinal rule is to determine the legislative intent and to give it that meaning if possible (Wallace v. Woods, 102 S. W. (2d) 91, 340 Mo. 452.

The reason for the enactment of such a reciprocal law is to keep the owner of a motor vehicle from having to register same in every state in which he might enter, providing, he has complied with the laws of the state wherein he is a resident and further that such state has a similar reciprocal provision which grants the same and like privilege to the resident of this state. Prior to 1929, the law in this state provided any motor vehicle may be operated in this state if registered in another state. The Fifty-fifth General Assembly amended the act so as to recognize nonresident licenses only if such recognition is made to registered Missouri residents in that state.

In Volume 42 of Corpus Juris, Section 88, page 671, the general principle is stated:

"Under some statutes and agreements between states a nonresident who has complied with the laws of his home state in respect of licensing and registering his motor vehicle or obtaining an operator's license is given, for a limited period at least, the privilege of operating his motor vehicle over the highways of another state without having obtained a license or registered his car therein, provided, under some regulations, the owner or operator has complied with certain conditions prescribed by the local legislation, such as displaying the distinguishing number or mark required by his state on his machine, or securing a local identifying tag or marker, and provided similar privileges are granted to residents by the state of such nonresident. A municipality cannot require a license or license fee of a nonresident owner in conflict with this exemption."

A careful examination of the reciprocal law of Ohio, the state where this corporation is a resident, and also the Missouri reciprocal law, will disclose that they are very similar and import the same meaning.

We find in Throckmorton's Ohio Code Annotated, 1940, Section 6306:

"The owner of every motor vehicle which is duly registered in any state, district, country or sovereignty other than the State of Ohio shall be exempt from the foregoing sections of this chapter and the penal statutes relating thereto, provided the owner thereof has complied with the provisions of law in regard to motor vehicles in the state of his residence and complies with such provisions while operating and driving such motor

Mr. E. P. Clark

(4)

February 24, 1941

vehicle upon the public roads or highways of this state, and further provided that such provisions of law of such other state make substantially like and equal exemptions to the owners of motor vehicles registered in this state.

"Reciprocal agreements between this and any other state, district or country necessary in administering the provisions of this section shall be made as provided in section 6306-1 of the General Code."

The reciprocal law in this State, Section 7768, R. S. Mo. 1929, reads as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the State, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

Now, if the only question in this request was whether or not trucks properly registered in Ohio may operate in Missouri, without registering first in this state, the answer would be in the affirmative. But here we are confronted with a different situation -- we are faced with a nonresident corporation whose headquarters are in Ohio, but some trucks belonging to this corporation are situated and registered in Illinois. The question for determination-- Is our reciprocal law broad enough to permit the operation of these trucks in this state under the Illinois registration? The Ohio reciprocal provision is not applicable for the reason the trucks are not even registered in the State of Ohio, and therefore, cannot display at all times upon said motor vehicles Ohio license plates as provided in both reciprocal laws of Ohio and Missouri. There is some question as to whether this corporation might be a resident of Ohio, and at the same time be a resident of the State of Illinois. However, we consider such question need not be determined to answer this opinion.

To determine this issue we shall examine the Illinois reciprocal provision regarding the operation of motor vehicles in other states, which reads as follows:

"Except as is herein provided for foreign corporations, the provisions of sections 8,9,9b,9c,9d,9e,9f,9g,9h, 9i,9j,9k,10,14,17 and 27 of this Act shall not apply to any motor vehicle or motor bicycle owned by nonresidents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence; and the registration number showing the initial or abbreviation of the name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in Section 14 of this Act; Provided, that the provisions of this section shall be operative as to a motor vehicle or

motor bicycle owned by a non-resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privileges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by residents of this State. If, under the laws of such city, state, foreign country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the highways of such city, state, foreign country or province, territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicles or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, 10, 14, 17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall comply with the provisions of sections 8, 9, 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, 10, 14, 17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned."

In view of the above reciprocal provision of Illinois, even if this company was a resident of Illinois as well as Ohio, it would not be exempt from the registration of its motor vehicles stationed in Illinois and using the highways in this state, for the reason there is an exception contained in the Illinois reciprocal provision which requires such

Mr. E. P. Clark

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February 24, 1941

foreign corporation to register in the State of Illinois. Such a provision is not included in the Missouri reciprocal provision pertaining to the State of Missouri.

This department, in an opinion to Col. E. M. Casteel, under date of July 7, 1938, ruled that a motor vehicle registered in the State of Colorado but operating solely between a point in Oklahoma and St. Louis, Missouri, is not required to be registered in the State of Missouri due to the fact that both the states of Colorado and Missouri have complete reciprocity with each other. Had these trucks in Illinois been registered in Ohio the same conclusion would be applicable in the case, but the facts in this case are different in that the trucks were registered in Illinois instead of Ohio where the corporation is a resident.

Therefore, it is the opinion of this Department that whether or not these trucks belonging to this corporation, which are stationed in the State of Illinois and registered in Illinois, may operate in this State without first registering in Missouri, shall be determined by the reciprocity provisions of the States of Illinois and Missouri. That since the reciprocal provision of the State of Illinois requires the registration in Illinois of any motor vehicles belonging to any foreign corporation, partnership and individual owning, maintaining or operating places of business in the State of Illinois, while no such provision is contained in the Motor Vehicle Act of the State of Missouri, there is not full reciprocity between the two states. Therefore, it will be necessary that these trucks stationed in Illinois be registered in the State of Missouri.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

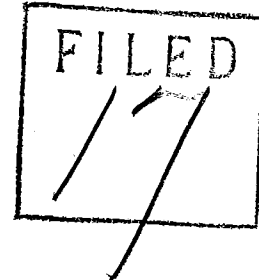
ARR/rv

BONDS:
PUBLIC ADMINISTRATOR:
OFFICERS:

County Court not authorized to pay
premium on bond of Public Adminis-
trator.

April 10, 1941

Honorable James D. Clemens
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Sir:

This will acknowledge receipt of your letter
of March 6, 1941, which is as follows:

"The Public Administrator of Pike County
has obtained a surety bond covering his
official duties and has requested the
County Court to pay the premium of the
bond in the amount of \$40.00. The Court
has taken the position that section 3238,
R. S. Mo. 1939 does not authorize them to
pay the costs of such surety bond on the
theory that under the Public Administra-
tor's bond the county is not 'the public
body protected thereby.'

"Assuming that the County consents and
approves of the filing of the surety
bond by the Public Administrator, may
Pike County properly pay the premium on
the bond?"

Section 3238, R. S. Mo. 1939, provides as follows:

"Whenever any * * * * * officer of any
county of this state * * * * * shall be
required by law of this state * * * * *
to enter into any official bond, or other
bond, he may elect, with the consent and

April 10, 1941

approval of the governing body of such
* * * * * county * * * * * to enter into
a surety bond, or bonds, with a surety
company or surety companies, authorized
to do business in the state of Missouri
and the cost of every such surety bond
shall be paid by the public body protected
thereby." (Underscoring ours)

No one will doubt that the Public Administrator is an officer of the county. By Section 295, R. S. Mo. 1939, he is required to "enter into a bond to the State of Missouri in a sum not less than ten thousand dollars."

Thus, without question, the terms of Section 3238, supra, are broad enough to and do include a public administrator except in so far as the restriction on the right of the county court to pay for said bond limits the broad scope of the statute.

Under Section 295, R. S. Mo. 1939, a public administrator's bond is required to be conditioned "that he will faithfully discharge all the duties of his office" and is also to secure "the amount of property in his hands or under his control as such administrator."

In view of the condition of this bond it must be made to appear that it protects a "public body" before the county court is authorized to pay the premium thereon. This arises from the fact that under Section 3238, supra, only the "public body protected thereby" is authorized to pay the premium. Thus, if no "public body" is protected by such bond, then there is no source from which money may be derived to pay the premium.

Examination of Article 13 of Chapter 1, R. S. Mo. 1939, relating to Public Administrators, discloses that his only duties pertain to the preservation and administration of the estates of the class named in Section 299, R. S. Mo. 1939. He collects no funds of the county, draws no compensation from the county and does not have in his hands or under his control any property of the county. There is no maximum on fees he receives from the estates in his charge and he accounts

Honorable James D. Clemens

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to no one for the fees received. They are only paid to him upon order of the probate court as in cases of other administrators. Section 298, R. S. Mo. 1939.

From this resume it is apparent that the terms of his bond do not protect in any sense the funds of the county.

Section 3242, R. S. Mo. 1939, applies to throw further light on this question. This statute provides:

"Persons injured by the neglect or misfeasance of any officer may proceed against such principal or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury."

Subsequent statutes set up the procedure for any person injured to sue on official bond.

In a sense, the bond of a public administrator would protect the county. This is to be gleaned from the case of State v. Gomer, 101 S. W. (2d) 57, 68 (Mo. Sup.) In that case a county assessor was charged with having received payment for assessment lists which were not actually made. The suit was one to recover these fees. The bond in that instance was conditioned to secure the faithful performance of the duties of the office and it was provided by statute that in the event the assessor should fail to perform his duty, that is, make an assessment of the property, then a summary judgment could be entered on said bond for an amount sufficient to make the assessment. The court ruled that the sureties on the bond were not liable for the excess fees collected by the assessor, but as is to be seen, the bond did protect the county to the extent of what it cost to complete the duties the assessor failed to faithfully discharge.

Other authorities also recognize the right of a governmental body to sue on a faithful performance bond of one of its officers where any damage is sustained by the government. In Murfree's Official Bonds, Section 247, it is stated:

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April 10, 1941

"Although the state may maintain a civil action on a sheriff's official bond for official delinquency in criminal cases, yet unless some damage results from the breach of the bond the action cannot be sustained."

It is also stated in 46 C. J. p. 1070, Section 403, that:

"In the case the government performs work which the principal on an official bond has neglected to perform, the sureties are liable * * * * * for a reasonable compensation * * * * *."

Under this authority it appears that if a public administrator should fail to perform his duties properly, was thereupon removed from office by the county court and the county is put to some expense in straightening out his affairs, then in this sense the county is a public body protected by the bond given.

However, we do not think it was this type of protection that was contemplated by the Legislature when Section 3238 was enacted. There are two types of bonds given by officers of the counties in this state. One class is that conditioned to secure the faithful performance of the duties of the office and the other is conditioned to secure faithful performance of the duties and to pay over all funds of the county that may come into his hands. This latter type is that required of those officers who collect taxes and fees which must be accounted for, such as collector, treasurer, etc.

A study of the history surrounding the enactment of Section 3238, supra, leads us to believe that it was on this latter type of bond that the Legislature authorized the "public body protected thereby" to pay the premium. In an opinion to W. J. Melton, dated April 4, 1939, speaking of this statute, we said:

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April 10, 1941

"It is a matter of common knowledge that prior to the enactment of this statute many county officials gave personal bonds, the cost of surety bonds being almost prohibitive in view of the compensation received by such officers. However, the Legislature wishing to protect and safeguard public moneys in a safer and more secure fashion, provided that with the consent and approval of the governing body that surety bonds paid for by the public body protected could be given."

It is also a matter of legislative record and common knowledge that shortly prior to the passage of Section 3238, supra, (Laws 1937 page 190) the State Auditor under the terms of Section 13094, R. S. Mo. 1939 (Laws 1933 p. 416) had completed audits of the officers of the several counties, and found that several were in default on funds belonging to the county and further, it developed that their personal bonds were worthless. For this reason the funds were lost to the counties with no chance of recovery. It was this condition that prompted the Legislature to take steps to safeguard its funds.

We think this view leads to the conclusion that the intent of the Legislature in enacting Section 3238, supra, was to only authorize premium payments on bonds of officers that collect funds of the county or who must account for and pay over fees which they collect.

CONCLUSION.

Therefore, it is our opinion that the County Court is not authorized to pay the premium on the bond required of a public administrator.

APPROVED:

Respectfully submitted,

VANE C. THURLO
(Acting) Attorney General

LIB/rv

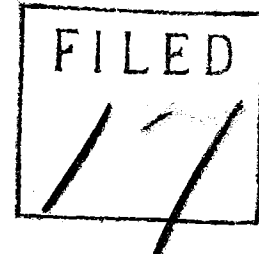
LAWRENCE L. BRADLEY
Assistant Attorney General

TAXATION:

Certificates of purchase of property in Kansas City are personal property and taxable as such.

August 13, 1941

Mr. George R. Clark, Assessor
Jackson County
Kansas City, Missouri



Dear Sir:

We are in receipt of your request for an opinion dated August 9, 1941, which reads as follows:

"My attention has been called to the fact that numerous so called Investors in our tax service consistently buy large amounts of City delinquent taxes. It is my understanding that city taxes become delinquent on September 30th, of each year and on November 1st, every parcel of land within the limits of Kansas City are advertised for sale in the Daily Record. It is also my understanding that on or about the 10th of November the City sells every piece of property for which there is a bidder, the purchaser receiving a certificate which if not redeemed in five years entitles the purchaser of the tax certificate to receive a deed from the City of Kansas City, Missouri.

"The question which I am submitting to you here on which I respectfully ask an opinion is as follows:

"Take for example, let us say, the Standard Investment Company. They buy a tax certificate on a piece of property on November 1st. The property of course, remains in the hands of the owner for a period of five years during which time the Standard Investment Company is entitled to a deed as above set out. What is the status of the certificate which the

Standard Investment Company hold in the meantime? It is my thought that the certificate is personal property and taxable as such. My reasoning being as follows:

"If the money with which the certificate was purchased was in the bank and known to the Assessor, it would of course be taxable. When the Investment Company take that money and buy the tax certificate the Company is buying a mortgage and a prior lien on the property which lien is superior to any mortgage and liens which were on the property at the time of the tax sale. Under those circumstances I believe I am entitled to and I believe it is my duty to ascertain from the Commissioner of Accounts the amount of these tax certificates outstanding and unredeemed and to make an assessment against them as I would against any other personal property.

"May I have an opinion on this important matter at your earliest convenience as you can readily see what an important item this would be to the City and to the School district."

The question to be decided in this opinion is whether or not a certificate of purchase for the purpose of taxation should be considered personal property or real estate.

Section 11211, R. S. Missouri 1939, defines the words "real estate" as follows:

"The term 'real property,' 'real estate,' 'land' or 'lot' wherever used in this chapter, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, * * * * *

The same section also defines the term "personal property" as

follows:

"* * * The term 'personal property,'
wherever used in this chapter, shall
be held to mean and include bonds,
stocks, moneys, credits, the capital
stock, undivided profits, and all
other means not forming part of the
capital stock of every company,
whether incorporated or unincorporated,
* * * * *
and every tangible thing being subject
to ownership, whether animate or in-
animate, and not forming part or any
parcel of real property as herein-
before defined. * * * * *

In your request you refer to tax certificates given
by the City of Kansas City, Missouri, which tax certifi-
cates are redeemable by the owner of the property within
five years from the date of such purchase. The procedure of
the giving of a certificate of purchase, which you call a
tax certificate, is governed by the city charter and Revised
Ordinances of the City of Kansas City. We are herein set-
ting out the form of the certificate of purchase as given
by the city treasurer to the purchaser under Section 1011,
Chapter 13, Article I of the Revised Ordinances of Kansas
City, page 459:

"* * * No.....

"I, _____, Treasurer of
Kansas City, County of Jackson, State
of Missouri, do hereby certify that
the following described real property,
namely:..... situate in
Kansas City, Missouri, which was sub-
ject to taxation by said city, and on
which taxes were levied and assessed by
said city, and which have become de-
linquent, and after having given notice
of the sale of said real property for
delinquent taxes thereon, by publishing
daily such notice for at least ten (10)
days before the first day of sale in a
newspaper of general circulation pub-

August 13, 1941

lished in Kansas City, Missouri, containing a description of such property, the time, place of such sale and the amount of delinquent taxes, penalty and costs, as provided in the Charter and the ordinances of Kansas City, Missouri, was on, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon thereof, duly sold by me at public sale at my office in Kansas City, Missouri, in the manner provided by law for the delinquent city taxes thereon for the year....., amounting to the sum of Dollars, including penalty and costs thereon, to, for said sum, which was thereupon paid to me the said purchaser having publicly bid in said real property for per cent per annum, which was the lowest rate of interest per annum offered or obtainable to pay the amount of taxes, penalty and costs due on said property.

"And I further certify, that unless said real property above described is redeemed from said sale within five (5) years from the first day on which the annual tax sale began at which it was sold or at any time before it was sold, or at any time before the execution and delivery of the tax deed to the purchaser at the tax sale, as provided in the Charter and the ordinances of Kansas City, Missouri, the said heirs or assigns, will be entitled to a deed therefor on and after on surrender of this certificate, provided application is made for said deed within two years from and after said

"IN WITNESS WHEREOF, I have hereunto set my hand this

'
'City Treasurer, Kansas
City, Missouri.'

In the above certificate of purchase the rate of interest has been left blank but under the Charter the interest is restricted to not more than twelve per cent. The certificate of purchase is personal property and conveys no title to the land itself for the reason that Section 1011 of the Revised Ordinances of Kansas City provides:

"* * * Such certificate of purchase shall be assignable, and an assignment thereof shall vest in the assignee all the right, title and interest of the original purchaser. Every certificate of purchase shall be acknowledged in the same manner that deeds of real property are required to be acknowledged by the laws of this State."

It will be noticed that it does not require the assignment be acknowledged in the same manner that deeds are acknowledged. In case of the death of the owner of a certificate of purchase, this being personal property, does not descend to the heirs but descends to the administrator. In the case of *Brueggeman v. Jurgensen*, 24 Mo. 87, 1. c. 89, the court said:

"If we look upon the suit as one to recover damages for a breach of the covenant to convey, it is not free from difficulties. If it is an action to recover damages, the heirs of *Brueggeman* have no right to them. They can not have an action to recover damages for a breach of contract. The right to maintain such actions is in the executor or administrator alone. * * * * *

Also, in the case of *Barnes v. Prewitt*, 28 Mo. App. 163, 1. c. 168, the court said:

"* * * For the conversion of the personal property left by the deceased, *David Prewitt*, the latter's heirs did not have a cause

of action. The right to the possession of that property belonged solely to the personal representative of David Prewitt (State ex rel. v. Moore, 18 Mo. App. 410), and the right to maintain an action on account of its conversion said representative alone had."

Also, in the case of Toler v. Judd, 262 Mo. 344, 1. c. 351, the court said:

"It will be observed by reading this bill that it states that E. F. Toler and Ida E. Toler, at the time of the execution of the contract mentioned, were husband and wife; that after its execution the husband, E. F. Toler, died intestate, leaving surviving him his widow, Ida E. Toler; his mother, Mary J. Toler and a brother, W. F. Toler, as his only heirs at law; that Ida E. Toler was the duly appointed and acting administratrix of her deceased husband's estate.

"Upon that state of facts counsel for defendants contend, among other things, that since the object of the suit was to annul the contract and recover back the stock of merchandise, which of course was personal property, it could not be maintained by the plaintiffs, although it being admitted by the demurrer, that they were heirs of the deceased, for the reason that the title to personal property of a deceased person vests in his administrator, and that the heir can acquire no title thereto except through an administration of the estate through the probate court, which has not been done, rather completed, in this case.

"The following authorities cited by counsel for defendants fully sustain

this contention, viz.: * * * * *

In the above case personal property was exchanged for real estate. After the death of the owner of the personal property a suit was filed to annul the contract and recover back the stock of merchandise. It was denied for the reason that an administrator must bring the suit and not the heirs. That a certificate of purchase does not pass title to the real estate was held in the case of *Kohle v. Hobson*, 215 Mo. 213, 1. c. 219, where the court said:

"* * * The transaction was nothing more than a redemption of the land, but as the defendant paid the purchase money and took an assignment of the certificate of purchase, he is entitled to a lien upon the land to compel contribution. (Black on Tax Titles (2 Ed.), sec. 284; *Lomax v. Gindele*, 117 Ill. 527.) In the case last cited it is held that, where one of the tenants in common of a tract of land which had been sold for taxes, instead of redeeming directly from the sale, made an agreement with the holder of the certificate of purchase that the latter should take out a tax deed thereon and then convey the premises to the former, which was done, the transaction amounted to but a redemption for the benefit of both tenants in common, and that a court of equity would compel the one taking a conveyance of the tax title to convey to the other one undivided half of the tax title upon payment of half the cost thereof.

"The certificate of purchase did not, of course, pass the title, but only entitled the purchaser, or the defendant as his assignee, to a deed passing the title at the expiration of two years from the time of the tax sale, during which time any of the co-

tenants had the right to redeem the land; and defendant's purchase of the certificate of purchase, as before stated, amounted to nothing more than a redemption from that sale, and inured to the benefit of his wife and her cotenants."

In passing upon the rule whether a certificate of purchase passes title, it was held in 61 Corpus Juris, Section 1651, page 1220, as follows:

"A tax sale certificate has been characterized as a written certification by the official making the sale of the facts regarding the sale of real estate for taxes. It is intended for the benefit and protection of the purchaser, but is not essential to the validity of the sale. Such certificate does not create or pass title, nor does it entitle the holder to possession of the land, but is evidence of the purchaser's equitable title, and of the purchaser's lien until the time for redemption has expired, and entitles the holder to a deed passing title after the time for redemption has passed. When genuine and valid on its face, it imparts constructive notice of the sale to a subsequent purchaser of the property. Issuance of the certificate of sale does not extinguish the lien of prior certificates of sale concerning other delinquent taxes. Prior payment of the tax, or failure to comply with the law in the issuance of the certificate renders it void and ineffectual, and a void certificate to the state as purchaser confers no rights."

That a certificate of purchase does not pass title is proven by the fact that the City Charter of Kansas City, under its Revised Ordinances, Section 1024, stated as follows:

"Unless the holders or owners of certificates of purchase for real estate purchased at any tax sale under this article, take out deed or deeds, as permitted or contemplated by this article, within two years from and after the time for redemption expires, the said certificates or deeds and the sales on which they are based shall, from and after the expiration of such two years, be absolutely null, and shall constitute no basis of title, and shall cease to be a cloud on the title to the real estate to which such certificates refer."

Under the above section if the owner of a certificate of purchase does not demand a deed within two years after the time for redemption expires the certificate of purchase is absolutely void and would not be a cloud on the title to the real estate.

To pass a title so that the certificate of purchase would be considered real estate the following rule was set out in 61 Corpus Juris, Section 1864, page 1331, as follows:

"Under some statutes it is the rule that the purchaser at a tax sale, by his performance of all that is necessary to entitle him to a deed, becomes invested with title at the expiration of the period of redemption, although the deed has not, in fact, yet issued to him; however, it seems to be more generally held that the execution and delivery of a tax deed is necessary to vest title in the purchaser. * *."

Since certificates of purchase are personal property, their actual valuation is taxable under Section 10950, R. S. Missouri 1939. The pertinent parts of said section read as follows:

"The assessor or his deputy or deputies shall between the first days of June

and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: * * * * * all other property not above enumerated * * * and its value; * * * * * and every other species of property not exempt by law from taxation. * * "

That certificates of purchase do not convey title under the state law was held in Hilton v. Smith, 134 Mo. 499, 1. c. 509, as follows:

"What title to, interest in, or lien upon land a certificate of purchase secures to the holder is a question upon which there is a difference of opinion. It may be said generally that the right is no larger than the statute gives. The law of 1872 only gives the right to the redemption money in case the land is redeemed, and to a deed when the time of redemption has expired.

"In the absence of provisions of law defining the rights of the holder of a certificate of purchase the generally accepted rule is that, until the delivery of a deed, he takes no title to the land, either legal or equitable. Black on Tax Titles, sec. 322; Burroughs on Taxation, p. 321.

"The rule is announced by this court in Donohoe v. Veal, 19 Mo. 335, 336, as follows: 'If the law did not propose to give the purchaser the title to the land until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period, and the

right of the purchaser was to receive his money, with a high penal interest, during the delay of redemption. It appears very clearly to be the design of these two acts, that the title of property sold for taxes shall remain undisturbed, until the deed is actually executed by the register; and that, until that act is performed, the title is in the former owner.'

"It was further held in that case that the doctrine of relation did not apply to such sales, and the title acquired under the deed did not relate back to any prior act or proceeding.

"The law of 1857 made the certificate prima facie evidence of title, yet the court held that it never intended to confer title; but was mere evidence of title authorizing the purchaser to take possession of the premises for a limited period. Clarkson v. Creely, 40 Mo. 114.

"In Parsons v. Viets, 96 Mo. 413, this court, in considering the rights of one holding a certificate acquired under a sale made pursuant to the laws of 1872, held that he acquired thereunder no right to the possession of the premises, and in taking possession he was a trespasser and disseizor.

"After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector. The law thereafter gives him no lien upon the land for any sum, except that, in case his title fails, he may secure a lien under section 219, 2 Wagner's Statute, page 1206. Pitkin v. Reibel, 104 Mo. 511."

August 13, 1941

As to decisions in other states we refer you to the case of State ex rel. Goodman, Prosecuting Attorney, v. Halter, 47 N. E. 665, (Ind.), which was an action by the state to recover a penalty for making a fraudulent or false tax return. It was held, l. c. 667, where appellee fraudulently omitted a Two Hundred Dollar tax certificate for certain years that although the older tax statute did not specifically mention tax certificates while later on a statute did mention tax certificates, yet a tax certificate was assessable and taxable under both for the reason that they were not exempt from taxation. It held that tax certificates were personal property and subject to taxation.

In the case of Wedgbury, Township Collector, v. Cassell (Ill.), 45 N. E. 978, a certificate of purchase given by a master on a sale under a decree of foreclosure of a mortgage, subject to the usual right of redemption, is taxable.

In the case of Miller v. Vollmer, 53 N. E. 949, the court held that the statute taxed all moneys invested in certificates of purchase given at a sheriff's sale and that a tax certificate was taxable although holder of tax certificate later secured a deed.

CONCLUSION

In view of the above authorities it is the opinion of this department that certificates of purchase on pieces of property located in the City of Kansas City, Missouri, are subject to taxation on its actual value as of June 1, of each year.

It is further the opinion of this department that a certificate of purchase is personal property and taxable as such.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

WJB:DA

MOTOR VEHICLES: States of Missouri and Tennessee do not have full reciprocity.

October 20, 1941



Missouri State Highway Patrol
Jefferson City, Missouri

Attention: Sergeant Major E. P. Clark

Gentlemen:

This will acknowledge receipt of your letter of September 22, enclosing a copy of a request for an official opinion from Sergeant O. L. Wallis at Poplar Bluff, Missouri. Said request reads as follows:

"1. It is requested that the office of the Attorney General be asked for an opinion on the following: The Kroger Grocery and Baking Company, an Ohio corporation, has a branch office in Memphis, Tennessee, from which their trucks make deliveries to their stores in Southeast Missouri. These trucks bear Tennessee plates but since trailers are not required to be licensed in Tennessee, the Kroger trailers have no plates of any kind on them. Occasionally a trailer load of merchandise will be pulled from Memphis to Missouri by a Tennessee licensed truck and upon arrival at some point in Missouri the trailer will be disconnected from the Tennessee truck, hitched to a Missouri licensed truck and the trip continued in Missouri, with the trailer bearing no license.

Tennessee grants reciprocity to trucks and trailers of other states only for occasional and irregular trips. The trips of the Kroger Company trucks could hardly be called occasional and irregular since they deliver merchandise to their Missouri stores at rather regular intervals. Request that an opinion be obtained as to whether Kroger trucks can legally operate upon the highways of the State of Missouri with only Tennessee license plates and if Tennessee trailers can be legally operated upon the highways of the State of Missouri with no license plates."

The State of Missouri has enacted a reciprocal provision for nonresident owner of a motor vehicle operating in the State of Missouri. Section 8375, R. S. Missouri 1939, reads as follows:

"A nonresident owner, except as otherwise herein, provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under

the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The State of Tennessee has also enacted a reciprocal provision for nonresidents operating in that State. Section 1148 (22a), Michie's Tennessee Code of 1938 also provides that the Commissioner of Finance and Taxation is authorized to enter into reciprocal agreements with the proper officials of other states where the motor vehicles are properly licensed and bear license tags or plates of such states, but only when like privileges to citizens of Tennessee are granted.

"The commissioner of finance and taxation of the state of Tennessee is hereby authorized to enter into reciprocal agreements with proper officials of other states of the United States under which agreements motor vehicles of non-resident owners properly licensed and bearing license tags or plates of such states may be operated over the highways of the state, and without being registered or licensed in said state; provided that this law shall not warrant said commissioner in entering into any agreement with the officials of any other state which does not grant like privileges to citizens of Tennessee operating motor vehicles in such state or states."

Section 1152 (1), Michie's Tennessee Code of 1938, provides how the Commissioner of Finance and Taxation of the State of Tennessee may enter into agreements with like authorities of border states to Tennessee and reads as follows:

"The commissioner of finance and taxation of the state of Tennessee is hereby authorized to enter into

reciprocal agreements with proper officials of border states or states adjoining Tennessee, under which agreements motor vehicles of nonresident owners properly licensed and bearing tags or plates of a border state or states adjoining Tennessee may be operated over the highways of the state of Tennessee without being registered or licensed in said state; provided, that authority conferred on said commissioner by this section shall not authorize him to enter any reciprocal agreement, the effect of which would be to permit regular operations of motor vehicles from border states or states adjoining Tennessee without Tennessee registration or license, the intent of this section being to authorize said commissioner to make such agreements as may permit occasional or temporary operations of such vehicles in Tennessee without the necessity of registration or license in Tennessee; and provided, further, that this section shall not warrant said commissioner in entering into any agreement with the officials of any border state or states adjoining Tennessee which does not grant like privileges to citizens of Tennessee operating motor vehicles in such border states or states adjoining Tennessee. Provided, further, that nothing in this section shall apply to, or give the commissioner of finance and taxation any power to make such regulations or agreements in regard to, common carriers by truck or bus or in regard to contract carriers for hire except for a distance of thirty miles from the state line."

You state that trailers in Tennessee are not required to be registered in that State, while in Missouri the law specifically requires that these be registered.

Whenever it is at all possible this Department endeavors to hold that there is full reciprocity between this State and other states in order to carry out the purpose of such reciprocal provisions as Section 8375, supra. However, in this case the clear words of the Tennessee reciprocal law definitely prohibits full reciprocity with Tennessee. One of the well established rules of statutory construction is that when there is no ambiguity in a statutory provision there is no room for construction.

Since our law specifically requires all trucks and trailers to be registered in the State where the owners are residents and, since Tennessee requires no registration of such owners, said reciprocal provision in Tennessee fails to comply with our reciprocal provision. Furthermore, it is practically impossible to identify such Tennessee trailers while operating in the State of Missouri and the enforcement officers of the State of Missouri would find it very difficult to enforce our motor vehicle act under such conditions.

Furthermore, the Tennessee law herein above referred to requires the owners of Missouri trucks and trailers to request a free permit of the Department of Finance in Tennessee before operating therein. No such provision is required of Tennessee trucks and trailers in Missouri. While this permit is free it nevertheless is an additional burden placed upon residents of Missouri. Furthermore, the Tennessee reciprocal provision only allows occasional and irregular trips in Tennessee while Missouri places no such limitations on Tennessee trucks and trailers operating in this State.

"Occasional" and "irregular" have been defined in various ways according to the various uses of these words. We fail to find wherein such words have ever been construed when used as they are in the instant case. Such words have very broad meaning.

Webster's New International Dictionary, Second Edition, unabridged, defines "occasional"--"2. Of or pertaining to an occasion or occasions; acting, met with, or occurring now and

then; made or happening as opportunity requires or admits; casual; incidental.* * * 3. Occuring at irregular intervals; infrequent."

Ballentine, Law Dictionary, defines "occasional" thus:-
"For the occasion; not regularly; pertaining to the cause; casual."

Webster's New International Dictionary, Second Edition, unabridged, defines "irregular" -- "Not regular; not according to established law, method, or usage; not conformable to nature, to the rules of moral rectitude, or to established principles; not normal; disorderly; immethodical; erratic; not straight; not uniform; * * *. Syn.- unsystematic, desultory; eccentric; unsettled, variable, changeable, mutable, uneven; abnormal, anomalous; devious, crooked; immoderate, intemperate, wild. Ant.- Normal, usual, customary; orderly, methodical, level, even; straight; uniform."

In *Palle vs. Industrial Commission of Utah*, 7 Pac. (2) 284, 1. c. 290, the court defined "regularly employed" in the Workmen's Compensation Act as follows:

"There of course is a difference in the popular or ordinary meaning of the phrase three or more men 'regularly employed' in the business of the employer, and of language three or more men employed in the regular or usual business of the employer. The first excludes mere casual or occasional employments, in the business, while the other includes all kinds of employments, whether regular, casual, or otherwise in the usual or regular business of the employer. While the term 'regular' in its ordinary and popular meaning is the clear antonym of 'casual' or 'occasional,' yet it seems the Legislature declared that the term as used in the statute shall not have that meaning, and that it was in-

tended to include all employments, regular, casual, or occasional, in the usual trade or business of the employer."

In *Biermann vs. Guaranty Mut. Life Ins. Co.*, 120 NW. 963, 1. c. 965, the court defined 'occasional' as used in an insurance policy, where the insured stated he took a glass of beer occasionally, as follows:

"The application itself discloses his habits, to some degree at least; for, while saying that the applicant did not use malt or spirituous liquors 'to excess,' it further informs the company that he did take 'a glass of beer occasionally.' This was sufficient disclosure to suggest to a discreet person the advisability of further inquiry if the subject was one deemed of vital importance. What constitutes 'excess' in this respect is largely a matter of opinion, and varies all the way between a 'drink' and a 'drunk'; while an 'occasional' glass of beer may mean anything from a glass once a month to one every 15 minutes, according to the capacity of the individual, or, perhaps, according to the 'liberality' of his views. * * * * *

* * * * *

From the foregoing definitions it is not an easy matter to determine the meaning of such words. The same definition may not apply in each case. Much depends upon the facts in the particular case.

In the instant case we are not in possession of all the facts, but assume the Kroger Grocery and Baking Company has established a more or less regular route where they transfer trailers at Benton, Missouri, or some other common meeting place within this State. It is the assumption that for such a business,

October 20, 1941

with retail stores in Missouri and Tennessee, it is necessary that such a meeting be at rather regular intervals. The business is dependent upon certain definite deliveries. While as herein above stated this is a mere assumption, yet to the writer it seems to be a reasonable one.

We have not overlooked the fact that the State of Missouri, through its Secretary of State, and the Department of Finance in Tennessee have entered into a written agreement as to the reciprocity between the two states; however, since there is no authority under the laws of Missouri, for the Secretary of State entering into such agreement it has no legal status. Even in said proposed agreement it also requires a permit to be secured by Missouri residents.

Therefore, it is the opinion of this Department that since the State of Tennessee under its law requires no registration of trailers in that State, that they require any trucks or trailers registered in the State of Missouri to obtain a free permit before operating in that State, that they further require that such operation be permitted only without registration in the State of Tennessee when said trucks or trailers are being used on an occasional or irregular trip within the State, that the State of Missouri does not recognize such reciprocal provision of the State of Tennessee as being tantamount to full reciprocity and, therefore, such trucks and trailers registered within the State of Tennessee carrying goods or wares belonging to the owner of said trucks or trailers must likewise be registered in this State before operating herein.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

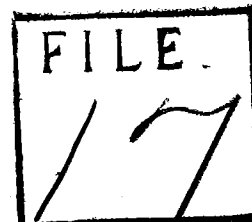
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TAXATION:
SHARES OF STOCK:

Present attitude of Supreme Court indicates that shares of stock held by a resident of this state in a foreign corporation may be subjected to a personal property tax.

October 20, 1941

Mr. George R. Clark
County Assessor
Court House
Kansas City, Missouri



Dear Sir:

This is to acknowledge your letter of recent date, requesting an opinion from this department relating to the taxation of shares of stock held by a resident in this state in foreign corporations. Your request reads as follows:

"On numerous occasions recently the question has come up in this office as to the liability for State, County and School Tax purposes, of stock of a foreign corporation owned by a resident of this state.

" * * * * *

"We would greatly appreciate a definite ruling from you in this respect, and your advise in detail as to what corporate stock is taxable and what corporate stock is exempt from taxation under the laws of the state of Missouri."

At the outset, it should be observed that for the support of the Government the state taxes shall be levied on all property, real and personal. Section 10936 of R. S. Mo., 1939.

It is provided by Section 10939 of R. S. Mo., 1939 that:

"All personal property of whatever nature and character, situate in a county other than the

one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 10957; and all notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides; and the owner, in listing, shall specifically state in what county, state or territory it is situate or held."

Attention is also directed to Section 10950 of R. S. Mo., 1939, relating to what the assessment lists shall contain. In view of the fact that section of the statute is lengthy, we do not deem it necessary to set it out verbatim. Suffice it to say that in substance and effect, that section requires the listing of property embraced within eleven different classifications. If the shares of stock, to which you have referred in your request for an opinion, are taxable for state, county and school tax purposes, then such stock must be embraced within the eleventh classification, which reads as follows:

" * * * eleventh, all other property not above enumerated (except merchandise, bills and accounts receivable, and other credits of a merchant or manufacturer, arising out of the sale of goods, wares and merchandise, which have been returned for taxation, under sections 11309 and 11339, R. S. 1939), and its value; under this head shall be included all shares of stock or interest held in steamboats, keelboats, wharfbots, and other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all vehicles used in the transportation of persons (except of railway carriages), and all paintings and statuary, and every other species of property not exempt by law from taxation. * * *"

In view of the fact the Supreme Court of this state has had occasion to pass upon sections of the statutes above set forth, we do not attempt to construe such statutes, except in light of what has been said. In this respect, your attention is directed to the case of State ex rel. Koeln v. Lesser, 237 Mo. 310, 141 S. W. 888. That case was decided by the Court en banc on November 14, 1911. In that case the question, before the court for determination, was whether or not the revenue statutes of this state subjected to taxation, shares of stock owned and held by a resident in this state in foreign corporations, whose property is all beyond our borders. The court held that what is now Section 10950 of R. S. Mo., 1939 did not include shares of stock held by a resident of this state in foreign corporations. This was because that section of the statute did not specifically name that classification of property as being subject to a tax. The court pointed out that the statute classified the property subject to personal taxation by enumerating the various classes of property. At that time the statute contained ten specific classifications. It was contended that the tenth classification, which is now the eleventh classification, would subject the shares of stock owned by a resident in a foreign corporation to a personal property tax. The tenth classification at that time read in part as follows:

" * * * tenth, all other property not above
enumerated * * * and its value; * * * * *
* * * * * * * * * and every species of
property not exempt by law from taxation. *
* * *"

The court rejected this contention, and said:

" * * * If by those two general terms the
lawmaker intended to say that everything
that a person might own or have any inter-
est in, either direct or indirect, here or
elsewhere, was to be listed for taxation,
what was the use of specifying items either
in that clause or in the preceding nine clauses?
If shares of stock in a foreign corporation are
'property' within the meaning of that word
as there used, so are shares of stock in steam-
boat companies, and so are printing presses
and mills and wagons and paintings and statuary,
yet all those things, and more, are especially

mentioned in that tenth clause, while the preceding nine other clauses are also industriously specific of items to be listed.

"Section 11519, on which appellant relies to sustain his contention that shares of stock in a foreign corporation are comprehended under the general terms 'property' and 'personal property,' defines the term 'property' 'wherever used in this chapter,' to mean and include every tangible or intangible thing being the subject of ownership, whether animate or inanimate, real or personal. If the General Assembly had intended by that definition to say that the taxpayer should list for taxation, not only his property in this State, including the items specified in section 11348, but also everything else on the face of the earth in which he had any interest, either within or without the State, it would require him to list not only the personal property, but also the real estate outside the State, which he might own or have an interest in. The reasonable construction of that clause of the statute is that it was intended to mean property in this State. That intention also appears in the definition in that section given the term 'personal property.' The definition is very comprehensive, and specifies stocks and bonds and many other things tangible and intangible, but it nowhere says of any of the items mentioned that they are included whether in this State or elsewhere, until it comes to 'ships, vessels or other boats,' and of them it says, whether 'within the jurisdiction of this State or elsewhere.' If it was intended to mean that all the personal property enumerated or interest therein, here or elsewhere, was included, why did it specify boats here or elsewhere? The distinction in this particular drawn between steamboats and other properties shows that the Legislature intended, except as to steamboats, etc., to include only property or interests within this State."

The Court finally, after considerable straying into the field of obiter dictum, held that there was nothing in our statute intending to render subject to taxation shares of stock held by a resident of this state in a foreign corporation, whose property is not in this state.

Attention is further directed to the case of State ex rel. Brinkop, 238 Mo. 298. That case was decided December 16, 1911. The Court en banc there reconsidered its conclusion in the Lesser Case, supra. The court said:

"We have just had occasion in another case decided at this term, State ex rel. v. Lesser, 237 Mo. 310, to review our revenue statutes from 1845 to this date, and we there reached the conclusion that it had never been the policy of this State to tax both the shares of stock and the property which they represent. * * *"

Based upon a decision of the Lesser Case, the court further said:

"* * * To take into account, in assessing the value of the shares of stock in this insurance company, property owned by the corporation outside of this State, would be equivalent in effect to requiring the shareholders to pay taxes on such property; our statutes do not authorize such taxation. * * *"

This last quotation, it seems, demonstrates what was actually held in the Lesser Case, supra, to-wit, that since the shares of stock represented property located without the state, our statute did not subject such property to tax. Of course, the Court en banc, reached that conclusion by observing at page 320:

"* * * The reasonable construction of that clause of the statute is that it was intended to mean property in this state. * * *"

It seems therefore, that this court's construction of what is now Subdivision 11 of Section 10950, supra was based upon reasonableness, without regard to whether or not fundamental rules to be invoked in the construction of statutes should be applied. In other words, the court, at that time, apparently was not interested in determining the intention of the legislature, and therefore rendered practically a whole clause of the statute, there under consideration, a mere nullity.

Attention is also directed to the case of State ex rel. Globe Democrat v. Gehner, 294 S. W. 1017. That case was decided by the Court en banc in May, 1927. The court again referred to its decision in the Lesser Case, supra, and again explained its ruling there, to the effect that they had previously held that what is now Section 10950, supra was not to be construed as intending to include property beyond the territorial jurisdiction of the state. The Court said:

"The decisive ruling in State ex rel. Koeln v. Lesser, 237 Mo. loc. cit. 319, 141 S. W. 888, was that the shares of stock there sought to be subjected to taxation were beyond the jurisdiction of the state and that no law existed providing for their taxation. The additional holding, that the meaning of the general words in what is now section 12766, as amended, should be restricted to the meaning of the particular words, was not necessary to the determination of the matter at issue and does not rise to the dignity of a precedent in the construction of that section and may be regarded as obiter. A more forceful reason may be urged against the correctness of the ruling, in that the Lesser Case, as we have indicated, ignores the object and purpose of our laws of taxation and in so doing places an incorrect construction upon the duty imposed upon the taxpayer in making a return of his property for taxation." (Under-scoring ours.)

Your particular attention is directed to that portion of the quotation, respecting the court's observation, with respect to the general words in what is now Section 10950, supra.

Therefore, what was said by this court en banc in 1911, respecting the meaning of what is now the eleventh classification in Section 10950 supra was obiter, and should not be regarded as the true construction of the general language used in such classification. It is interesting to notice in this case that the court is beginning to depart from its holding in the Lesser Case. This is demonstrated by the case of In re Zook's Estate, 296 S. W. 778. That case was decided by Division 1 of this court in July, 1927, just two months subsequent to the Globe Democrat Case, previously noticed. In that case, the court had before it for consideration as to whether or not an inheritance tax could be imposed against the Estate of a Decedent. The estate consisted in part of shares of stock which the decedent owned in a corporation organized under the Laws of Nebraska. At the time of decedent's death, the certificates, representing the shares of stock, were not within the State of Missouri, but were kept for safety reasons in a safe deposit box in the City of Omaha, Nebraska. It was contended that the transfer of the stock in the Nebraska Corporation was not subject to the Inheritance Tax Laws of Missouri. Before ruling the proposition involved, the court observed:

" * * * the corporate stock here in question is intangible property (13 C. J. 387; Foster v. Potter, 37 Mo. 526, loc. cit. 530; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, loc. cit. 20, 20 S. W. 690, 35 Am. St. Rep. 691), and the force and effect of whatever our ruling may be in this case will necessarily be limited to intangibles."

In support of the contention that the shares of stock there involved were not subject to an inheritance tax, the Lesser Case was again cited, and the court declined to follow it, and again explained its ruling there by saying:

" * * * In fact, Leavell v. Blades and State ex rel. v. Lesser, supra, cases involving the direct taxation of property and holding that evidence of debt or shares of stock outside this state, though owned by a resident of this state, are not taxable in this state, were decided on the express ground that our statutes do not require that they be so taxed, * * *"

By the above quotation, it is now apparent that the court is dissatisfied with their previous holding in the Lesser Case.

Attention is also directed to the case of State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057, 1065. That case was decided in July, 1928. In that case, the court again had before it for consideration what is now Subdivision eleven of Section 10950, supra, and in passing upon whether or not that classification embraced certain credits, said:

"The tenth item includes 'all property not enumerated (except merchandise),' mentioning several kinds of chattels and other property, 'and every other species of property not exempt by law from taxation.' If deposits in other states are not included in item 6, they are covered in item 10. That is comprehensive enough to cover everything, including debts, credits, which under the general rule are taxable. It only prevents the taxation of property exempt by law from taxation."

In that case the court again took the opportunity of considering their holding in the Lesser Case, supra:

"In State ex rel. v. Lesser, 237 Mo. 310, 141 S. W. 888, it was held, notwithstanding the statute, that shares of stock in a foreign company owned by a resident of this state were not taxable in this state. It was because all the property represented by the shares was in the state where the corporation was located and was taxed there. * * *"

In spite of this observation, the court cited the case of In Re Zook's Estate, supra, and concluded:

" * * * it seems that the policy of this state is to consider specific securities, bonds, stocks, and the like, as having a situs wherever they

happen to be. * * * *"

By this quotation, it is apparent this court recognizes that the interest which a person may have in a share of stock is a property right, separate and apart from that of the corporation, and being intangible property, the situs of such share of stock would be wherever such share of stock might be located or employed. The court further explained its ruling in the Lesser Case in the following language:

" * * * In the Lesser and Leavell Cases, supra, in considering the statute relating to the taxable assets of a person or corporation, particular attention was paid to the statute specifying what shall be in a tax return for such property, on the ground that such statutes indicate the legislative intent with regard to taxable property."

This observation leads one to believe that the court is just awaiting the opportunity to overrule its previous holding, respecting the taxation of shares of stock owned by a resident in a foreign corporation.

Attention is also directed to the case of State ex rel. American Central Insurance Co. v. Gehner, 9 S. W. (2d) 621. That case was decided in July, 1928 by the Court en banc. The court emphasized its previous ruling in the American Automobile Insurance Case by stating:

"Property of an intangible nature, such as credits, bills receivable, bank deposits, bonds, promissory notes, mortgage loans, judgments and corporate stock, has no situs of its own for the purpose of taxation, and is therefore assessable only at the place of its owner's domicile."

The question, there before the court, was whether or not a certificate of deposit was an evidence of debt, within the meaning of what is now Section 10939 of R. S. Mo., 1939, relating to the assessing of personal property in a county in

which the owner resides. In ruling the question involved, the court considered the In Re Zook's Case, supra, and said:

"The latest deliverance of this court upon this subject was in the Zooks Case (Mo. Sup.) 296 S. W. 778. That involved an inheritance tax, but, whatever difference there might be between the application of an inheritance tax and a general tax so far as nontaxable property on account of its class is concerned, there should be no difference between the two so far as its location is concerned. In that case the property held taxable was shares of stock in a Nebraska corporation, a certificate of which was at the time out of the state for the purpose of safe-keeping. It was owned by a resident of Missouri. The language applied to it is in section 589, Revised Statutes 1919, where it was said that the property involved shall include all personal property 'within or without the state'. That is certainly not stronger than the statement in section 12755, in relation to evidence of debt held in any state or territory other than that in which the owner resides. * * * #"

It is to be seen from these considerations of the cases subsequent to the ruling in the Lesser Case, that no logical pattern may be drawn with respect to what the present attitude of our Supreme Court may be respecting the taxability of shares of stock owned by a resident of this state in a foreign corporation. But, if the cases reviewed subsequent to this decision chart any course of action, it is reasonable to believe that if the question is again presented to the court, the holding in the Lesser Case will be overruled. This is made apparent when it is considered that the court held in the Lesser Case, in construing what is now Section 10950, supra that such section was only intended to mean property in this state. Since therefore the court has concluded, in the American Central Insurance Case, supra, that shares of stock may have a situs in this state, when owned by a resident in a foreign corporation, such shares of stock, may, under the present attitude of our Supreme Court, be subject to a tax under the provisions of Section 10950 of R. S. Mo., 1939.

APPROVED:

Very truly yours

VANE C. THURLO
(Acting) Attorney General

RUSSELL C. STONE
Assistant Attorney General

RCS:ww

MOTOR VEHICLES: Full reciprocity does not exist between Indiana, Illinois and Missouri.

October 22, 1941

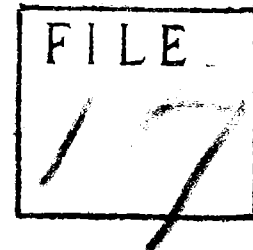
Missouri State Highway Patrol
Jefferson City, Missouri

Attention: Sergeant Major E. P. Clark

Gentlemen:

This will acknowledge receipt of your request for an official opinion under date of September 15, 1941, which reads as follows:

"The Kroger Grocer Company, of St. Louis, operate about 15 or 20 trucks with Missouri license, having inaugurated a new type of service. As an example, they will have a load of merchandise which is going to their Terre Haute branch and the trailer, which is registered in the State of Missouri, has Missouri license and is loaded for this point. Upon arrival there, instead of unloading this trailer, the tractor will be attached itself to a trailer which is loaded with merchandise for the St. Louis branch. This trailer is registered in the State of Indiana and will return to St. Louis. The same trailer equipped with Indiana license will engage in hauling their merchandise within the State of Missouri from St. Louis to various points in entirely intra-state operation. The trailer equipped with Missouri license will engage in the same type of operation within the State of Indiana.



"We would like to have an opinion from your office as to whether or not the above operation is legal or whether the reciprocal agreement with Indiana and Illinois does apply to the above operation, or whether it means Interstate Commerce only. This is a private Missouri corporation handling their own merchandise and are not engaged in any way for hire."

In this State the legislature enacted a reciprocal provision, Section 8375, R. S. Missouri 1939, pertaining to motor vehicles, which reads as follows:

"A nonresident owner, except as otherwise herein, provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

Indiana enacted the following motor vehicle reciprocal

provisions. Chapter 29, page 152, Session Acts of 1937, provides:

"Section 1. Be it enacted by the general assembly of the State of Indiana, That section 2 of the above entitled act be amended to read as follows: Sec. 2. The governor of the State of Indiana and such commission so appointed and designated by him are hereby authorized and empowered to engage in any conference with the officials of any or all other states, commonwealths or the District of Columbia, that in their judgment would be in the interest of the State of Indiana and the citizens thereof, and they are hereby empowered to enter into such reciprocal contracts and agreements as they may deem proper, expedient, fair and equitable to the citizens of this state, with the proper authorities of adjoining states or any or all of the states or commonwealths and the District of Columbia, regulating the use of motor vehicles on the highways of this state, belonging to and owned or operated on such highways by citizens of such other states, commonwealths or the District of Columbia, in consideration of the granting by such other state, commonwealth, or District of Columbia to the citizens of this state a like privilege or privileges while operating a motor vehicle in such other state, commonwealth or the District of Columbia. They are likewise empowered and authorized to confer, advise with and enter into such reciprocal contracts and agreements as they may deem proper, expedient, fair and equitable to the citizens

of this state with legislative bodies, commissions, boards or officials duly authorized and empowered by the law of any other state, commonwealth or the District of Columbia, with a view to promoting and establishing such fair, just, equitable and reciprocal agreements for the licensing, movement, taxing, registration, regulation and fees to be charged therefor of motor vehicles owned and licensed in this state and operated on the highways of such other state, commonwealth or the District of Columbia and those owned and licensed in such other state, commonwealth or the District of Columbia and operated on the highways of this state. If such other state, commonwealth or the District of Columbia has no commission or official authorized to enter into such a reciprocal agreement, but does have in force a law or statute which contains a reciprocal provision for the benefit of the citizens of this state, then the governor and said commission, if they are of the opinion that it would be beneficial to the citizens of this state, are authorized to consent to the provisions of such reciprocal law or statute, and to notify the proper authority of such other state, commonwealth or the District of Columbia thereof. In all cases where reciprocal agreements are entered into by said commission, pursuant to the provisions hereof, said agreements shall be given full force and effect and shall be construed as modifying any existing laws insofar as they are inconsistent therewith, and so long as such agreements are in force."

Section 11127, Baldwin's Indiana Statutes, annotated, 1934, provides full reciprocity on motor vehicles and trailers with other states, with this exception:

"The provisions of this act relative to registration and the display of registration numbers shall not be construed to apply to any motor vehicle, motor bicycle, tractor, trailer or semi-trailer owned by a nonresident of this state, other than a foreign corporation doing business in this state, if the owner of such motor vehicle, motor bicycle, tractor, trailer or semi-trailer shall have complied with the provisions of the law of the state of which he is a resident, relative to the registration of motor vehicles, motor bicycles, tractors, trailers and semi-trailers and the display of registration number plates thereon, and shall conspicuously display his registration number plates as required hereby. A nonresident shall not be deemed to have complied with the law of the state of which he is a resident unless regulation metal license plates, issued by the proper authorities of such state, are conspicuously displayed on the motor vehicle, motor bicycle, tractor, trailer or semi-trailer for which said license was issued. * * * * *

The Indiana reciprocal provision authorizes the governor, and the commissioner appointed by the governor, to enter into any agreement with officials having like authority in any other state, and if there be no like officials having the necessary authority to enter into such agreement with officials of Indiana, but the other state does have a reciprocal provision for the benefit of the citizens of Indiana, then the governor of Indiana and the commissioner have authority to notify the proper authorities of such other state that they consent to such reciprocal provision. In such case such agreement or consent shall be construed as modifying any existing law insofar as they

October 21, 1941

are inconsistent with said agreement.

Since no authority is granted to any office or department in this state to enter into any such agreement we must be guided solely by the respective reciprocal provisions of Indiana and Missouri.

Section 11127, supra, Indiana Statutes, specifically exempts nonresidents from registration in Indiana with the one exception and that is "other than a foreign corporation doing business in this state." It is the opinion of this Department that this one exception would include such case as the Kroger Grocery and Baking Company owning business in both Missouri and Indiana and carrying their own goods in their own trucks and trailers.

Therefore, we must hold that due to that provision in Section 11127, supra, of the Indiana Statutes requiring foreign corporations doing business in Indiana to register in Indiana, Missouri requiring no such registration of foreign corporations in Missouri, that such corporation as the Kroger Grocery and Baking Company in Indiana must register in Missouri before operating in this state. We have heretofore held that there is not full reciprocity between Illinois and Missouri in just such a case as presented by these facts due to a similar provision in their law.

It is the further opinion of this Department that if the governor and commissioner in Indiana should consent to our reciprocal motor vehicle act and assures the Commissioner of Motor Vehicles in Missouri that the State of Indiana would grant full reciprocity to Missouri corporations doing business in Indiana, which would be contrary to Section 11127, Indiana law, but such authority is granted the governor and said commissioner, then such Indiana trucks and trailers would be permitted under our motor vehicle act to operate within this state as suggested in your request.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

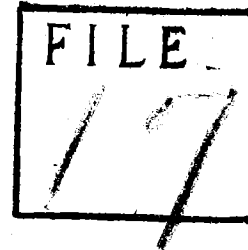
VANE C. THURLO
(Acting) Attorney General

ARR:EAW

COUNTY COURTS: Procedure to be followed in proceeding
to correct error of valuations under
Section 11118.

November 8, 1941

Mr. George R. Clark
Assessor
Jackson County
Kansas City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of October 27, 1941, asking us to review our opinion to Walter H. Miller, former Jackson County Assessor, under date of November 24, 1934. In that opinion we held that the County Court, by virtue of the authority granted in Section 11118, R. S. Missouri, 1939, could correct erroneous valuations of real estate at any time prior to the time the taxes due on said real estate were paid.

As to this request, we need only say that we have, on several other occasions, been asked to recede from the conclusion reached in that opinion and have declined to do so. We have again reviewed it and our present research does not disclose any ruling by a court of last resort, since said opinion was issued, that causes us to change the views we expressed therein. We still believe it is a correct exposition of the law.

Your letter of October 27, 1941, however, presents an additional question. The correctness of the procedure being followed by the Jackson County Court in exercising the authority granted in Section 11118, R. S. Missouri, 1939. In your letter you state that, with our opinion as "its license, the Court, without the showing of a basis in fact, has followed the practice of indiscriminately cutting and lowering valuations upon Jackson County real estate, either because of whim or caprice or for other reasons best known to themselves. The practice, too, is indulged in, as I say, indiscriminately and arbitrarily, after the equalization functions of the County Board and of the State Tax Commission have been followed. Evidence

of the chaotic condition in which the entire basic tax level of the County may be thrown, if the present practice were followed to its ultimate possibility, is drawn from the fact that in connection with the tax base established for the year 1939, the County Court, for taxes payable in that year, and after delinquency in certain of those taxes, entered special privilege dispersing abatement orders, during the year 1940, reducing real estate valuations (and thus cutting the tax due thereon) in the sum of \$10,000,000.00."

Upon this statement of fact you ask: "* * *, if the County Court of Jackson County has the right and power by law to arbitrarily adjust valuations or abate State, County and School taxes duly placed on real estate and due thereon, upon alleged 'errors' or 'mistakes' of valuation, in the absence of a finding and certificate of error or mistake, by the official, or officials, charged by law with the initial determination of that fact?"

It would be extremely difficult for us to determine whether the Court has been acting properly upon the statement of facts before us, and for that reason we will not attempt to do so. We think the best way to answer your request is to outline what is the correct procedure and let others, more familiar with the present practice, lay that outline beside the present procedure followed and thus determine its sufficiency or correctness.

The County Court is a Court of record (Section 1990, R. S. Missouri, 1939), and as such, can only speak through its records when acting judicially. The rule is stated in *Riley v. Pettis County*, 96 Mo. 318, 321, as follows: "* *. The County Court, when acting in a judicial capacity, can speak only by and through its records."

Under Section 11118, R. S. Missouri, 1939, the County Court is given "* * * full power to correct any errors which may appear in connection * * *," with taxes assessed against real estate, "* * * whether of valuation, * * * or otherwise, * * *" and "* * * to make such valuations * * * conform in all respects to the facts and requirements of the law.* * *." The function of the County Court under this section has not yet been classified as to whether judicial

Mr. George R. Clark

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Nov. 8, 1941

or administrative, but we think the rulings made on analogous functions are authority for classing the function of correcting errors in valuation as judicial.

The County Board of Equalization is the analogy to which we refer. Section 11002, R. S. Missouri, 1939, provides that:

"Said board shall have power to hear complaints and to equalize the valuations and assessments upon all real * * * property within the county * * * * * so that each tract of land shall be entered on the tax book at its true value: * * * * *."

Section 11004, R. S. Missouri, 1939, provides:

"The said board shall hear and determine all appeals made from the valuation of property made by the assessor in a summary way, and shall correct and adjust the assessment accordingly. The county clerk shall keep an accurate record of the proceedings and orders of the board, and the assessor shall correct all erroneous assessments, and the clerk shall adjust the tax book according to the orders of said board and the orders of the state board of equalization: Provided, that in adding or deducting such per centum to each tract or parcel of real estate as required by said board, he shall add or deduct in each case any fractional sum of less than fifty cents, so that the value of any separate tract shall contain no fractions of a dollar."

State ex rel. Van Raalte v. Board of Equalization of City of St. Louis, et al., 256 Mo. 455, was an action involving a valuation increased by the board. The charter provision involved was, in substance, the same as Sections 11002 and 11004, supra. After the board had acted, certiorari was sued out in the circuit court and the case thereafter went on appeal to the Supreme Court. That court, in characterizing the function of the board, said l. c. 461:

"The functions of the board of equalization in judging the assessments of property are judicial, * * * * *."

State ex rel. Morris v. Cunningham, 153 Mo. 642, was an action wherein the board of equalization had raised a personal property valuation. The court said, in characterizing the nature of this act, l. c. 654:

"* * * such proceedings do partake somewhat of a judicial character * * * * *."

Again, in State ex rel. Johnson v. Bank, 279 Mo. 228, at l. c. 235, the court said:

"The county boards of equalization perform judicial functions, as is clearly indicated by Article 3 of Chapter 117, Revised Statutes 1909. And this court has so held. Thus in Black v. McGonigle, 103 Mo. l. c. 198, et seq., is said: 'According to the plain letter of the statute, the board has not only the power to hear complaints, but it has the power, of its own motion, to equalize the valuation for the purposes named in the law, namely, so that each tract of land shall be entered at its "true value." In performing these

duties the board acts judicially:
this has been often held, and the very
nature of the duty to perform makes
it a judicial one. (St. Louis Mutual
Life Ins. Co. v. Charles, 47 Mo. 465;
Railroad v. Maguire, 49 Mo. 483; Cooley
on Taxation (1 Ed.), 291.)" "
(Underscoring ours)

There is no essential difference between the acts
of the board in adjusting valuations and the acts of the
County Court, under Section 11118, in correcting errors
in valuations. Under the above authorities we are of the
opinion that in correcting such errors the County Court
acts judicially as a court of record.

It is well settled in this state that courts cannot
set themselves into motion. In Owen v. McCleary, 273 S.
W. 145 (Mo. App.) it is said, l. c. 147:

"It is well settled that a court
cannot of its own motion set itself
in action; * * * * *"

Again, in Riggs v. Moise, 128 S. W. (2d) 632 (Mo.
Sup.) the rule is stated. At l. c. 635, it is said:

"The judicial power can be set in
motion in civil matters only by some
person * * * *. The courts cannot,
ex mero motu, set themselves in motion,
* * * * *"

It is, therefore, to be seen that before the County Court
can act, to correct errors of valuations, some person must
invoke their jurisdiction by an appropriate request.

Section 11118 does not prescribe the method to be
followed in this respect, that is, whether there must be

a written pleading - but we think a review of general rules of law indicate that such a pleading is required.

It has been ruled that a County Court is an inferior court of limited jurisdiction. St. Louis County v. Menke, 95 S. W. (2d) 818 (Mo. App.); Ex Parte McLaughlin, 105 S. W. (2d) 1020 (Mo. App.). As to these courts, it is said in Doddridge v. Patterson, 222 Mo. 1, c. 155, that:

"* * * 'It has long been settled law in Missouri that the jurisdiction of courts of inferior jurisdiction, and of courts that do not proceed according to the course of the common law, must affirmatively appear on the face of the proceedings.' * * * * *"

On what constitutes jurisdiction, the court, in State ex rel. Lambert v. Flynn, 154 S. W. (2d) 52, 57 (Mo. Sup.) stated:

"* * * It is said that the jurisdiction of a court to adjudicate a controversy rests on three essentials: (1) jurisdiction of the subject matter; (2) jurisdiction of the res or the parties; (3) and jurisdiction to render the particular judgment in the particular case."

It is these three things that the face of the record must show in order for the proceedings of a County Court to correct errors of valuation, to be valid. In Sutton v. Cole, 155 Mo. 206, the court further discusses the question of jurisdiction of inferior courts and the showing necessary. It is said, l. c. 213:

"* * * But it is not essential that jurisdiction should appear from the

face of the record proper. (Case cited). It is sufficient if it appears from the entire record of the proceedings. * * * * *."

At first glance it would appear that this rule is a barrier to concluding that some written pleading is required in these proceedings. However, we do not think so, but to the contrary, believe that it supports our view.

As heretofore noted, jurisdiction consists of three elements. With these in mind, suppose a judgment of the County Court increasing a property valuation that recites that the property owner appeared before the court requesting the court to exercise its power under Section 11118, and that, upon consideration of all the facts, the court finds there has been an error in valuation and therefore corrects said error by increasing the valuation to Two Thousand Dollars (\$2,000.00).

Such recitals would no doubt show that the court's jurisdiction was invoked by some person; the matter involved, by reference to the statute, clearly shows jurisdiction of the subject matter and the appearance of the party shows jurisdiction of the party. But would such a recital show jurisdiction to render the particular judgment in the particular case. We do not think it would.

If jurisdiction can be shown by any part of the record, then by the same token, lack of jurisdiction may be shown by something appearing somewhere in the entire record of the proceeding. As was said in *Sisk v. Wilkinson*, 265 S. W. 536 (Mo. Sup.) at l. c. 538:

"The judgment may be impeached by other parts of the record, * * * * *."

Again, in *G. M. A. C. v. Lyman*, 78 S. W. (2d) 109, (Mo. Sup.), it is said, l. c. 112:

"* * * It is the rule in this state that a recital in a judgment * * * * * may be shown by other parts of the record to be incorrect even in a collateral proceeding. * * * * *."

Suppose, in this hypothetical case, the property owner had petitioned the court by written pleading to correct some error under Section 11118 other than an error of valuation; that in that proceeding the court, of its own motion, corrected the valuation as above stated. In such case then, the property owner could show by another part of the record (his written pleading) that the County Court had no jurisdiction to render the particular judgment -- that of correcting the valuation.

This is to be seen by what is said in *Owen v. McCleary*, 273 S. W. 145 (Mo. App.), at l. c. 147, where it is said:

"It is well settled that a court cannot of its own motion set itself in action; that it has no power to decide questions, except such as are presented by the parties in their pleadings; that, where a court adjudicates a matter not embraced in the issues as made by the pleadings, that part of the judgment so adjudicated is coram non judice and void; * * * * *."

Also, in *Riggs v. Moise*, 128 S. W. (2d) 632, at l. c. 635, it is stated:

"* * * The courts cannot, ex mero motu, set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings. The parties, by their attorneys, make the record, and what is decided within the issue is res adjudicata; anything beyond is coram non judice and void.' * * * * *."

However, take the same hypothetical case and suppose the property owner had only made an oral request to the court, where, then, would we be? A court cannot act of its own motion. The judgment reached would show action taken at the request of some person, but since it was not wholly upon the subject upon which action was requested, in effect, it would be the court acting on its own motion on a matter without the issues. This would clearly be wrong, yet there would be no record to show the contrary, and further parol evidence would be inadmissible to contradict or supply the record. (State ex rel. v. Ross, 118 Mo. 23). Neither could said judgment recitals be impeached by parol evidence as to the true request made of the County Court. Sisk v. Wilkinson, 265 S. W. 536, 538 (Mo. Sup.)

A procedure that would lead to such absurd results certainly cannot be the rule. And if jurisdiction to render the particular judgment must be affirmatively shown by the record in order for the action of an inferior court to be valid, then the record must show what action the court was requested to take - what issue was before it - and the only proper place for this to appear is in a written pleading. With a written pleading on file there could be no doubt as to whether the judgment entered was within the issues presented -- that is, the record would show the court had jurisdiction to render the particular judgment that it rendered. We think a written pleading is necessary to show the third element of jurisdiction, as stated in the Flynn Case, supra. A mere recital in the judgment alone of the issue presented might suffice, but it would not be the best evidence of such fact, since such could be impeached by the petition showing otherwise. The only true source of evidence to prove the existence of the third element of jurisdiction would be the petition itself, which would be a part of the record and show conclusively that the court acted within its authority.

As heretofore pointed out, the County Court can only speak through its record and of necessity, would have to render a judgment of record as to its disposition of the case before it.

Mr. George R. Clark

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Nov. 8, 1941

We think the foregoing disposes of the question before us, and we conclude that the proper procedure to be followed under Section 11118 is for the interested party to petition the court in a written pleading to correct an error of valuation, alleging his reasons therefore; that the court should then hear evidence and make its determination, reciting in its judgment the necessary jurisdictional facts.

Under Section 2479, R. S. Missouri, 1939, the court has the power to bring before it any person or evidence that it deems necessary to examine in order to reach a decision. While such a proceeding would be ex parte, yet, obviously all taxing districts whose revenues depended upon the valuation fixed are interested parties and would have the right to appear and be heard.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB/rv

COUNTY TREASURERS: Compensation can not be increased during term.

April 11, 1941

Honorable William R. Collinson
Prosecuting Attorney
Greene County
Springfield, Missouri



Attention - V. O. Coltrane, Jr.
Assistant Prosecuting Attorney

Dear Sir:

Under date of March 27, 1941, you wrote this office requesting an opinion as follows:

"Under date of February 12, 1941, I requested an opinion from your office on certain questions set out therein. I have received no reply to this letter, and am wondering whether or not this was ever taken up by your office.

"The most pressing question presented at the time was the question as to the authority of the County Court to pay the salary of a deputy in the Treasurer's office. I expressed the opinion that the Treasurer was not entitled to a deputy since there was no provision for one given by statute, Greene County no longer being in the class of counties having a population of 75,000 to 80,000 inhabitants; that there being no provision for a deputy in counties of the class of Greene County, the Treasurer must pay the deputy out of his own salary.

"Shortly after January 1st, 1941, the Greene County Court, by its order entered of record, fixed the salary of the County Treasurer at \$3,200.00, being the same salary the Treasurer drew under the provisions of Sec. 13498 R. S.

1939. The said Court further fixed the salary of a deputy at \$1,800.00 per year.

"Assuming that it is your opinion that the County Court cannot legally pay the salary of a deputy to the Treasurer, the further question arises as to whether or not the County Court can increase the salary of the Treasurer so that the Treasurer may pay the deputy out of his own salary. In other words, would it be proper to increase the Treasurer's salary to \$5,000.00 a year so that he could pay the deputy \$1,800.00 a year out of his own compensation?

"Sec. 13800 R. S. 1939, provides that 'Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor.'.

"Sec. 10400 R. S. 1939, provides that 'the County Treasurer shall be allowed such compensation for his services as the County Court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him to be paid out of the County Treasury.' This compensation is for the Treasurer's duties as custodian of school moneys.

"If the compensation of the Treasurer can be raised, the Court could make an order giving the Treasurer \$1,800.00 per year for disbursing the school funds in addition to his present salary of \$3,200.00 per year. In this county \$1,800.00 per year would not be more than one-half of one per cent of the school moneys disbursed by him. The Treasurer could then pay the deputy's salary out of his own compensation.

"The only objection to this procedure, as I see it, is Sec. 8, Article 14, of the Constitution which prohibits the increase of the com-

April 11, 1941

pensation or fees of a State, County or Municipal officer during his term of office. Under Sec. 13800 R. S. 1939, the annotation states that 'Treasurer is not a constitutional officer, and his salary may be increased or decreased at any time.' The case of Givens vs. County, 107 Mo. 603, 17 S. W. 998, which is cited does not seem to hold that, however, in my opinion.

"However, since Sec. 10400 R. S. 1939 and Sec. 13800 R. S. 1939, leave the compensation of the Treasurer up to the discretion of the County Court, it seems as though the Court would have the power to increase or decrease his compensation at any time; that it would be unreasonable to say that once the Court fixed his compensation it could not increase it at any time during his term, especially if it had been inadequate prior to the time of the increase; that Sec. 8, Article 14 of the Constitution should not apply since the compensation of the Treasurer is not fixed but is left to the Court's discretion.

"It is my understanding that the Treasurer here has always had a deputy. Also, I have been informed and believe, that a deputy is necessary to assist the Treasurer in the performance of his duties. Consequently, it is desirable that a way should be determined for employment of one if it is at all legally possible to do so. This, assuming that the County Court cannot directly pay the salary of a deputy to the Treasurer.

"While I understand legislation is now pending before the State Legislature in regard to the Treasurers' Offices in the various Counties, the Greene County Court would appreciate your opinion on these matters."

April 11, 1941

While the object sought to be achieved is to provide some method of compensating a needed deputy in the office of the Treasurer of Greene County, the substance of your inquiry is Can the compensation of the county treasurer be increased during his term of office?

As noted in your letter, the compensation of a treasurer is provided by two sections of the statutes. Section 10400, R. S. 1939, provides that the county court may fix the compensation of the treasurer for disbursing school moneys at not to exceed one-half of one per cent of moneys disbursed by him, and Section 13800, R. S. 1939, which provides that the county court shall allow the treasurer such compensation as may be deemed just and reasonable.

In the case of Sanderson v. Pike County, 195 Mo. 598, similar sections of the statutes found in the Revised Statutes of 1899 were discussed and the Supreme Court ruled that before any compensation could be drawn by the treasurer under either section, the county court must fix it in some manner.

In Volume II of the Statutes, following Section 13800, among others, is the following annotation: "Treasurer is not a constitutional officer, and his salary may be increased or decreased at any time. Givens v. County, 107 Mo. 603, 17 S. W. 998." In your letter you state that you do not believe the holding in this case is to that effect. Neither does the writer believe it is, although in the case of Dietrich v. Brickey, 277 S. W. 615, at l. c. 616, is the following:

"Our Supreme Court has decided that the compensation of the county treasurer could be increased, changed, or diminished during the incumbency of that office. See Givens v. Daviess County, 107 Mo. 603, 17 S. W. 998. * * * * *

In this case there is a general statement of the law on page 609 to the effect that absent constitutional restrictions, changes may be made in salaries:

Hon. William R. Collinson

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April 11, 1941

"* * * In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158; City of Hoboken v. Gear, 27 N. J. L. 278; United States v. Fisher, 109 U. S. 143."

However, we have a constitutional restriction on increasing salaries during a term of office. This is Section 8 of Article 14 of the Constitution mentioned in your letter, which is as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

This section, you will note, does not limit this prohibition to the salaries of the constitutional officers.

In the case of State ex rel. Stevenson v. Smith, 87 Mo. 158, at l. c. 160, this section was held to apply to the compensation of the assessor and collector of water rates of the City of St. Louis. In the case of Callaway Co. v. Henderson, 119 Mo. 32, at l. c. 40, the court, in holding this section to apply to the compensation of a county clerk, said:

"3. The acts of the twenty-first of March, 1883, of the thirtieth of March, 1887, and of the twelfth of April, 1889, all limit the amount of fees which a clerk may retain for one year to the sum of \$1,500, and the amount which he may pay out

April 11, 1941

for deputies and assistants to \$1,250, in counties of the population before mentioned. Under Section 8, of article 14, of the constitution, the compensation of the clerk cannot be increased during his official term. The amounts, therefore, which he may retain for 1890 are \$1,500 for himself and \$1,250 for deputy hire."

In the case of *Givens v. Daviess County*, supra, at 1. c. 610, the court said:

"We do not think the order had the effect of accomplishing a change in the salary for services subsequent to its date for the reason that the terms used, 'in full of all demands as such treasurer,' does not express such an intention. Those terms imply rather that this payment was in full of salary to that date, but as such a construction would increase the salary, which could not be done under the constitution, (art. 14, sec. 8,) we must infer that it was only intended to cover the salary for two years, leaving the additional period for future adjustment."

CONCLUSION

It is the conclusion of this department that to increase the compensation of the county treasurer of Greene County during his term of office would be a direct violation of Section 8 of article 14 of the constitution.

APPROVED:

Respectfully submitted,

VANE C. THURLO
(Acting) Attorney General

W. O. JACKSON
Assistant Attorney General

WOJ/rv

POOR PERSONS: County Court may provide surgical treatment;
acts judicially in determining necessity.

June 18, 1941

6-23

Honorable Clyde E. Combs
Prosecuting Attorney
Barton County
Lamar, Missouri



Dear Mr. Combs:

Under date of June 13, 1941, you wrote this office asking for an opinion as follows:

"We have at the present time in our county a resident who is afflicted with some kind of a brain disease or pressure. His financial condition is such that he is clearly included under the terms of the county poor laws of the Missouri statutes, and there is also no question as to him being an inhabitant of the county. He has been treated and examined by three resident doctors in the county. They have been unable to help him and diagnose his case either as a brain tumor or a pressure of some sort on the brain. Two of them recommend that he be sent to Kansas City for diagnosis and possibly treatment.

"The county court, realizing upon diagnosis there will probably be a necessity for a brain operation and the accompanying expense, and also the precedent it will be setting in the matter, have requested of me an opinion as to the county court's liability for the relief, maintenance and support of such poor persons.

June 18, 1941

"I would like the opinion of your office defining the duties and the liabilities of the county court under Sections 9590, 9591, 9593 and 9594, R. S. Mo. 1939, as to whether or not it is the duty of the county court to send poor persons outside the county for special examination and medical treatment after all the medical resources to aid a poor person have been exhausted within the county; also whether or not there would be any liability on the county court should they refuse assistance in cases such as this."

The provisions of our laws relating to the assistance of poor persons are statutory in origin. There was no assistance for such persons under the common law. In the case of Wood v. Boone County, 133 N. W. 377, the court said at l. c. 378:

"There being no legal obligation at common law upon a county or any of the instrumentalities of government to furnish relief to the poor, plaintiff's action, if he has any, must be bottomed upon some statute of the state entitling him to relief. Cooledge v. Mahaska County, 24 Iowa, 211. * * *"

In this state we have a number of statutes making various provisions for poor persons, among which are those mentioned in your letter, contained in Article II, Chapter 55, R. S. Missouri, 1939, which are herein set out, as follows:

Section 9590:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 9591:

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Section 9593:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

Section 9594:

"The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

Inasmuch as you specifically ask concerning the application and construction of the above four sections, the other sections will not be quoted or called to your attention, except where it may be necessary to mention them in order to arrive at the answer to your questions.

It will be observed that Section 9590, supra, provides that poor persons shall be "relieved, maintained and supported" by the county of which they are inhabitants, and Section 9593,

supra, provides that the County Court shall, from time to time as may be necessary provide, at the expense of the county, for the relief, maintenance and support of such poor persons. As you are aware, it has never been necessary for the Appellate Courts of the State to construe these sections, and in none of the decisions of the courts of this state are the verbs "relieve", "maintain" and "support", or the nouns "relief", "maintenance" and "support" defined as used in these sections of the statutes. The words "relieve", "maintain" and "support" are defined in Webster's New International Dictionary as follows:

"relieve - 1. To raise or remove, as anything which depresses, weighs down, or crushes; to render less burdensome or afflicting; to alleviate; abate; mitigate; lessen; as, to relieve pain; to relieve want.
2. To free, wholly or partly, from any burden, trial, evil, distress, or the like; to give ease, comfort, or consolation; to; to give aid, help, or succor to; to strengthen or deliver; as to relieve a besieged town; to relieve the poor. 3. To release from a post, station, or duty; to put another in place of, or to take the place of, in the bearing of any burden, or discharge of any duty; as, to relieve a sentry. * * * * *

"support - 1. To bear the weight or stress of; to keep from sinking or falling; uphold; sustain; prop; as, a pillar supports a structure; an abutment supports an arch. * * * * *
3. To keep from fainting, sinking, yielding, or the like; to encourage; as, to support one's courage or spirits. * * * * *
5. To furnish with funds or means for maintenance; to maintain; to provide for; as, to support a family."

"maintain - 1. To practice as a matter of habit or custom. Obs.

Learn to maintain good works.

Titus iii 14.

2. To hold or keep in any particular state or condition, esp. in a state of efficiency or validity; to support, sustain, or uphold; to keep up; not to suffer to fail or decline; as, to maintain a certain degree of heat in a furnace; to maintain a fence or a railroad; to maintain the digestive process or powers of the stomach; to maintain a legal action.

5. To bear the expense of; to support; to keep up; to supply with what is needed; as, to maintain one's life.

What maintains one vice would bring up two children.

Franklin."

It will be noted that each one of the above words is a synonym for the other, but each has other meanings. It would not have been the intention of the lawmakers, in using these three words, that they should be used merely as synonyms, for in construing laws meaning should be given to each word if possible. The view is advanced by some that the words apply only to the relieving from hunger and lack of shelter, and the supporting and maintaining of the poor persons with food and shelter so long as the need exists. However, the writer believes it was the intention of the lawmakers, in using these three words, to attempt to make certain that all the necessities of life were provided for those persons, mentioned in section 9591, supra, so unfortunate as to be unable to provide for themselves. Medical and surgical attention are certainly just as necessary as are food and shelter. It would be a strange construction of a law to say that it imposed the duty of furnishing food and shelter by way of relieving, maintaining and supporting, and omitted the necessity of medical and surgical attention. What a strange construction of the law it would be that required that food be furnished to preserve life, yet

would not authorize the furnishing of medical and surgical attention, when indigestion and appendicitis were caused by the food furnished and threatened to destroy life. This view is strengthened by the fact that, by the provisions of Section 15158, Article I, Chapter 125, R. S. Missouri, 1939, it is made the duty of the county court in counties where county hospitals are built, to place therein for treatment poor persons. This section is as follows:

"Whenever a county hospital is established and built by the county court, as provided in section 15157 of this article, it shall be the duty of such county court to place therein all of the poor persons that the county court shall deem proper to place in said county hospital, who shall be kept there and treated."

As previously noted, laws relating to poor persons are all of statutory origin and, reading the cases of other states, is of very little help, for we have found none which contain provisions identical with the Missouri statutes. There are a great many reported cases from other states in which the matter of furnishing medical and surgical treatment to inhabitants of the county and persons who were not inhabitants. Most of the reported cases arose out of resistance by the county court, or similar body, to paying for services rendered poor persons. In some of the cases there was direct statutory authority for furnishing medical aid, in others there was no direct provision. But in none of the cases was the question raised as to the propriety of furnishing medical and surgical assistance to the extent of amputations and operations. And, in some instances, recovery has been permitted to be made for medical and surgical services rendered transients in emergencies. These last cases were ruled solely upon humanitarian principles and, in this connection, we call your attention to several cases.

The first of these is Board of Commissioners v. Lomax, 32 N. E. 800, a case in which an amputation of a leg was involved, and the physician who performed the amputation was suing for his services and recovery was had. While the statutes involved were different from our statutes, the county was re-

quired to "relieve and support all indigent persons settled therein" and we quote from l. c. 801:

"* * * * * Section 6069 of the Revised Statutes makes it the duty of counties, as such, to 'relieve and support all poor and indigent persons lawfully settled therein.' Section 6066 provides that 'the township trustees of the several civil townships of the state shall be the overseers of the poor within their respective townships.' Section 6071 provides that the 'overseers of the poor' shall have the oversight and care of all poor persons in their respective townships as long as they remain a county charge, and 'shall see that they are properly relieved and taken care of.' Thus it will be seen that paupers are a county charge; that a township trustee, as an 'overseer of the poor,' is required to 'care for and relieve' the paupers in his township. He is, for this purpose, an agent of the county. Section 5764 provides that the board of commissioners may contract with one or more physicians 'to attend the poor generally;' that when they do this no one has authority to employ others for this purpose. This section, however, is qualified by the following proviso: 'Provided, that this section shall not be so construed as to prevent overseers of the poor, or any one of them, in townships not otherwise provided for, from employing such medical and surgical services as paupers within his or their jurisdiction may require.' It is manifestly the policy of our poor laws to properly and adequately care for and relieve the distress of those who are so

unfortunate as to become paupers. It is the duty of the properly constituted authorities to see that this is done without any false ideas of economy upon the one hand or a needless extravagance upon the other. If a pauper is sick, it is the duty of the township trustee to see that he has a competent physician to attend him. If a competent physician has been contracted with by the county for this purpose, then he should be called. If surgery is required, then a competent surgeon should be called. If none has been provided by the county, then it is the duty of the township trustee to select and employ one to perform the needed service.
* * * * *

The case of Rock Island County v. Arp, 118 Ill. App. 521, is a case in which surgical operations were performed upon a husband and his wife. The husband had been removed from the district in which he resided and which had the duty of taking care of him, but the court enforced collection of the demand against the district where he resided.

Another case is Sayre v. Madison County, 254 N. W. 874, 93 A.L.R. 896, a Nebraska case. We also quote from this case as it involved an appendicitis operation. The court said at l. c. 897:

"* * * * * It was the duty of the county to furnish medical aid under the circumstances, but not necessarily to furnish the poor person's choice of medical aid. Statutes of the kind under consideration here should be given a very liberal construction, and county boards should be generous in supplying the aid which the legislators intended for destitute persons; but when the county provides a physician for that

purpose, able and competent to give satisfactory service, and such physician is ready and willing to render such service upon call, then the duty of the county is fulfilled. * * * * *

It would appear that it is a duty which has been imposed upon the county court and not merely a discretionary function in regard to caring for the inhabitants of the county. In this connection, attention is called to the use of the word "shall" in Sections 9590 and 9593, supra. It is recognized that shall may be construed as may in some instances, but in the case of State ex rel. Gilpin v. Smith, 96 S. W. (2d) 40, the following language was used by Judge Tipton, who wrote the opinion, at l. c. 41:

"We are of the opinion that it is the duty of a county to support the poor who are within its boundaries. Section 12950, R. S. Mo. 1929 (Mo.St. Ann. sec. 12950, p. 7474), is as follows: 'Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants.'

"An examination of the Revised Statutes of Missouri 1929 clearly shows that poor relief is a "public purpose" and a governmental duty because by sections 12950 and 12952 (Mo.St. Ann. secs. 12950, 12952 (p. 7474)), counties are authorized to spend money in support of the poor; by section 9986 (Mo.St. Ann. sec. 9986 (p. 8022)), a county pauper fund is provided; by section 12058 and 13942 (Mo. St. Ann. secs. 12058, 13942 (pp. 6410, 4240)) county poor houses and county hospitals are maintained; section 9697 (Mo. St. Ann. sec. 9697 (p. 7349)) gives authority to educate poor children that are blind or deaf; section 12961 (Mo. St. Ann. sec. 12961 (p. 7476)) directs

the county court to set aside, out of its annual revenues, a definite sum for the support of the poor; article 1, chapter 90, creates a state board of charities and defines its functions; section 12930 (Mo.St. Ann. sec. 12930, p. 7465) requires this board to supervise public relief to the poor. * * *

"The good of society demands that when a person 'is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood,' he is entitled to be supported at the expense of the public. 'It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important.' 'So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper.' 'An able-bodied man, who can, if he chooses obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men.' 21 R.C.L. 705, 706. It necessarily follows that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support, is entitled to public relief.' Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, 981, 87 A.L.R. 365."

The above quotation, while only dicta, seems to express the views of the Supreme Court that, under the statutes here being considered, a duty is laid on the county court, for what was Section 12950, R. S. Missouri, 1929, is now Section 9590, R. S. Missouri, 1939, to furnish the necessities of life to the poor persons who are inhabitants of the county. We fail to find anything that would prevent them from going outside their own county to procure such necessities if they could not be procured within the county. If sending an inhabitant to another county for surgical treatment would preserve the life of an inhabitant, then it is believed it is within the power of the county court to do so. However, before administering to the needs of the poor persons, the county court must determine that the person sought to be aided comes within the class of persons it is authorized to assist, and the need for assistance, and it is further necessary for it to determine to what extent it can extend aid, for its resources are limited by the application of the County Budget Law. In making these determinations, the county court would be acting judicially, and even though its judgment were erroneous, there would be no personal liability on the members of the county court.

In the case of Pike v. Megoun, 44 Mo. 491, the court said at l. c. 494-497:

"This was an action by plaintiff against the defendants, as registration officers within and for Ralls county, for refusing to register plaintiff as a legally qualified voter. The petitioner avers that prior to the general election in 1866 the plaintiff was a resident of said county, and had been for many years previous thereto; that he was legally qualified and entitled to be a voter therein; that he took and subscribed the oath of loyalty prescribed by the constitution of this State, and in all respects complied with the requirements of the law, and that his qualification as a voter was well known to each and all of the defendants at that time; but that said defendants, 'conspiring together to cheat and defraud plaintiff

out of his right to exercise the elective franchise, knowingly, willfully, corruptly, and unlawfully, jointly and severally, did refuse and exclude the name of plaintiff as a qualified voter, and refused to register him, or suffer him to be registered as such."

"To this petition there was a demurrer, assigning as grounds of objection that the defendants, in their capacity of registration officers, acted judicially, and were not responsible in a civil proceeding. There was judgment for defendants on the demurrer in the Circuit Court, which was affirmed by a division of the judges in the District Court.

"The question presented is one of considerable embarrassment, on account of the multiplied, various, and conflicting opinions which have been entertained concerning ministerial and judicial acts. The proposition is undoubted, that wherever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which such duties are performed. If corrupt or willful, he may be impeached or indicted, but he can not be prosecuted by an individual to obtain redress for the wrong which may have been done.

"In all the cases, the rule is nowhere better laid down than by Fox, J., in *Taaffe v. Downes*, 3 Moore, P. C. 51. 'The principle at law,' he said, 'of exemption from being sued for matters done by judges in their judicial capacity, is

of great importance. It is necessary to the free and impartial administration of justice that the persons administering it should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely; it is calculated for the benefit of the people, by insuring to them a calm, steady, and impartial administration of justice; it is a principle coeval with the law of the land and the dispensation of justice in this country, and is founded on the very framework of the constitution. It is to be met with in the earliest books of the law, and has been continued down to the present time without one authority or dictum to the contrary. I think myself called upon in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner as may be necessary to give it full effect and operation; still, however, not trenching in any manner on the rights of the subject, which this principle is intended to protect -- not to injure or infringe -- it appears to be most necessary that a judge administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution. They are only answerable for their judicial conduct in the high court of Parliament; and without the existence of this principle it is utterly impossible that there could be such a dispensation of justice as would have the effect of protecting the lives or property of the subject. A judge must -- a judge ought -- to be uninfluenced by any personal consideration whatever operating on his mind when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved

to himself. There is something so monstrous in the contrary doctrine that it would poison the very source of justice, and introduce a system of servility utterly inconsistent with the constitutional independence of the judges -- an independence which it has been the work of ages to establish -- and would be utterly inconsistent with the preservation of the rights and liberties of the subject.'

"In a very recent case in the Supreme Court of the United States (Randall v. Brigham, 7 Wall. 523), it was declared to be the established law, and as the result of the authorities, that judicial officers are exempt from liability in a civil action for their judicial acts done within their jurisdiction, and judges of superior or general authority are exempt from such liability, even where their judicial acts are in excess of their jurisdiction, unless, perhaps, where the acts in excess of their jurisdiction are done maliciously or corruptly.

"An action, then, does not lie against judges or magistrates, or persons acting judicially in a matter within the scope of their jurisdiction, however erroneous their judgment or corrupt and malicious their motives. (Cases supra, also, Stone v. Graves, 8 Mo. 148; Yates v. Lansing, 5 Johns. 282; 9 Johns. 395; Cunningham v. Bucklin, 8 Cow. 178; Briggs v. Wardwell, 10 Mass. 358; Doswell v. Impey, 1 Barn. & Cress. 169; Phelps v. Sill, 1 Day, 315.) But there is a limit to this judicial immunity. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the

ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. (Wilson v. The Mayor, etc., 1 Den. 599; Rochester White Lead Co. v. City of Rochester, 3 Const. 463) And the same rule obtains where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty. (Reed v. Conway, 20 Mo. 22; Caulfield v. Bullock, 18 B. Monr. 494).# * * * * *

In the case of Wood v. Boone County, 133 N. W. 377, at l. c. 380-1, the court said:

"It is a general rule that, where a governmental duty rests upon a state or any of its instrumentalities, there is absolute immunity in respect to all acts or agencies. Beeks v. Dickinson County, supra. In this case it is said: 'In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws for the promotion of the public health, it is performing governmental functions, and its officers are not agents for whose actions or inaction it is liable, unless such liability is imposed by its charter or by the laws of

the state under which it exists.
* * * The remaining question is whether the members of the local board of health are individually liable for the loss of the plaintiff's crops. The statute makes it the duty of the health officers to quarantine against all "infectious or contagious diseases dangerous to the public," and it cannot well be questioned that the defendants were acting within their scope of duty as such officers, and that in establishing the quarantine they were acting in a quasi judicial character. They were vested with the power to determine whether an infectious or contagious disease existed in the appellant's family, and, if found to exist, their duty under the statute required them to take proper steps to prevent its spread, and, had they neglected to do so, they would have been culpable in a high degree. They were therefore acting judicially, and it is the general rule that officers so acting are not liable for injuries which may result from such acts performed in the honest exercise of their judgment, however erroneous or mistaken the action may be, provided there be no malice or wrong motive present.' See, also, *McFadden v. Town of Jewell*, 119 Iowa, 324, 93 N. W. 302, 60 L.R.A. 401, 97 Am. St. Rep. 321. As supporting the same proposition, see *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Kincaid v. Hardin Co.*, 53 Iowa, 431, 5 N. W. 589, 36 Am. Rep. 236; *Calwell v. Boone*, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154; *Saunders v. Ft. Madison*, 111 Iowa, 103, 82 N. W. 428; *Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507; *Easterly v. Irwin*, 99 Iowa, 696, 68 N. W. 919. A great num-

ber of cases announcing the same rule are to be found in 28 Cyc. pp. 1305, 1306. Some cases seem to make an exception where the county undertakes to furnish relief, and in doing so negligently fails to use proper and necessary care. Such an exception seems to be made in Meier v. Paulus, 70 Wis. 165, 35 N. W. 301. But the contrary rule was announced in Lexington v. Batson, 118 Ky. 489, 81 S. W. 264; Twyman v. Frankfort, 117 Ky. 518, 78 S. W. 446, 64 L.R.A. 572; Richmond v. Long, 17 Grat. (Va.) 375, 94 Am. Dec. 461."

In the case of Ussery v. Haynes, 127 S. W. (2d) 410, at 1. c. 416-17, the court said:

"While our county and probate courts are, generally speaking, courts of limited jurisdiction, yet, as said in State v. Fulton, 152 Mo. App. 345, 348, 133 S. W. 95, 96, the case of Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276, (overruling some prior decisions), announced the principle that 'while the probate and county courts are courts of limited jurisdiction and their power to act is provided by the statute, yet as to such matters as the statute places exclusively within their jurisdiction they stand on the same footing as courts of general jurisdiction, and the same presumptions are to be indulged in favor of the regularity of their proceedings and the validity of their judgments and orders in relation to the matters exclusively confided to their jurisdiction as are indulged in favor of the judgments and orders of a court of general jurisdiction. This case has

been cited and the principle therein announced approved in all the later cases in this state. *Desloge v. Tucker*, 196 Mo. 587, 601, 94 S. W. 283, and cases cited; *Ancell v. Bridge Co.*, 223 Mo. 209, 227, 122 S. W. 709.' The opinion of the Springfield Court of Appeals in *State v. Fulton*, supra, was adopted by the St. Louis Court of Appeals, 184 S. W. 938.

"In *Desloge v. Tucker*, supra, 196 Mo. loc. cit. 601, 94 S. W. loc. cit. 286, it is said that, 'though probate courts are courts of limited jurisdiction, yet, moving in the orbit of their constitutional and statutory powers, in the administration of estates, they are not inferior courts, and the same liberal presumptions and intendments are indulged to sustain their proceedings and jurisdiction (attacked collaterally) as are indulged in behalf of other courts of record.' See also, to like effect, *Brawford v. Wolfe*, 103 Mo. 391, 395, 15 S. W. 426..

"In the matter of examining into and determining the question whether plaintiff should be committed to the hospital the county court had jurisdiction of the subject matter. The statute gave it jurisdiction of that class of cases and a written statement, as provided by statute, had been filed invoking its action in the particular case. It had to determine that notice had been served upon her before it could render judgment against her. In doing so it acted judicially. 'The first question to be decided by any court in any case is whether or not it has jurisdiction in point of fact.' *Bealmer v. Hartford Fire Ins. Co.*, 281 Mo. 495, 501, 220 S. W. 954, 956. See,

also, Mahon v. Fletcher's Estate, Mo. App., 245 S. W. 372; Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64; Dowdy v. Wamble, 110 Mo. 280, 19 S. W. 489. In State v. Baty, 166 Mo. 561, 66 S. W. 428, it is said: 'Every presumption will be indulged in favor of the correctness of the action of a court of general jurisdiction, and that it proceeds by right and not by wrong. (Citing cases.) If the record is silent about a matter necessary to confer jurisdiction, or, more properly, to cause it to attach in the particular instance, the existence of such matter (nothing appearing of record to the contrary) will be presumed.' And to the same effect see Hadley v. Bernero, supra, where the record was silent as to finding of a fact necessary to give the circuit court appellate jurisdiction but the court retained and decided the case.

"It is not shown that the county court made a record showing that it found notice had been given and it did not so state in its judgment. The statute did not provide that such fact should be stated in the judgment or order required to be entered of record. But since such finding or determination was necessary before the court could proceed to final judgment against plaintiff we think, in the light of the principles enunciated in the cases we have cited above, the presumption must be indulged that it did so determine. In so determining it erred, because the notice was not legally served, but it was an error made in the exercise of a judicial func-

Hon. Clyde E. Combs

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tion, for which the judges cannot, on well settled principles of law, be held liable in damages."

CONCLUSION.

It is the conclusion of this Department that in caring for poor persons county courts may furnish medical and surgical attention and are not limited to that which may be procured in their own county; that in determining the necessity for medical or surgical treatment, and the qualifications of a person to receive it, the county court acts judicially and would not be liable if there was an erroneous judgment.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

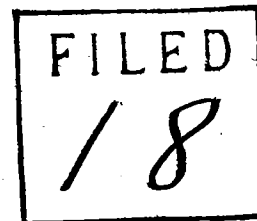
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TAXATION: County Collector may issue deeds of correction
COLLECTOR'S for deeds which have been issued for lands
DEED: which have been sold for delinquent taxes.

August 12, 1941.

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Hon. V. O. Coltrane, Jr.
Assistant Prosecuting Attorney
County of Greene
Springfield, Missouri



Dear Sir:

This will acknowledge your letter of recent date, requesting an opinion from this department on the following facts:

"I would like to obtain an opinion from your office on a question that has arisen in Greene County, Missouri, in regard to the sale of land by the County Collector for delinquent taxes. The County Collector of said county sold certain land for delinquent taxes, interest, etc., under the provisions of Section 11130 R. S. Mo. 1939; said sale being a 'third' sale; said Collector thereupon executed and delivered to the purchaser of the land a deed similar in form to the one enclosed herewith.

"Honorable Guy Kirby, Judge of the Circuit Court of Greene County, Missouri, recently held that the aforesaid deed did not convey title to the purchaser for the reason that the Collector of Greene County, Missouri, was the grantor in said deed instead of the State of Missouri; that the Collector had no title to convey, and that said deed should be made in the name of the State of Missouri. Section 11150 R. S. Mo. 1939

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sets out a form for a deed by the County Collector, which form names the State of Missouri as party of the first part, or grantor.

"The question that has arisen and which is presented to your office for an opinion is whether or not the County Collector can execute deeds in the name of the State of Missouri correcting deeds that have heretofore been executed and delivered wherein the Collector was the grantor instead of the State of Missouri. Numerous requests have been made to the Collector asking for correction of deeds."

The authorities which you have cited in your request sustained the proposition that a collector may execute and issue a deed of correction in cases where the original deed for delinquent lands sold for taxes is incorrect. These authorities are stated as follows:

"It is the general rule that after the execution of a tax deed which is irregular or does not conform in its recitals to the facts, as exhibited by the tax records, another deed conforming to the facts and regular upon its face may be executed and will be valid."

Ann. Cas. 1912 B, page 952.

"When there has been a sale for nonpayment of taxes carried out in accordance with law, and all the conditions have been complied with so as to entitle the purchaser to a deed of the premises, the power of the collector to execute and deliver a valid deed is not exhausted by the execution and delivery of an invalid one, and if the deed first delivered is defective and invalid, the collector may execute and deliver a substitute deed, which, if drawn up in accordance with the statutory requirements, will

be as effective to pass the title as if the prior invalid deed had never been delivered. The length of time that has elapsed since the first deed was issued does not affect the right to issue a second one."

26 R. O. L., Sec. 379, p. 42.

"Although there is authority to the contrary, it seems to be the general rule that the power vested in an officer to execute a tax deed is not exhausted until a deed is made in compliance with the law, and the making of an insufficient deed does not exhaust his power where the facts exist upon which a valid deed may be made. Thus a treasurer or collector who has made a tax deed so irregular or imperfect as not to pass title may, where the law has been substantially complied with, execute a second or other deed correct in fact and regular in form so as to invest the purchaser with the legal title, and if he refuses, he may be compelled to do so by mandamus. But this authority cannot be used to cure defects in the anterior proceedings or misstate the prior proceedings, nor can a second or other deed so operate as to divest rights which have accrued prior to its execution."

61 C. J. Sec. 1870, p. 1333.

"Even where no proper deed was made in pursuance of the tax sale, the owner of the land, made a defendant in the tax suit, and his heirs after his death are required to take notice of the tax suit and sale; and where they have made no improvements or expended any money on the land, and the grantees of the purchaser at the tax sale have taken possession by authority of that sale, they are entitled to a corrected deed from the ex-sheriff twenty-three years after the sale."

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In the case of Smith v. Vickery, 235 Mo. 413, 1. c. 422, the court, in passing on the authority of the Sheriff to execute an amended deed, said:

"Plaintiffs' main objection to the amended sheriff's deed is that it was not made under an order of court and was not made timely; that it was invalid because made nearly twenty-three years after the tax sale took place. To the first of these propositions, we will say that an ex-sheriff is not required to obtain an order of court before he makes an amended deed to land which he has sold while in office. In making such amended deed, he proceeds under authority derived from the common law, to complete and make effective acts which he began or attempted to perform while in office. (Osark Land and Lumber Company v. Franks, 186 Mo. 673, 1. c. 689.)

"No sufficient reason has been shown in this case why Ex-Sheriff Scott should not have made the amended deed twenty-three years after the sale on which said deed is based. * * * * *

CONCLUSION

We are, therefore, of the opinion that the county collector may execute correction deeds in the name of the State of Missouri for deeds which have heretofore been executed and delivered, wherein the collector was the grantor instead of the State of Missouri by the collector, etc.

In view of the fact that some authorities which we will cite hereafter may not have been called to the attention of the court on the question of the sufficiency of the deed which the collector has executed for delinquent lands sold for taxes, we submit the following authorities and statements. The granting clause in the collector's

Hon. V. O. Coltrane, Jr.

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deed for lands sold for delinquent taxes at the third sale does not follow the form of the granting clause which was prescribed by the General Assembly for the collector to use in cases where lands are sold at the first sale. Section 11150 R. S. Mo. 1939.

Apparently the circuit court took the view that any deed the collector issues for delinquent lands sold for taxes should contain this same language showing that the deed was made in the name of the State of Missouri because of the language contained in Section 11149 R. S. Mo. 1939 which provides, in part, as follows:

"* * * the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, * * * * *"

However, Section 11150 R. S. Mo. 1939 would indicate that the county collector execute this deed. Referring to the deed this section reads, in part, as follows:

"Such conveyance shall be executed by the county collector, under his hand and seal, witnessed by the county clerk and acknowledged before the county recorder or any other officer authorized to take acknowledgments * * * * *"

"Therefore, this indenture, made this day of 19, between the State of Missouri, by C. D., collector of said county, of the first part, and the said A. B., of the second part, * * * * *"

"State of Missouri, County, ss:
Before me, the undersigned,
....., in and for said county, this
day, personally came the above-named C.D.,

collector of said county, and acknowledged that he executed the foregoing deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and seal this day of 19..... (L.S.)"

Section 11151 R. S. Mo. 1939 authorizes a variation in the form of the deed referred to in Section 11150, supra. This section reads, in part, as follows:

"In case circumstances should exist requiring any variation from the foregoing form, in the recital part thereof, the necessary change shall be made by the county collector executing such deed, and the same shall not be vitiated by any such change, provided the substance be retained. * * * * *

In case of the failure of the General Assembly to prescribe a form of deed, then the "four corners" rule of construction is applicable to a tax deed. Robinson v. Levy, 217 Mo. 498, 1. c. 520.

The question as to who should convey in a tax deed is passed on in the case of Knox v. Huidekoper, 21 Wis. 534, 1. c. 535-6, in the following language:

"The first objection is, that the deed did not purport to be signed by any officer known to the laws at the date of its execution. In the testatum clause of the deed, the officer describes himself as 'the clerk of the county board of supervisors of the county of Milwaukee,' and signs and executes the deed under the corporate seal of the county, as 'clerk, board of supervisors, Milwaukee county, State of Wisconsin.' Now it is claimed that inasmuch as the 3d sec. of ch. 129,

Laws of 1861, declares that 'the county board of supervisors' shall be a body corporate known by and under the name and style of the county board of supervisors of (naming the county), that there was no such officer as 'clerk, board of supervisors,' etc., and that this mistake in the designation of the title of the officer renders the deed invalid. We consider the objection quite untenable. In the law of 1859, which prescribes the form of a tax deed (sec. 50, ch. 22), the office is designated as 'the office of the clerk of the county board of supervisors of the county of _____' while in the 51st section the officer is spoken of as 'the clerk of the county board of supervisors,' and 'the clerk of the board of county supervisors.' The 6th section of the act of 1861, above referred to, provides for 'the first election for clerk of the board of county supervisors,' when but a moment before the legislature had enacted that the technical corporate name of the board should be 'the county board of supervisors of _____.' From these instances, and numerous others which might be cited from our statutes, if necessary, it will be seen that no certain title or description of the office of the clerk is given, he being indiscriminately named 'clerk of the county board of supervisors,' 'clerk of the board of county supervisors,' or 'clerk of the board of supervisors,' when referred to by the legislature. Chapters 398 and 399, Laws of 1862; chapters 290 and 292, Laws of 1863; chapters 120 and 460, Laws of 1864; chapters 124 and 264, Laws of 1865. Either one of these descriptions is sufficient to identify the officer and show his relations to the board, and we think fully meets the requirements of the law."

The same question was passed on by the Supreme Court of the State of New York based upon a statute of the Laws of New York for 1813, at page 517, which is in part as follows:

"* * * * the comptroller shall, at the expiration of the said two years, execute to the purchaser, his heirs or assigns, in the name of the people of this state, a conveyance of the lands so sold, which conveyance shall vest in the person or persons to whom it shall be given, an absolute estate in fee simple, * * * * *"

Construing said section the court, in the case of *Bank of Utica v. Mersereau*, New York Reports, Barbour's Chancery, Vol. 3, at page 576, said:

"I do not agree with the vice chancellor that the comptroller's deed is void, either as to its form, or because it does not specify the year in which the taxes were laid for the non-payment of which the premises were sold. The provision in the revised statutes directing the comptroller to execute a conveyance of the property sold, in the name of the people of the state, is not new, but was contained in the revised laws of 1801 and of 1813. (1 Rev. Laws of 1801, p. 555. 2 Rev. Laws of 1813, p. 517.) And I believe the comptroller's deeds upon tax sales have been in the same form in this respect under all of these laws. They have so far back as I have examined, which is more than a quarter of a century. And thousands of titles now depend upon conveyances executed in the same form as the deed in this case. When we recollect, too, that deeds in this form have been executed by such men as Chief Justice Savage, Mr. Justice Marcy, and Silas Wright, who have heretofore filled the office of comptroller, and probably with the sanction of the several distinguished jurists who have from time to time occupied the station of attorney general of the state, and that many recoveries have been had in our courts upon such deeds without objection, it is too late to pronounce such deeds invalid, upon a mere

technicality, suggested for the first time by the counsel for the complainants in this suit. * * * * *

In the case of *Sheets v. Selden's Lessee*, 69 U. S. 822, 1. c. 825, a question very similar to the one which is raised here was before the court and the court said:

"The objection to the deed of the Governor and Auditor is, that it is not executed in the name of the State, and does not cover the premises in controversy.

"It is true that the form of the deed is not in literal compliance with the language of either of the Acts of Indiana; it is not in terms between the State, of the one part and the assignee of the purchasers of the property of the other part; but it shows a completed transaction between the State and the grantee named. It refers to the Acts of the Legislature authorizing the sale; it sets forth a sale made pursuant to their provisions; it mentions the joint resolution affirming the sale; and it declares that the Governor and Auditor, in virtue of the power vested in them by the Acts and joint resolution, convey the property sold, 'Being all the right, title, interest, claim and demand which the State' held or possessed therein.

"In the execution of this instrument the Governor and Auditor acted officially and not personally, and in our judgment the deed was sufficient to pass the title of the State they represented. And it may be stated generally that when a deed is executed, or a contract is made on behalf of a State by a public officer duly authorized, and

August 12, 1941.

this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties, and may have affixed his individual name and seal. * * * * *

In the case of Cruzen v. Stephens, 123 Mo. 337, 1. c. 347, the court quoted a deed, which did not mention the State of Missouri, in the following words:

"Now, therefore, in consideration of the premises, and of the sum of \$97 to me, the said sheriff, in hand paid by the said N. G. Cruzen, the receipt whereof I do hereby acknowledge, and by virtue of the authority in me vested by law, I, Gabe W. Cox, sheriff as aforesaid, do hereby assign, transfer and convey unto the said N. G. Cruzen all the above described real estate so stricken off and sold to him that I might sell as sheriff as aforesaid, by virtue of the aforesaid judgment, execution and notice.

"To have and to hold, the right, title, interest and estate hereby conveyed, unto the said N. G. Cruzen, his heirs and assigns, forever, with all the rights and appurtenances thereto belonging. In witness whereof, etc."

In passing on the sufficiency of said deed, the court said:

"It is enough to say that we regard the terms of this deed as sufficient to transfer to plaintiff the interests of the defendants in the tax suit, under the statute law touching the form of such conveyances."

Hon. V. O. Coltrane, Jr.

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August 12, 1941.

The form of the deed for the collector to use for sale of lands sold for delinquent taxes at a third sale was one that was prescribed and approved by the State Tax Commission by virtue of the provisions of Section 11164 R. S. Mo. 1939. This form was prescribed by the Tax Commission because the lawmakers failed to prescribe a form which could be used at the third sale of lands offered and sold for delinquent taxes.

For the purpose of supporting the view that the collector's deed, herein referred to, complies with the statute, we respectfully submit the foregoing authorities.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

(Acting) Attorney-General

TWB:LB

CRIMINAL COSTS: The State is only liable for the costs, including transportation to the Missouri Training School, in juvenile trials on conviction before a jury, plea of guilty, acquittal, or dismissal under the general criminal law, where the punishment is solely imprisonment in the state penitentiary.

November 10, 1941

Hon. Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of November 1, 1941, which is as follows:

"We have a case here where the defendant was charged with the felony of grand larceny. He entered a plea of guilty to said charge and the court committed him to the Missouri Training School for Boys.

"Section 9004, R. S. Mo. 1939, would indicate the State would pay the costs of transporting the child to said School. Sec. 9698 defines a delinquent child as including a child under the age of seventeen years who violates any law of this state.

"State ex Rel. Shartel v. Trimble 333 Mo. 888 holds that a child proceeded against in juvenile court whether for misconduct or violation of a criminal statute, must be adjudged delinquent.

"Where a child pleads guilty to a charge of grand larceny, is adjudged delinquent and committed to the Missouri

Training School would the State pay the costs of transporting said child to said school."

We are herein enclosing an opinion rendered by this office on September 2, 1938, to the Honorable Forrest Smith, which held that the State is only liable for the costs in juvenile trials on conviction before a jury, plea of guilty, acquittal, or dismissal under the general criminal law, where the punishment is solely imprisonment in the state penitentiary. By that holding it was to the effect that the conviction must be under the general criminal law and the sentence upon a conviction must be originally in the penitentiary or the acquittal or dismissal under the general criminal law must be where the punishment is solely imprisonment in the state penitentiary. We believe the above opinion answers the larger part of your request. But, in answering the last paragraph of your request, referring to the payment of costs of transportation of the child to the Missouri Training School, we submit the following:

Section 9004, R. S. Mo. 1939, reads as follows:

"In all cases of conviction of felony, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the Missouri training school for boys shall be allowed

the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said Missouri training school for boys and in returning therefrom, to be paid by the state or county, as the case may be."

The language in the above section is unambiguous and does not call for a construction. It specifically states that in all cases of conviction of felony, where the punishment is commitment to the Missouri Training School for boys, the costs of the proceedings and the delivery of such person to the Missouri Training School for boys shall be paid by the State. It also provides that where the punishment in a misdemeanor case was a commitment to the Missouri Training School for boys, the costs of the delivery of such person to the Missouri Training School for boys shall be paid by the county in which the conviction is had.

It is very noticeable in Section .9004, the words "conviction of felony" is used. The conviction of felony should not be confused with delinquency for the reason that delinquency is more in the nature of a civil action and not a criminal action. The Supreme Court of this State in construing the juvenile law in the case of State v. Trimble, 63 S. W. (2d) 37, para. 2, said, l. c. 38:

"The Juvenile Act, article 8, chapter 125, R. S. Mo. 1929 (section 14136 et seq. (Mo. St. Ann. Sec. 14136 et seq.)), is a complete law within itself, dealing with minors under the age of seventeen years. The purpose of the Juvenile Law is not to convict minors of criminal acts, but to safeguard and reform children that may have erred and have been declared delinquent and to provide for children that may be declared neglected. For a full discussion of the purposes of juvenile

laws see Ex parte Januszekowski (C. C.) 196 F. 123; 31 C. J. 1101, Sec. 226. The Juvenile Act authorizes the juvenile judge, if he deems that a child is not a fit subject to be dealt with in the juvenile court, to dismiss the proceedings and order the child to be prosecuted under the general law. Section 14163, R. S. Mo. 1929 (Mo. St. Ann. Sec. 14163). A minor under the age of seventeen years cannot be convicted of a crime in a proceeding in a juvenile court, as the term 'conviction' is understood in law. State ex rel. v. Walker and Ex parte Bass, supra; State v. Naylor, 328 Mo. 335, 40 S. W. (2d) 1079, loc. cit. 1082 (6). The juvenile court can only adjudge a child a neglected child or a delinquent child. The two terms have a distinct and separate meaning under the Juvenile Act. A child may be of good character, and yet, through no fault of its own, be declared a neglected child. A delinquent child means one who has been guilty of violations of the law or is incorrigible, vicious, or immoral. Section 14136, R. S. Mo. 1929 (Mo. St. Ann. Sec. 14136); Ex parte Naccarat, 328 Mo. 722, 41 S. W. (2d) 176. If a child is proceeded against as a delinquent, the final judgment of the juvenile court, if against the child, can only be a judgment declaring it to be delinquent. It is immaterial whether the misconduct charged against the child, by the information, consists of violations of the criminal statutes or of conduct, though not violations of the law, which nevertheless renders the child incorrigible, vicious,

or immoral. In either case the judgment must be that the child is a delinquent. The juvenile court then has the authority to place the minor on probation or in some institution other than the penitentiary. Section 14151, R. S. Mo. 1929 (Mo. St. Ann. Sec. 14151); Ex parte Bass, supra; 31 C. J. page 1111, Sec. 245."

In the above citation the court specifically held that when a minor is convicted of delinquency it is not a conviction as generally understood in law. It also in the same paragraph held that a child may be convicted of delinquency by an information and the verdict should declare the child to be a delinquent. It also stated that it was immaterial whether the misconduct charged against the child by the information consisted of a violation of the criminal statutes or of conduct, though not a violation of the law. It held that in either case the judgment must be that the child is a delinquent, that procedure being a juvenile matter where the child is not tried under the general criminal statutes. We find no provision allowing a sheriff fees for the transportation of a child who has been adjudged delinquent. The only fee allowed for the transportation of a child to the Missouri Training School is when the child has been tried and convicted under the general criminal law. Section 9004, supra, contains clear and unambiguous language and there is nothing to construe. State ex. rel. Jacobsmeier v. Thatcher, 92 S. W. (2d) 640, 338 Mo. 622.

CONCLUSION.

In view of the above authorities it is the opinion of this department that where a child pleads guilty under the general criminal law to a charge of grand larceny and is committed to the Missouri Training School the State must pay the costs of transporting the child to said school, but if the child pleads guilty to an information not under the

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general criminal law, but under the juvenile law which charges him with delinquency, even though the information contains a charge under the general criminal law, the State is not liable for the costs of transporting said child to the Missouri Training School.

It is further the opinion of this department that the State is liable for the costs of transporting a child to the Missouri Training School where he is convicted before a jury or pleads guilty on a criminal charge, is sentenced to the penitentiary and his sentence commuted to the Missouri Training School; or, if he is acquitted or the charge dismissed under the general criminal law where the punishment is solely imprisonment in the State penitentiary.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:CP

ELECTIONS: Failure to elect County Treasurer at proper time does not create vacancy and
COUNTY TREASURERS: incumbent holds office until successor is elected at next regular election and qualified.

November 17, 1941

Honorable William R. Collinson
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Sir:

Under date of October 31, 1941, you wrote this office requesting an opinion as follows:

"On February 12, 1941, I requested an opinion from your office in regard to the County Treasurer of Greene County, Missouri. This request was later withdrawn. I would like to renew that request at this time, and obtain an opinion from your office.

"The question is whether or not the County Treasurer of Greene County, Missouri, holds office until the year 1944 at which time there will be a general election.

"The County Treasurer of Greene County was elected in the year 1938, under the provisions of Section 13790 R. S. Mo. 1939; said county having at that time a population of between 75,000 and 90,000 inhabitants. At the last decennial United States census, Greene County had a population of over 90,000 inhabitants.

"Section 13792 R. S. Mo. 1939 provides for the election of county treasurers in counties of 40,000 or more inhabitants, except counties of 75,000 to 90,000 inhabitants. This section provides for the election of a county treasurer in said counties in the general election years.

"Since there is no provision for the election of a county treasurer in Greene County in the year 1942, on which date the treasurer's term expires, the question will arise whether the present county treasurer holds over until the general election in the year 1944, at which time a treasurer will be elected under the provisions of the above-mentioned Section 13792.

"Section 13790 R. S. Mo. 1939 provides that the county treasurer 'shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office.'

"Article 14 of Section 5 of the Missouri Constitution provides:

"'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.'

"Section 12820, R. S. Mo. 1939 provides as follows:

"All officers elected or appointed by authority under the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

"In 46 C. J. page 968, it is said:

"The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary, an officer is entitled to hold his office until his successor is appointed or chosen and has qualified."

"In State v. Brown, 274 S. W. 1. c. 967, the Court says:

'The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. (Citing cases). It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. (Citing cases).'
See also Langston et al vs Howell County 79 S. W. (2) 99.

"It is my opinion that since there is no provision for an election of a County Treasurer in this county in the year 1942, the present County Treasurer holds over under the

provisions of the constitutional and statutory provisions, supra, as a de jure officer until his successor is chosen in the general election in the year 1944."

The office of treasurer for the various counties has been created by the General Assembly under the authority found in Section 14, Article IX of the Constitution. The acts creating the office and providing for the election of such officers are found in Article VIII of Chapter 100, R. S. 1939. The sections of the statutes which are pertinent to your questions are Section 13791, R. S. Missouri, 1939, which created the office of treasurer in counties having a population of 75,000 inhabitants and less than 90,000 inhabitants; Section 13790 which provided for the election of a treasurer in counties having a population of less than 40,000 and in counties having a population of 75,000 and not more than 90,000, this section is as follows:

"On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state, now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four (4) years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that nothing in this section shall apply to counties under township organization."

And Section 13792, which provides for the election of treasurers in counties having more than 40,000 inhabitants. This section is as follows:

"On the Tuesday after the first Monday in November, 1940, and every four (4) years thereafter, there shall be elected by the qualified voters in all counties of this state, now or hereafter having a population of 40,000 or more inhabitants according to the last Decennial United States Census (except in counties having 75,000 and not more than 90,000 inhabitants) and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor; Provided, further, that the present county treasurers shall remain in office until their successors are elected or appointed and qualified, unless sooner removed from office."

Section 5 of Article XIV of the Constitution pertains to the term of Officers, and is as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the

right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

This section recognizes the right of officers to assign and authorize the holding over of an officer until his successor is properly chosen and qualifies unless there should be other provision definitely prohibiting or restricting any holding over. And in the section of the statutes the county treasurer is authorized to hold his office until his successor is properly chosen and qualified.

In 1938, in accordance with the provisions of Section 13790, R. S. 1939, there was elected for Greene County a treasurer, who was to serve for four years from the first day of January next succeeding his election and until his successor is elected and qualified, unless sooner removed from office. This would make the term of office of the present treasurer expire December 31, 1942, or when his successor is chosen and qualifies. Since the election of this officer the population of Greene County has increased, according to your letter, so that now the provisions of Section 13792, R. S. 1939, govern the election of a treasurer in Greene County and his term of office. This section directs the election of a treasurer in the year 1940, for a term of four years and until his successor is chosen and qualifies. Your letter states no treasurer was elected in Greene County in the year 1940. No treasurer having been elected at the election in 1940, and the county having a treasurer who was elected for a term of four years and until his successor is elected and qualifies, unless sooner removed, the present treasurer will continue to perform the duties of the office until his successor is elected and qualifies, or until he is removed from office for cause. In the early case of State ex rel. McHenry v. Jenkins, 43 Mo. 261, in discussing the effect of not holding an election the Supreme Court said at l. c. 264-265:

"If the constitution is to be followed, it is clear that 'clerks of all courts of record' holding office under the constitution shall be elected; that the first election shall be in 1866; and that their term shall be four years. The constitution found in existence clerks in every county whose terms under existing law expired at different times. They had all been appointed by the governor under the vacating ordinance; and, had there been no constitutional provision on the subject, elections of their successors would have been held for some in 1866, some in 1868, and some in 1870. The object of this section of the constitution was to establish a uniform rule both for the length of the term and its commencement. That object could not have been secured in plainer language than that used. If the Constitution controls the matter, the term of Mr. Vincent expired in January, 1867, for the plain reason that it could not extend beyond the time when the office must be filled by a new election. It is claimed that the constitution does not interfere to shorten his term, and that he holds under the appointment of the governor for his full four years. This claim cannot be set up except upon the hypothesis that the ordinance is of equal force with the constitution, and that its provisions cannot be changed by that instrument, which will not be seriously pretended. That there might be no possibility of cavil, the draughtsman of that section, knowing that various general and local laws of the State had provided different modes of appointment, length and commencement of terms, added the last clause, 'any existing law of this State to the contrary notwithstanding.' We hold, then, that there should have been an election to fill the office at

the general election of 1866.

"But, as there was no such election, is there a vacancy? Or if not, who is the present clerk? By the terms of the act creating the Kansas City Common Pleas, as well as by the constitutional provision, the clerk shall hold his term until the election and qualification of his successor. Thus there is no vacancy, and Mr. Vincent holds over.

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In *The State v. Robinson*, 1 Kansas, 17, a question was raised as to the validity of an election for governor, and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired.

"The writ is refused. The other judges concur."

And in the case of *State ex inf. v. Lund*, 167 Mo. 228, at l. c. 234:

"It was held in *People v. Tieman*, 30 Barb. 193, 8 Abb. Prac. 359, and later by the Supreme Court of the United States in the case of *Badger v. United States ex rel. Bolles*, 93 U. S. 599, that by the common law, and, in most of the States, when the term of office to which one is elected or appointed expires, his power to perform his duties ceases; that this is the general rule.

"In this State, however, if the common-law rule be as stated in *Badger v. Bolles*, supra, it does not apply with the exceptions as to judicial officers and members of the legislature, and, in the absence of words indicating that the officer is to hold over until his successor is elected or appointed and qualified, 'it is sometimes a matter of doubt whether or not the incumbent can hold over Sometimes, however, where words of holding-over import are omitted, it may remain doubtful whether such a right was intended to be conferred. In which case the prevalent rule of construction in this country appears to be that if no restrictive words be used, no terms expressly or impliedly prohibiting holding over, then such continuance in official power and life is permissible and valid, until a successor be chosen,' etc. (*State ex rel. v. Perkins*, 139 Mo. 106).

"The same rule is announced in *Dillon on Municipal Corporations* (4 Ed.), secs. 219 220; *Tiedeman on Munic. Corp.*, sec. 81; *Mechem on Public offices and officers*,

sec. 397; and in Throop on Public Officers, secs. 323, 325."

The above case was one involving the title to the office of comptroller of Kansas City. After stating the foregoing rule, the court held certain language in the City Charter to be restrictive and that respondent was not entitled to the office because of such restriction.

And in the case of State ex inf. v. Smith, 152 Mo. 512, where the Supreme Court said at l. c. 517:

"The appointment of defendant by the judges named was expressly predicated upon the theory that a failure to elect a successor to Haughton at the regular election in 1898, ipso facto, created a vacancy in that office. This is a misapprehension of the law in this State. Whatever may be the rule in other States, under their constitutions, and statutes, it has been the settled law in this State ever since the decision in State v. Lusk, 18 Mo. 333, that the failure to elect a successor to an office at the regular time for holding an election for that office, does not create a vacancy in such office, and does not, therefore, authorize any one to appoint a successor, and that if a person is so appointed as such successor he acquires no title. (State ex rel. v. Ranson, 73 Mo. l. c. 91, 94 and 95; State ex rel. v. McCann, 81 Mo. 479; State ex rel. v. Manning, 84 Mo. l. c. 663; State ex rel. v. Smith, 87 Mo. l. c. 160; State ex rel. v. McCann, 88 Mo. l. c. 390; State ex rel. v. McGovney, 92 Mo. l. c. 430; State ex rel. v. Powles, 136 Mo. l. c. 381.)"

Also in State ex inf. Hulen v. Brown, 274 S. W. 965, l. c. 967:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk, 18 Mo. 333; State ex rel. Stevenson, v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 78.

"The law under which appellants were appointed fixed their terms of office at one year, and contemplated that at the end of that time new appointments would be made. But, since the appointing power might not be promptly exercised, to prevent a vacancy the law provided for the incumbents to hold over until their successors were appointed and qualified. This is a wise rule as applied to public officers, for thereby the public is protected from possible evils naturally attendant upon a situation wherein neglect and waste might result. This contingency, as contemplated by the law, enters into every such appointment, and it must be concluded that the time an incumbent holds over the designated period is as much a part of his term of office as that which precedes the date when the new appointment should be made. The authorities are uniform on this rule, and we think there can be no question about it."

In the early case of State ex rel. Attorney General v. Seay, 64 Mo. 89, a case involving the office of circuit judge, the Court recognizes the right of an incumbent to hold office until a successor is elected and properly qualified, uses the following language at l. c. 100 and following:

"In the case at bar there was an election. The successful candidate, McCord, received his commission and took the oath of office. The limit of Gale's term of office fixed by the constitution was six years from the first Monday in January, 1869, if a successor should be duly elected and qualified. His successor was duly elected and qualified. There was no one elected by the General Assembly to succeed Lusk, and this makes a material and vital difference between the two cases, and without overruling that, we may, in this case, determine that there was a vacancy created by the death of McCord.

"The case of the Commonwealth vs. Hanley (9 Barr, 513) is in many of its features similar to this, and is confidently relied upon by relator. Hanley was elected clerk of the orphan's court on the second Tuesday in October, 1845, for three years from the first day of December, 1845, 'and until a successor should be duly qualified.' He qualified and entered upon the discharge of the duties of the office. On the second Tuesday in October, 1848, one Brooks was elected to succeed Hanley, but died on the 7th day of November following, within thirty days from the day of election, and by the law of that State he could not have qualified to fill the office by taking the necessary oath, or by giving bond within thirty days from the day of election.

"The opinion of the court was delivered by Rogers, J., and we quote from that opinion so much as we think bears upon the questions discussed in this case. 'Was there a successor duly qualified within the spirit of the Constitution? is the point on which the **question** mainly if not entirely depends. Being duly qualified in the constitutional sense, and in the ordinary acceptation of the words, unquestionably means that the successor shall possess every qualification; that he shall in all respects comply with every requisite, before entering on the duties of the office; that in addition to being elected by the qualified electors he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the constitution of the commonwealth, and to perform the duties of the office with fidelity. Until all these pre-requisites are complied with by his successor (for if you can dispense with one you can dispense with all) the respondent is de jure as well as defacto the clerk of the orphan's court.'

"The words are emphatic and full of meaning. The successor must not only be qualified, but duly qualified; and qualification for office, as defined by the most approved lexicographer, is 'endowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities fit or suitable for the purpose.'

"If McCord had died after his election and before he received his commission and qualified, Commonwealth v. Hanley would be an authority direct to the point that his death created no vacancy, and we infer from the opinion of the court, that if in that case Brooks had duly qualified and

died before the commencement of the term for which he was elected, the court would have held that his death created a vacancy. Here it is admitted that McCord was duly elected and commissioned, took and subscribed the prescribed oath, was thirty years of age, learned in the law, and resident in the ninth judicial circuit, and was therefore, at his death 'duly qualified,' as those words are expounded by the learned judge in *Commonwealth vs. Hanley*.

"By the law of Pennsylvania, Brooks was not permitted to give his official bond or take the oath of office within thirty days after his election, but by Section 2, Art. 1, ch. 4, Wagn. Stat., it is provided that 'each judge or justice shall, within thirty days after the receipt of his commission, and before entering upon the duties of his office, take the oath of loyalty prescribed by the Constitution of the State, and that he will faithfully demean himself in office.' So that taking of the oath of office by McCord was not premature, but was taken in compliance with the law.

"There is such a conflict between the California cases which have been cited, that they are of but little authority on either side of the question. The earlier cases sustain defendant's view. They are, however, overruled, in two cases more recently decided, but by a divided court, the dissenting judges adhering to the doctrine of the former cases.

"We have been referred to cases in New York and elsewhere, in which are observations to the effect that an office cannot be considered vacant while there is an incumbent legally in office, and discharging

the duties of the office, but this we do not controvert, and it only brings us back to the question, was there an incumbent of the office of judge of the ninth judicial circuit when the governor issued his writ of election? If there was, there was no vacancy, and those cases would be in point; but the very question we are discussing is, whether there was then an incumbent, and this turns on the meaning of the word qualified, as used in our constitution of 1865."

Here a successor had been elected and qualified, but died before the beginning of his term, and recognizing the rule above set out, held that the election and qualification were sufficient to terminate the tenure of the incumbent and create a vacancy.

Section 5 of Article XIV of our present Constitution is the same as Section 8 of Article XI of the Constitution of 1865, which was in force at the time the Seay case was decided.

And again, in the case of State ex inf. Attorney General v. Dabbs, 182 Mo. 359, a case involving the office of circuit judge in Jasper County, under a statute which gave to Jasper County an additional circuit judge, and wherein the election was not held at the proper time to elect a successor to the incumbent, the court used the following language at l. c. 369:

"The act of March 25, 1901, provides that the appointee shall continue in office until his successor is elected and qualified. This has not been done, and the time intervening between the first Monday of January, 1903, and the election and qualification of his successor is as much a part of the term for which he was appointed as the period next pre-

ceding the first Monday of January, 1903.

"As a successor to defendant can not now be elected and qualified until after the general election in 1908, he is entitled to hold the office and to discharge its duties until that time.

"If follows from what has been said that the demurrer to the return to the writ should be overruled, the writ of ouster denied, and the proceeding dismissed."

Section 8 of Article XIV of the Constitution, relating to the compensation and term of officers, is as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of State ex rel. The Attorney General v. Ransom, 73 Mo. 78, this section was discussed at length, and the court said at l. c. 89 and following:

"His second objection involves the construction of the 8th section of the 14th article of the constitution, and the 2807th section of the Revised Statutes of 1879. This is a case of first impression in this court. The spirit and intent of the convention, in framing section 8, of article 14 of the constitution, as we apprehend, was to prevent the too frequent practice that

had obtained, of passing special laws to increase the compensation or fees of particular officers, or to extend the term of special offices by like special legislation, for the benefit of present incumbents. This, we think, was the object and purpose of this section of the constitution. We cannot suppose that the convention intended thereby to cripple and embarrass the legislature in the exercise of a sound and wise discretion in making such reasonable changes in the times of electing public officers, as the public interest and convenience might require. Such changes were not within the mischief contemplated by the convention, although they might incidentally result, in some instances, in prolonging the time a given officer might have under his commission. The object and intent of the legislature in framing section 2807, Revised Statutes, was to provide and fix a certain and uniform time at which the election of justices of the peace should take place. It was not their purpose thereby to extend the term of said offices within the meaning of this constitutional prohibition, but simply to supply an omission that had long existed in our statute, prior to this enactment, and remedy as far as possible the inconvenience and want of uniformity resulting therefrom; and, if in the exercise of a sound and proper discretion on the part of the legislature, in thus fixing a definite time for the election of justices of the peace, it should incidentally result, that some of the justices should thereby continue in office longer than they would have done in the absence of this enactment, we are not prepared to say that the legislature thereby exceeded its authority, or violated the spirit or intent of the constitution in this particular.

"The convention that framed the constitution thought proper, in order: 'That no inconvenience might arise from the alterations and amendments of the constitution of the State,' to ordain and declare that all persons then filling any office or appointment in the State, should continue in the exercise of the duties thereof, according to their respective commissions and appointments, unless otherwise provided by law. See schedule and section 6 of the schedule to the constitution of the State. By the latter clause of section 2807 of the statute, the legislature at its revising session in 1879, prompted by a like consideration, intended, we think, to obviate any like inconvenience that might result from the alteration of the old law as to the time of electing justices of the peace. The spirit and intent of the convention in framing this ordinance and that of the legislature in passing this section of the statute, are so near alike that it has occurred to us that they ought to receive the same liberal consideration and construction."

"Section 37, of article 6 of the constitution, provides that: 'In each county there shall be elected or appointed as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law.' In the exercise of that power and duty, the legislature, in the revision of 1879, first determined how many justices the public good required in municipal townships, and then proceeded, by the first clause of section 2807, to effect a much needed reform, that had long been felt, in the statute law of the State, by fixing a definite time at which all justices of the peace should be elected; and to this section is appended the latter clause which provides that: 'Every justice of the peace

now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified.' This latter clause, it is claimed, acts as an extension of the term of certain justices whose terms would otherwise have expired at the recent November election in 1880, and is, therefore, claimed to be in violation of section 8, of article 14 of the constitution above mentioned.

"The first question is, what constitutes, under the law, the official term of justices of the peace? The statute in force now and when respondent was elected and qualified, provides that: 'Justices of the peace are to be commissioned by the county court, and shall hold their office for four years, and until their successors are elected and qualified.' The constitution of the State--5th section, 14th article--declares that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.' The stipulation of the parties shows that at the November election in 1876, the respondent was duly elected, commissioned and qualified as a justice of the peace within and for Kaw township, in Jackson county, Missouri, for the period of four years, and until his successor was duly elected or appointed and qualified. It would seem from this that the period of four years, and whatever time thereafter may elapse before the election or appointment and qualification of his successor, constitutes the official term of justices of the peace; that the time intervening between the end of the four years and the election or appointment and qualification of his successor, is as much a part of his term of office, as the four years that pre-

ceded it. Such, we think, is the meaning and import of this term. In the case of the State v. Lusk, 18 Mo. 337, this court, in treating of an act of the legislature creating the office of public printer, and in commenting on the 5th section of that act, which provides that: 'The public printer to be elected at each session of the general assembly, shall hold his office for two years * * and until his successor shall be elected and qualified,' uses this language: 'While it may be true that the design of continuing an incumbent in office until his successor is duly elected and qualified, is to prevent an interregnum in the office, and to have some person always authorized to discharge its duties, it is also true that the incumbent, until the qualification of his successor, is as fully in the office and entitled to all its advantages and emoluments, as he was for the previous period of his service, and it is his right to hold the office until everything has been done which is required by law to give title to the office to another person.' Commonwealth vs. Hanley, 9 Barr (Pa.) 513; State v. Robinson, 1 Kas. 17; State v. Berg, 50 Ind. 496; Thompson v. State, 37 Miss. 518; Placer Co. v. Dickerson, 45 Cal. 12; State v. Daniel, 6 Jones (N. C.) 444; Sparks v. Bank, 9 Am. Law Reg. (N. S.) 365. In the case of Harris v. Babbit, 4 Dill. C. C. 190, and some of the cases there cited, a somewhat different doctrine is held."

The law is well settled in this State that failure to elect does not create a vacancy, and that absent restrictions, the incumbent continues to hold the office as a part of his term until his successor is chosen at the proper time and in

the proper manner and qualified.

Your letter states that, by the last decennial census Greene County had a population of over 90,000 inhabitants. The last census having been taken in 1940, the question might be raised as to when this increase became effective for the purpose of determining when a treasurer should be elected in Greene County.

Sections 13790 and 13792, supra, each contain the words "according to the last Decennial Census of the United States," when referring to the population of the county for the purpose of fixing the time for electing a county treasurer. This could only mean the "last Decennial United States Census" before the time when the election is to be held. In 1938, Greene County had a population of less than 90,000 inhabitants by the census of 1930; in 1942, Greene County, by the census of 1940, will have a population in excess of 90,000. Townships may pass from one class to another by a change in population, when there is classification according to population and grow into a law or out of it.

In the case of State ex rel. Wallace et al. v. Summers, et al., 9 S. W. (2d) 867, the Court said, l. c. 868:

"As we read the Ryan Case we conclude that to construe the statute as holding within its terms only municipal townships, as of the time of the passage of the act, would render the act unconstitutional. Therefore we hold under this authority that a municipal township grows out of a law by reason of decrease in population as well as growing into a law by reason of increase in population. State ex rel. v. Ryan, supra; State ex rel. v. Williams, 310 Mo. 267, 275 S. W. 534; State ex rel. v. Turner, 210 Mo. 77, 107 E. W. 1064.
* * * * *

Hon. Wm. R. Collinson

(22)

Nov. 17, 1941

The same rule should be applicable to counties.

Greene County, by the increase in population, has passed into a different classification from what it was in 1938, when the present treasurer was elected. There is no law authorizing the election of a county treasurer in the year 1942, in a county having a population of over 90,000 inhabitants.

CONCLUSION.

From the foregoing, it is the conclusion of this Department that the present treasurer of Greene County should serve until his successor is elected in the year 1944 and properly qualified.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ/rv

OFFICIAL BONDS:
COUNTY COLLECTOR:

County court can, at any time, require additional bond to be furnished by county collector if a mistake was made in the amount of taxes collected in the years previous to his election.

2/12
August 20, 1941

Honorable Phil H. Cook
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Sir:

We are in receipt of your request for an official opinion under date of August 15, 1941, which reads as follows:

"Will you please give me an opinion on the following set of facts: On March 6, 1939 the county collector of Lafayette County filed an official bond with the county court in the sum of \$240,000.00. No order was made by the court requiring the county collector to deposit his receipts daily. The largest amount collected by the county collector during the year 1938 was \$348,662.26. In view of Section 11056 of the Revised Statutes of Missouri for 1939, it would appear that the collector's bond should have been in an amount equal to \$348,662.26 plus ten per cent. Does the county court at this time have the right to require the county collector to give additional security or enter into a new bond covering the \$348,662.26 plus ten per cent."

Section 11056, R. S. Missouri 1939, partially reads as follows:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before enter-

ing upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: * * * * *

Under the above partial section it is mandatory that the county collector give bond and security to the state which bond should be approved by the county court. This bond should be in a sum equal to the largest monthly collection of the previous year preceding the election or appointment of the collector plus ten per cent of said largest monthly sum.

Under Section 11062, R. S. Missouri 1939, the collector's bond, when received by the state auditor, must be examined by the auditor and if found that it conforms to the law, and the sureties are satisfactory, he shall file the same in his office and immediately certify the fact thereof to the clerk of the county court; but if the auditor finds the bond not to be in accordance with law, or if he has reason to doubt the sufficiency of the security, he shall immediately return the bond to the clerk of the county court.

Section 3260, R. S. Missouri 1939, reads as follows:

"As soon as practicable after the taking effect of this article, and at least once in each year thereafter, the officers and courts required by law to examine and approve any such bonds shall examine as to their sufficiency and as to the solvency of the sureties therein, and shall briefly note thereon, or on the record thereof, the result of such examination; and if any such bond be for any reason deemed insufficient, the principal therein shall be required by a notice in writing to furnish a new and sufficient bond within thirty days;

August 20, 1941

and if such bond be not so furnished and approved, the office shall at the expiration of said thirty days become vacant, and the vacancy shall be filled as provided by law."

Under the above section it is the duty of the county court to examine to see if the county collector's bond be for any reason deemed insufficient. If they find the bond is insufficient, they should require the county collector, by a notice in writing, to furnish a new and sufficient bond within thirty days. It was held in a case in your county in State ex rel. v. Lafayette Co. Ct., 41 Mo. 545, 1. c. 561, that the county court could compel the giving of a new bond where a mistake was made in the ascertaining of the revenue to be collected by the collector. In that case the court said:

"It seems to be admitted that the plaintiff did, within the time limited by the order of the court in relation to the filing of a new bond, appear and present for its approval a bond in the penal sum required in the order, but it is averred that in the meantime it had been ascertained that the revenue would actually amount to the sum of \$100,000, and that therefore the bond was insufficient on that account. Admitting this to be a true statement of the facts, it would seem to be a great hardship upon the plaintiff, after fixing the penalty at a specific sum and giving him only ten days to procure solvent sureties for so large an amount, to say to him when his bond was presented that there was a mistake in the amount of the revenue to be collected, and his bond was not large enough by at least \$30,000, and must be rejected. What was the necessity for this hasty action on the part of the County Court? If a mistake had been committed in reference

to the amount for which the bond was required to be given, Adamson was certainly not responsible for it. He had been led into error by the action of the court itself, and common fairness would seem to require that some additional time ought to have been given him to file a new bond and hunt up additional sureties. Certainly the public interest could not have suffered by pursuing such a course, and it is fair to presume that the plaintiff could not comply with the requirements of the court at once, but ought to have had a reasonable time given him to do so. The question as to the solvency of the sureties offered by the plaintiff seems really to cut but a small figure in the transaction, and great stress is laid upon the fact that the penalty of the bond offered by the plaintiff was not double the amount of the revenue to be collected, and therefore it was not such a bond as the law required. Then admitting the solvency of the sureties offered, the theory of the court would seem to be that no further time could be given to the plaintiff, and the bond must at once be rejected for insufficiency and the office declared vacant. There is much in this transaction that does not harmonize with the theory that the court was acting in the exercise of a sound and just discretion in the premises. There is nothing in the statute that prohibits the County Court from requiring the collector, at any time when the protection of the public interest would seem to demand it, to give additional bond and security. In all cases, however, he would be entitled to a reasonable time to comply with the order of the court; and if it is not given, and no good cause shown to the contrary, the presumption

Hon. Phil H. Cook

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August 20, 1941

would be that the court had acted in an arbitrary and unjust manner."

CONCLUSION

In view of the above authorities it is the opinion of this department that the county court, at this time, has the authority to require the county collector to give an additional bond or enter into a new bond covering the sum of \$348,662.26, plus ten per cent.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

COUNTY COURTS:
EMPLOYMENT OF
SPECIAL COUNSEL:

County courts may employ special counsel to represent the county in civil matters only when the prosecuting attorney refuses to act or is interested, or shall have been employed as special counsel and when such employment is inconsistent with the duties of the office or if the prosecuting attorney is related to the defendant.

August 29, 1941

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Honorable Phil H. Cook
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

"On Wednesday, August 13 I was in your office at which time I talked to Mr. Burton about the possibility of the county court retaining special counsel to assist the prosecuting attorney in suits for the collection of shortages as shown by the State Auditor's report filed in this county on August 12, 1941. Nothing definite was decided at that time. Since returning home I have attempted to check the law on this matter and the latest case that I am able to find ruling directly on this point is 162 Missouri 680. I also find that the right of the court to hire special counsel was conceded in the case of Morrow vs Pike County, 189 Missouri 610.

"Will you please furnish me with an opinion as to whether or not the county court has the right to hire special counsel to assist the prosecuting Attorney in a suit on an official bond to recover money belonging to the county, the road funds, school funds, bond funds, etc."

The statutory duties of the prosecuting attorney,

with reference to representing counties in civil and criminal matters, are stated in Sections 12942, 12944 and 12948, R. S. Missouri 1939, as follows:

"Sec. 12942. The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

"Sec. 12944. He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the

August 29, 1941

business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto; Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

"Sec. 12948. If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

In your request you cite some cases which have held that the county court may employ special counsel to represent the county in civil matters. Upon an examination of these cases, I find that those opinions were based upon a statute which was enacted in 1873, Laws of Missouri, 1873, page 18. Section 5 of said act, which is pertinent to your question, reads as follows:

"Sec. 5. The county court of any county in this state may employ, on such terms as said court shall deem proper, by an order made of record, one or more attorneys-at-law to aid and assist the prosecuting attorney of such county in any civil business, when, in the judgment of such court, the interest of the county requires such assistance."

At the Revision Session of the General Assembly in 1879, the law relating to prosecuting and circuit attorneys was reenacted under what was Article 2 of Chapter 9, R. S. Missouri 1879, and the foregoing 1873 law was left out of this article. Therefore, the cases which you cite are no longer authority because the opinions in those cases were based upon the provisions of the Act of 1873, supra. Regarding the repeal of this Act of 1873, the Supreme Court in *Butler County v. Sullivan County*, 108 Mo. 630, after discussing the statute pertaining to the employment of special counsel in tax suits, the court went into the question of whether or not there was any other statute authorizing employment of special counsel by the county court. At l. c. 638, the court said:

"This state, by law, has made ample provision for the collection of its revenue for all purposes. In the exercise of its prerogative, it makes use of certain officials, designated as county officers, to whom are assigned specific duties, and, among others, the county courts. But this statute confers no power upon the county court to cast upon the county the burden or cost of such collection. Nor is there anywhere in the statutes to be found an act conferring such authority. As conferring such authority, we are cited to an act, approved March 11, 1873, amending an act approved March 9, 1872, entitled 'An act to abolish the offices of circuit and county attorneys by adding a new section, to be denominated section 5.'

"That amendment reads as follows:

"Sec. 5. The county court of any county in this state may employ on such terms as said court shall deem proper by an order, made of record, one or more attorneys-at-law to aid and assist the prosecuting attorney of such county in any civil business, when, in the judgment of such court, the interest of the county requires such assistance.' The act of 1872, to which this section was amendatory, was revised and amended in 1879 (R. S. 1879, art. 2, ch. 9), and section 5 of that act omitted, and thereby the same was repealed. * * *

This opinion has not been criticized or overruled but has been recognized by the court in later decisions. *Morrow v. Pike County*, 189 Mo. 610, 620; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614. In the *Buchanan County case*, supra, 1. c. 633, in speaking of the duties of the prosecuting attorney and county court with reference to civil and criminal matters, the court said:

"It is the duty of prosecuting attorneys to commence and prosecute all civil and criminal actions in their respective counties, in which the county or State may be concerned. (Secs. 736 and 738, R. S. 1919.) The county court is the fiscal agent of the county and is charged with the duty and vested with the power to enforce the collection of money due the county, to order suit to be brought on bond of any delinquent and require the prosecuting attorney for the county to commence and prosecute the same. (Sec. 9560, R. S. 1919.) We are of the opinion that when the prosecuting attorney refused to perform his duty, as in this instance, the county court was not shorn of its power to act in the discharge of its duties in the premises, nor required to supinely abdicate its functions. The servant is not greater than his master. The county court was empowered by the statute to order the

suit to be brought and to require the prosecuting attorney for the county to commence and prosecute the action. The refusal of the prosecuting attorney to obey the order of the county court created an emergency. The suit must be brought or the county lose a large amount of its revenue. In this emergency we have no doubt the county court had the implied power to employ other counsel to bring the suit; otherwise it would have failed in the discharge of a duty imposed upon it by the statute."

The proviso clause in Section 12944, supra, very plainly shows that the lawmakers intended that special counsel be employed in cases where swamp lands were involved. Under the condition stated in Section 12948, supra, the county court may employ special counsel.

The Buchanan County case, referred to hereinabove, recognizes the rule that the county court, under the conditions and circumstances set out in said Section 12948, may employ special counsel in civil matters.

The cases which we have found on this question have not dealt with the authority that the county court might have under the provisions of Section 36 of Article VI of the Constitution of Missouri to employ special counsel. On the contrary, the courts seem to hold that this authority is derived solely from the statutes. Said Section 36 reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

CONCLUSION

From the foregoing it is the opinion of this depart-

Hon. Phil H. Cook

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August 29, 1941

ment that the county court may not employ special counsel to represent the county in civil matters except in matters pertaining to swamp lands and except in cases where the prosecuting attorney is interested or has been employed as counsel in a case where such employment would be inconsistent with the duties of his office or in cases where the prosecuting attorney is related to parties whose interests are in conflict with those of the county and in cases where the prosecuting attorney refuses to act.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

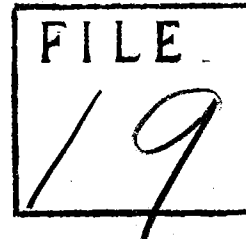
VANE C. THURLO
(Acting) Attorney General

TWB:DA

10
HEALTH, BOARD OF: Board of Health by regulation may quarantine person
COUNTIES: with communicable venereal disease; sheriff must serve
writ of isolation but is not entitled to fee; person
quarantined must pay cost thereof, but if indigent,
cost must be paid by the county.

October 10, 1941

Honorable James V. Conran
Prosecuting Attorney
New Madrid County
New Madrid, Missouri



Dear Sir:

This Department is in receipt of your request for
an official opinion which reads as follows:

"I enclose a letter and a bulletin from
the State Board of Health to the Sheriff
of this County. They have asked the
Sheriff to pick up the person named in
said letter, confine her to the County
Jail and treat her for Syphilis. For
which she has refused to be treated.

"We would like to know whether or not
the Sheriff has this authority and if
so, who if anyone will pay his costs in
picking up these cases and boarding them.
The mileage and board bill will amount
to a tremendous amount if this ruling is
strictly enforced.

*****"

The letter which accompanies your request is from
Dr. Herbert S. Miller, District Health Officer of the State
Board of Health, and is as follows:

"We are sending you, under separate cover,
a copy of Book IV and Supplement of the
Missouri Public Health Manual containing
the authority for quarantining a person in
order to prevent the spread of Venereal
Disease.

"M H 27 year old white Female,
Address % P C P has been
reported by Dr. J. J. K of that
city as havin syphilis in an infectious
state. She refuses to take treatment and
as a protection to the community she
should be treated or placed in quarantine."

A reading of the above letter from Dr. Miller discloses that he does not ask that the person in question be confined in the county jail, but only that she be placed in quarantine. However, we will answer your request as submitted.

Section 9736, R. S. Mo. 1939, which deals with the State Board of Health, provides as follows:

"The board shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

Section 9745, R. S. Mo. 1939, provides:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this law, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

Section 9747, R. S. Mo. 1939, reads as follows:

"It shall be the duty of the deputy state commissioners of health for the counties to enforce the rules and regulations of the state board of health throughout their respective

counties outside of incorporated cities which maintain a health officer who has been appointed a deputy state commissioner of health as provided for in section 9745. The deputy state commissioners of health for incorporated cities of less than 75,000 population shall enforce the rules and regulations of the state board of health within their respective cities. Any deputy state commissioner of health who neglects or refuses to perform his duties as required by this article shall be deemed guilty of a misdemeanor. In case of dereliction of duty or refusal to act on the part of the deputy state commissioner of health of any county, the state board of health may at their discretion declare the office of deputy state commissioner of health for that county vacant."

Section 9748, R. S. Mo., 1939, is as follows:

"All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the state board of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

The State Board of Health in accordance with the powers granted by the statutes, has enacted the following rules and regulations:

"Section 1, Division B.

"Diseases Communicable and Dangerous to Public Health?

Chancroid
Gonorrhea
Syphilis

"In addition to the general measures enumerated in the foregoing sections, the following rules and procedures shall apply to diseases enumerated in this section:

* * * * *

QUARANTINE MAY BE ESTABLISHED TO
PREVENT THE SPREAD OF VENEREAL
DISEASES.

"

Any person suspected of having any disease enumerated in Division B, Section I, Book IV, who fails to submit himself or herself to examination or treatment as ordered by the district or local health officer and who fails to report regularly for treatment until released as cured by said health officer, shall be subject to quarantine as hereinafter provided.

"In establishing quarantine, the district or local health officer shall designate a place or define the limits of the area in which the suspect shall be quarantined and no other person, except the attending physician, shall enter or leave said quarantined area without permission of the proper authorities.

"No one shall have the authority to terminate said quarantine except the officer responsible for it and only after the disease has become non-infectious as determined by said health officer or his authorized deputy.

"Anyone released from quarantine but not cured shall sign a statement agreeing to place himself or herself under the medical care of a physician or clinic and remain under treatment until finally released by the health officer."

This Department in an opinion rendered to Dr. Harry F. Parker, State Health Commissioner, on November 16th, 1939, approved the above regulations and held them constitutional and legal. Since that time there has appeared an annotation in 127 A. L. R. 424, in which it is stated, "Persons having communicable venereal diseases may be quarantined in the exercise of the police power and in order to protect public health." Numerous cases in support of this rule are cited.

Therefore, we believe that it is settled that a person suffering from a venereal disease may be quarantined in this State. However, as to the place of quarantine we call your attention to the statement in 29 C. J., p. 255, par. 47, which is as follows:

"While a person may be quarantined in other than his place of residence the mere determination that a disease is dangerous and communicable does not empower a health officer to refuse isolation in the home by quarantine and placard notice thereof and to commit the diseased person to a hospital. The danger must be such as to justify the quarantine isolation in a place other than the home; but, where this is the case, the person infected has no right to be interned in the locality in which he may reside; and the proper place for the confinement is a hospital and not a jail or penitentiary. * * *"

In view of the above statement we are of the opinion that a person may not be quarantined in a county jail, but again point out that from the contents of the request of the State Health Officer, such procedure was not demanded by the State Board of Health.

As to the question of whether a sheriff is required to serve a warrant or writ of isolation, we refer you to Section 13138, R. S. Mo. 1939, which reads as follows:

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace; and he shall attend upon all courts of record at every term, and in all cities which now have or shall hereafter have a population of three hundred thousand inhabitants or more, he may employ counsel to aid and advise him in the discharge of his duties and to represent him in court, and may fix the compensation to be paid such counsel, not, however, to exceed the sum of two thousand dollars per annum: Provided, the whole compensation is paid out of the fees of his office of sheriff; and the court shall have power to audit and allow such compensation as other fees and expenses are allowed by law."

This identical question was raised in the case of Nyberg v. Board of Com'rs. of Sedgwick County, 216 Pac. 282, in which the Supreme Court of Kansas said:

"The sheriff is the state's chief executive officer in his county (State v. McCarty, 104 Kan. 301, 305, 179 Pac. 309, 3 A. L. R. 1283), and he is the only officer possessing the necessary authority outside of his county. The statute provides that the sheriff shall serve and execute all process, writs, precepts, and orders issued or made by lawful authority and to him directed.

Gen. Stat. 1915, Sec. 2749. The courts are not the only sources of process directed to sheriffs. County treasurers issue tax warrants, the Governor issues warrants for fugitives from justice, and the order here involved was issued by competent authority, within the meaning of the statute.

"Special provision not having been made for payment of expense incurred in executing isolation orders, the general provision of the statute relating to payment by the county commissioners of the sheriff's expenses applies. Gen. Stat. 1915, Sec. 4714. This is no hardship to the county, because the service is rendered in a matter of quarantine, the expense of which falls ultimately on the county."

However, it is the rule in Missouri that a sheriff is not entitled to a fee unless the same is expressly allowed by statute. State ex rel. v. Brown, 146 Mo. 401, 47 S. W. 504. An examination of Section 13411, R. S. Mo. 1939, which sets forth the fees of sheriffs, discloses that there is no fee allowed for the serving of a process of this nature. Therefore, it is presumed the Legislature intended this service to be done without compensation and the sheriff must serve this warrant or writ of isolation but is entitled to no fee for doing the same.

The next question which arises, and which is the main point in this opinion, is - On whom falls the burden of paying the expenses of the quarantine? By expenses of the quarantine, in so far as this opinion is concerned, means the cost of maintaining the person so quarantined during the period of isolation and does not deal with other costs such as medical services etc.

Under the statutes there is no provision as to how and by whom this expense is to be paid. While Section 9758, R. S. Mo. 1939, might at first reading allow this cost to be paid by the county or city, further research discloses that that is not the case. This section provides as follows:

"The county court or city council in any such city shall have power to appropriate money out of the current revenues of the county or city, as the case may be, for the purpose of carrying out the provisions of this article."

When this law was passed in 1915 (Laws of Missouri, 1915, page 299), Section 9758, supra, provided that the money may be spent by the county court or the city council "for the purpose of carrying out the provisions of this act." The act in question included the two previous sections and dealt with a public health nurse and the right to disinfect public and private places. In the revision of 1919 the Revision Committee changed the word "act" in the section to read "article." However, a change by a revision committee of a word does not change the purpose of the act and the original act must be looked to in order to ascertain its scope and effect. 59 C. J. 894, Par. 493.

The general rule in regard to the payment of expenses during the quarantine is succinctly stated in the leading case of Dodge County v. Diers, 69 Neb. 361, in which it is said:

"The mere fact that they are quarantined for public safety does not relieve persons who are able to support themselves of the duty of so doing."

However, if it appears that the person so quarantined is unable to support herself during said period, then a different question arises. Section 9590, R. S. Mo. 1939, provides as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 9591, R. S. Mo. 1939, reads:

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no

other person required by law and able to maintain them, shall be deemed poor persons."

The duties imposed by these statutes have been held mandatory. *State ex rel. Gilpin v. Smith*, 96 S. W. (2d) 40, 1. c. 41; 48 C. J. 433.

The majority rule seems to be that where a person is placed in quarantine and is unable to pay the cost of maintenance during the period thereof that a county with a mandatory poor law must bear the cost of such maintenance.

In *Copple v. Commissioners of Davie County*, 50 S. E. 574, the Supreme Court of North Carolina had before it the question of the payment of the costs of maintenance of an indigent person during a quarantine. The court said, 1. c. 575:

"So far as municipal obligation is concerned, it is accepted doctrine that the care and support of the indigent and infirm is a matter of statutory provision. In *Smith v. Colerain*, 9 Metc. 492, it is said by Chief Justice Shaw, 'It has been too often decided to be now questioned that the liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation.' Where a statute imposes such duty on a county in general terms, leaving the method and extent of relief to the judgment and discretion of local officers and agents, in order to make a binding pecuniary obligation on the county there must be a contract to that effect, express in its terms, or the service must be done at the express request of the officer or agent charged with the duty, and having the power, to make contracts concerning it. The statutes of our state on this subject are of this character. By section 707, subd. 21, and section 3540, of the Code, the county commissioners are directed to

provide for the maintenance, comfort, and well ordering of the poor. By section 3541 it is provided that paupers who may become chargeable to the county shall be maintained at the county poorhouse, or at such place or places as the board of commissioners may agree upon. The general duty is here imposed of providing for the poor. The place, method, and extent of relief are vested in the judgment and discretion of the county commissioners. * * *

This rule is recognized in Dodge County v. Diers, supra, and Kollock v. Stevens Point, 37 Wisc. 348.

Therefore, we are of the opinion that an indigent person quarantined by an order of the State Board of Health must be cared for by the county of which she is a resident.

Conclusion

It is, therefore, the opinion of this Department that the State Board of Health may by rule and regulation provide that a person having a communicable venereal disease shall be quarantined, but that said person cannot be quarantined in a county jail. It is further the opinion of this Department that if such a person is able to pay the expense of said quarantine, she must do so, but if she is an indigent and unable to pay the cost or expense, then the duty is upon the county to bear the expense.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

TAXATION: **Property** person in military service not exempt.
Effect and application Soldiers and Sailors Relief Act on proceeding to enforce collection.

December 18, 1941

Honorable Phil H. Cook
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Sir:

This will acknowledge receipt of your letter of December 10, 1941, which is as follows:

"Is a person in the armed forces of the United States, either Army, Navy, or Marine Corps, who owns either real estate or personal property exempt from taxation under Section 10937, Revised Statutes of Missouri, 1939?

"If they are exempt from taxation, after taxes have become delinquent, are the taxes automatically cancelled on said delinquent taxes if the person becomes a member of the armed forces of the United States?

"In other words, does belonging to the armed forces of the United States relieve a person from paying current real or personal taxes, and also does it relieve a person from paying any delinquent taxes that he may owe at the time of his entering the armed forces of the United States?"

In answer to the first question, we enclose copies of three opinions heretofore rendered to Hon. John P. Shreves, dated May 18, 1934; Honorable William H. Sapp, dated September 17, 1936 and Honorable Andy Wilcox, dated January 4, 1937, in which we held that the property, real or personal,

of a person in the armed forces of the United States was not exempt from taxation, if otherwise taxable under the laws of this state.

The answer to the balance of your opinion request lies in the terms of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 USCA (App.) 501, et seq., June 1941 quarterly supplement.

Section 510 of said Act states the general purpose thereof, and is as follows:

"In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

Section 511 defines the various terms used, and is as follows:

"(1) The term 'persons in military service' and the term 'persons in the military service of the United States', as used in this Act, shall include the following persons and no others: All members of the

Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term 'military service', as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

"(2) The term 'period of military service', as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

"(3) The term 'person', when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

"(4) The term 'court', as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

Section 520 provides:

"If any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

"Any person who shall make or use an affidavit required under this section, knowing it to be false, shall be guilty of a misdemeanor and shall be punishable by imprisonment not

to exceed one year or by fine not to exceed \$1,000, or both.

"In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

"If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

Section 521, provides:

"At any stage thereof any action or proceeding

in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Section 523 provides:

"In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service--

"(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; * * * * *"

Section 560 provides:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of

real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

"When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken

to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

Under Sections 520 and 521, no action in any court to enforce payment of personal property taxes could be prosecuted to a final conclusion, absent compliance with the requirements laid down. In any such action, if the required affidavit could not be filed, then no judgment could be entered unless bond was given. Even then such judgment would be subject to being set aside, vacated or reversed upon application of the person in military service after termination of said service, if it appears he has a legal defense.

While Sections 520 and 521 would apply to suits in court (Section 11112, R. S. Mo. 1939) to enforce payment of personal property taxes, nothing in the act appears to suspend or bar the power to enforce payment by use of a distress warrant (Sections 11086 and 11087, R. S. Mo. 1939). However, such summary method has generally fallen into disuse in this state, and resort to it would certainly be contrary to the general spirit of the Relief Act as expressed in Section 510. We do not think any collector will or should resort to the same, especially since the taxing units are protected by the Relief Act. The Collector could file suit for personal property taxes, let it be shown that the defendant was in military service; have judgment entered subject to the terms of Section 520, and let the execution be stayed under Section 523. The Collector might also file suit and let the action be stayed under Section 521. Either of these methods, while preventing the taxing units from making immediate collection, would insure that such taxes

would be collected (if the defendant or his property were good therefor) when the period of military service ends.

Also, Section 525 provides:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

Under this provision the Collector could refrain from filing any suit, until the person liable is released from military service, and not endanger any right of the taxing unit from the standpoint of limitations running on the claim.

The first method, however, seems the more preferable, since it would clearly enable the Collector to account for these taxes in the delinquent list and in his annual settlement.

Section 560 deals completely with real estate taxes, and only with those that fall due during the period of military service. Therefore, any tax that fell due before the owner of the real estate entered military service may properly be collected, or collection enforced by the summary method provided by the "Jones-Hunger Act." (This would not be so in those parts of the state where real estate taxes are enforced by suit, since Sections 520 and 521 would govern).

However, it appears from Section 560 that upon the filing with the Collector of an affidavit setting forth certain facts, he cannot sell real property for taxes falling due during the period of military service of the owner. This seems to place the burden upon the property owner, who is in military service, to take an affirmative step to stop the sale of his land for taxes. Absent such affirmative action

Hon. Phil H. Cook

(10)

December 18, 1941

on his part, there does not appear to be any bar interposed by said section, and even then, by leave of a court upon the collector's application, the property may be sold. The person in military service, in either event, is protected because he is given the right to redeem the property at any time within six months after his service in the armed forces is terminated. The taxing units are protected, since, during the period when the right to enforce its tax lien is suspended, the tax bill bears interest at six per cent per annum until paid, and in the event not paid, the property could then be sold, and limitation would be no bar.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv

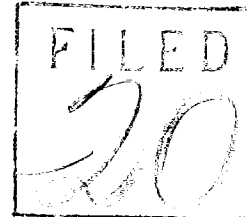
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DRAINAGE DISTRICTS DELINQUENT TAXES: Trustee appointed by county court to bid at tax sales not authorized to include delinquent drainage tax in the amount of his bid.

January 24, 1941

1-30

Hon. Marshall Craig
Prosecuting Attorney
Charleston, Missouri



Dear Sir:

Receipt is acknowledged of your letter of January 21, 1941, in which you ask for an opinion on the following question:

"In Section 9953B, Laws of the State of Missouri 1939, authority is given the County Court to appoint a Trustee to buy in land for the County for the amount of taxes due.

"In this County we have a great many Drainage Districts and several of them are County Court Districts. By reason of this situation there arises a question as to what steps the County Court and its duly appointed Trustee should take to protect the County Court Drainage Districts.

"For example lets' say the State and County taxes on 40 acres of land becomes delinquent and amounts to \$100.00. On the same land the Drainage taxes, assessed under a County Court District, amounts to \$50.00 for the same years. The question arises as to whether the Trustee appointed by the County Court can bid only \$100.00 and protect only State and County taxes or whether he can bid \$150.00 and protect Drainage District in addition.

"It seems that Trustees should be permitted to bid the full \$150.00 and then to sell the property for enough to pay both the County and Drainage District. This should be especially true if the Courts are going to hold that when

a piece of property is bid on by the Trustee for State and County purposes, all special assessments for the same years are to be cut off."

Section 9953b, Laws of Missouri, 1939, page 851, mentioned in your question was enacted by the General Assembly by Senate Bill 311, approved June 16, 1939. This bill also contained Sections 9953a and 9963f. These sections of the law were enacted to amend Senate Bill 94 enacted by the General Assembly in 1933, approved April 7, 1933, and found in Laws of Missouri, 1933, page 425 and following. This last mentioned Act does not apply to the collection of drainage or levee assessments or other special assessments, Section 9963d, page 448, Laws 1933.

"* * *nor shall this act be so construed as to change in any manner whatsoever the method or mode now or that may hereafter be provided by law for the collection of drainage and/or levee assessments, or other special assessments."

The original act, Senate Bill 94, 1933, did not apply to the collection of drainage assessments, and Senate Bill 311, Laws of 1939, page 850 and following is not made to apply by any of its provisions. However, by Section 9963f of this Bill, Laws 1939, page 852, drainage and levee districts which are given the right and the method is prescribed whereby the junior lien of drainage and levee assessments may be protected from being foreclosed by a sale to satisfy a tax lien, this section is as follows:

"Any drainage, levee or any other special improvement district having a lien on any land or lot, upon which there has been issued a certificate of purchase, may, if authorized by the law creating such drainage, levee or other special improvement district, at any time within the period of redemption applicable to any certificate of purchase, deposit with the collector the amount necessary to redeem such lands. Upon any such deposit the collector shall give immediate notice thereof to the holder of the certificate of purchase. But no drainage, levee or any other special improvement district shall foreclose its lien against any property sold under this act until it has redeemed as provided herein. The holder of such certificate or purchase shall then surrender said

certificate of purchase to the collector, who shall pay to the holder of the certificate the money so deposited by such drainage, levee or other special improvement district. In cases to which this section is applicable said certificate of purchase shall not be cancelled but shall be considered as legally assigned to the drainage, levee or other special improvement district making the deposit as hereinbefore set forth and shall be delivered by the collector to such district, noting thereon compliance with this section. Any such certificate may then be redeemed as provided for in this act from any such drainage, levee or other special improvement district; if not redeemed, then any such drainage, levee, or other special improvement district shall be entitled to a collector's deed, in the same manner and under the same conditions as provided for in this act as to other holders of a certificate of purchase."

This method being provided for the protection of drainage and levee assessments no other method could be followed. *Keane v. Strodman*, 18 S. W. (2d) 896, 1. c. 898.

"The familiar maxim of '*expressio unius est exclusio alterius*' may also be invoked, for the maxim is never more applicable than in the construction of statutes. *Whitehead v. Cape Henry Syndicate*, 105 Va. 463, 54 S. E. 306; *Hackett v. Amsden*, 56 Vt. 201, 206; *Matter of Attorney General*, 2 N. M. 49.

"Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts in this case is the interpretation given to it by the Kansas City Court of Appeals in *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 626, 85 S. W. 112, 113, to this effect: 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim* * * and* * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'"

Hon. Marshall Craig. - 4 - January 24, 1941.

CONCLUSION.

The trustee who may be appointed by the County Court under the provisions of Section 9953b, Laws 1939, page 851, is without authority to include in the amount of his bid the amount of delinquent drainage or levee assessments.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General.

WOJ/ms

COUNTIES: County courts issuing revenue bonds under
LIABILITY FOR: Section 8548, R. S. Mo. 1939, incur no
REVENUE BONDS: objection on a county other than that
mentioned in the bond.

FILED NO. 20

May 22, 1941.



Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Craig:

This is in reply to yours of recent date wherein you request an opinion on the following statement of facts.

"There has been some discussion in the County Court with reference to taking over a bridge which spans the Mississippi River from Missouri into Illinois, at Cairo, Illinois, by the County, through the issuance of Revenue Bonds by the County.

"It is our understanding that such a project was perfected by Pike County, Missouri. The County is, of course, interested in protecting its credit and we would like to know whether or not the matter has ever been brought to your attention and whether the County in anywise binds itself. It appears, by Section 8548, Revised Statutes of Missouri, 1939, that there would be no obligation on the County and that the bonds would be retired on the income of the tolls and in that matter only. If you have had occasion

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to give opinion on this matter, we would appreciate the benefit of your research so that the County might be certain of its position."

County courts and other political subdivisions of the state are authorized to issue toll bridge revenue bonds by authority of Section 8548, R. S. Mo. 1939. This section contains the following proviso:

"* * * Provided, however, that no revenue bonds or any liens securing such bonds shall be repaid in whole or in part from any funds arising from taxation, nor shall any such bonds or liens, given under authority of this act constitute a lien on any other property of any such public agency or a pledge of the credit of such agency; * * *."

Your inquiry goes to the question of whether or not additional liability is incurred by the county court in the issuance of such bonds. We think this question is the one answered in the case of State ex rel. City of Hannibal v. Smith, State Auditor, 74 S. W. (2d) 367, 1. c. 370, 371. In that case the following object was made to the issuance of bonds for erecting a bridge at Hannibal, Missouri, for which the City of Hannibal issued revenue bonds:

"The City Council of the City of Hannibal was without authority of law to adopt the said ordinance, because the ordinance is void in that it attempts to authorize the City to incur an indebtedness to an amount exceeding the income and revenue provided for the year in which the ordinance was adopted,

without a two-thirds vote of the voters of the City voting on a proposition to incur such indebtedness, at an election to be held for that purpose, as required by Section 12 of Article 10 of the Constitution; and because the ordinance makes no provision for the submission of such proposition to the voters of the City.

* * * * *

"In substance, section 12, art. 10, of the Missouri Constitution, provides specifically against the incurring of an indebtedness in an amount exceeding the income and revenue provided for the year in which said indebtedness was incurred without the consent of two-thirds of the voters voting on the proposition.

"The bonds in question are to be paid for wholly out of tolls laid on the traffic using the bridge. The lien to secure the payment of the bonds is only on the income from the toll charged for the use of the bridge. There is no lien on the bridge itself.

"A municipality does not create an indebtedness by obtaining property to be paid wholly out of income of the property. Thus, bonds issued to pay for water works or light plant which provide that they shall be paid solely from income of such works or plant do not constitute an indebtedness." 6
McQuillin, p. 48, Section 2389."

A number of cases are then cited by the court in support of its ruling. After citing those cases, the court further said:

May 22, 1941.

"We have consistently ruled that bonds or other forms of obligation issued by cities, counties, political subdivisions, or public agencies by legislative sanction and authority, if such particular bonds or obligations are secured and payable only from the revenues to be realized from a particular utility or property, acquired with the proceeds of the bonds or obligations, do not constitute debts of the particular political subdivision or public agency issuing them within the definition of 'debt' as used in the constitutional provisions of this state."

CONCLUSION

Therefore, it is the opinion of this department that toll bridge revenue bonds, which may be issued by a county under the provisions of Section 8548, R. S. Mo. 1939, would not obligate the county to raise funds for retiring such bonds from taxation, and that such bonds would not be a lien on any other property of such county, than the bridge, the payment for which they were issued.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:LB

HIGHWAY PATROL: Highway patrolman is entitled to fee of \$1.00
CONSTABLES: upon service of a warrant which must be paid
FEES: into the state treasury. The same applies as
to commitments. Only one officer entitled to
fee.

July 23, 1941

7-30

Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of July 19, 1941, which reads as follows:

"We have several Justices of the Peace that have requested information with reference to collection of \$1.00 to be turned over to the State in cases where an arrest is made by a patrolman. Of course, the patrolman would not be entitled to a fee for making the arrest. The question is whether that should be collected and paid to the State. Then in addition, if the Constable accompanies the patrolman, would he be entitled to \$1.00?"

I am presuming in the above request where you mention "patrolman" you mean a member of the State Highway Patrol.

Section 8357, R. S. Missouri 1939, reads as follows:

"The necessary expenses of the members of the patrol in the performance of their duties shall be paid by the state when such members are away from their places of residence or from the district to which they are assigned, subject to the approval of the commission. All fees for the arrest and transportation of persons arrested and witnesses' fees for mem-

bers of the patrol shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the state treasury as provided by law."

Under the above section the fees for the arrest and transportation of persons by members of the patrol shall be the same as the sheriff, and it is mandatory that the fees be taxed and collected as costs and paid into the state treasury. The reason that the money should be paid into the state treasury is that the state pays the necessary expenses of the members of the State Highway Patrol. Since Section 8357, supra, sets out that the highway patrolman shall receive the same fees as for a sheriff, we are herein setting out that part of Section 13413, R. S. Missouri 1939, which applies to the fees collected by a sheriff in a criminal proceeding in reference to the arrest and commitment to jail. Section 13413, supra, partially reads as follows:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

"For serving and returning each
capias, for each defendant \$1.00
 * * * * *
 "For committing any person to jail \$1.00
 * * * * *

Under the above section no provision is made for the payment of a fee for an arrest, the only provisions being made are the serving of a capias and for committing any person to jail.

The section applicable to the payment of criminal costs or fees allowed a constable is Section 13399, R. S. Missouri 1939, which partially reads as follows:

"Constables shall be allowed fees for their services as follows:

"* * * * *

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"For serving warrant in any criminal
case, for each defendant \$1.00
* * * * *
"For taking a criminal to jail .. 1.00
* * * * *

It will be noticed that although the wording is different in the section applicable to sheriffs than as set out in the section applicable to constables, it has the same meaning. Taking a criminal to jail under the constable section is the same as committing to jail under the sheriff section.

In the case of Thomas v. County of St. Louis, 61 Mo. 547, 1. c. 548, the court, in defining the term "committing any person to jail," said:

"The words 'committing any person to jail,' relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions."

Under that holding "committing to jail" is not an arrest without a warrant and placing in jail but is the placing in jail of a defendant by the sheriff on his order or warrant of commitment issued by an officer exercising judicial functions. For that reason we hold that for a mere arrest without a warrant, *capias* or other order, neither a constable, sheriff or highway patrolman is entitled to a fee for such arrest. In order that they be eligible to receive a fee for committing to jail there must first be a warrant, *capias*, or order issued and then an arrest made and the person then placed in jail, either for want of recognizance on a continuance or for placing in jail after a conviction of imprisonment.

Section 3808, R. S. Missouri 1939, prescribes the procedure of the issuing of a complaint before a justice of the peace who then issues a warrant for the arrest of the defendant.

Section 3815, R. S. Missouri 1939, provides for a continuance of the cause when the defendant is brought before the justice of the peace and gives a good reason for his con-

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tinuance. Under this section he may give a bond for his later appearance.

Under Section 3816, R. S. Missouri 1939, if he should fail or refuse to give bond, the justice shall commit him to jail until the day fixed for trial.

Under the above three sections, if a State Highway Patrolman, a sheriff or a constable should make an arrest without a warrant, then the one making the arrest, to whom the commitment should be issued, would be entitled to One Dollar for committing to jail for want of bond on a continuance.

Section 3833, R. S. Missouri 1939, provides a form of warrant of commitment which is used for committing to jail for want of payment of fine or costs after conviction. In that case the highway patrolman, sheriff or constable would then be entitled to another dollar for committing the prisoner to jail. Under the sheriff section, in case of the issuance of a capias, which is the same as a warrant, the sheriff would be entitled to One Dollar for serving the capias and making the return. All of the fees allowed for the serving of warrants, capias or serving of commitments to jail are by order of a court or officer of judicial function and no fees are allowed for an arrest without a warrant.

In your request you state that the patrolman is not entitled to a fee for making arrests. We agree that the patrolman is not entitled to a fee for making arrests without a warrant or capias, but if he has a capias or warrant at the time of the arrest, that fee is entitled to be taxed as a fee due the patrolman but must be paid into the state treasury as set out in Section 8357, supra.

You also inquire if the constable accompanies the patrolman would he be entitled to One Dollar. Under our above holding, we stated that the mere arrest without a warrant or capias is not subject to allowance of a fee as set out, either in the constable section or sheriff section allowing fees for service of a capias or warrant. The capias or warrant is directed to the sheriff or constable and a return must be made by the officer serving the capias or warrant. Therefore, the only one entitled

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to the One Dollar fee for serving the warrant or capias is the one that makes the return on the warrant or capias. Only one person can make a return and the one making the return is the one that is entitled to the fee as set out in the cost section.

A State Highway Patrolman may make an arrest if the warrant is directed to him. The duties of a State Highway Patrolman are set out in the case of State v. McKeever, 101 S. W. (2d) 1. c. 31, where the court said:

"* * * Among the duties of the state highway patrol is the policing, etc., of the state highways. Laws 1931, p. 234, section 12 (Mo. St. Ann. 8203l, p. 6974). They are 'declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state,' and are vested with the powers conferred by law on peace officers ('sheriffs, police officers and other peace officers of this state,'--Laws 1931, p. 231, section 2 (Mo. St. Ann. section 8203b, p. 6970), except they may not serve or execute civil process, Laws 1931, p. 234, section 13 (Mo. St. Ann. section 8203m, p. 6975)), and are restricted in the right or power of search and seizure to the taking of deadly and dangerous weapons from persons under or about to be arrested (Id., p. 235, section 16 (Mo. St. Ann. section 8203p, p. 6976)). They have authority to arrest any person detected in the act of violating any law of the state (section 13, supra (Mo. St. Ann. section 8203m, p. 6975)) and their powers and duties are supplementary to, and not a limitation on, the powers and duties of sheriffs, police officers, or other peace officers of the state (Laws 1931, p. 231, section 1 (Mo. St. Ann.

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section 8203a, p. 6970)). * * * "

CONCLUSION

In view of the above authorities it is the opinion of this department that the fee for the arrest of a person under a warrant or capias served by a State Highway Patrolman must be taxed as costs and paid into the state treasury.

It is further the opinion of this department that if a constable accompanies a State Highway Patrolman in serving a warrant or capias, he is not entitled to One Dollar for the service of a capias or warrant, if the State Highway Patrolman makes the return on the capias, or warrant. The One Dollar for making the arrest should be taxed in favor of the State Highway Patrolman and paid into the state treasury.

It is further the opinion of this department that where an arrest is made without a warrant and the defendant is taken before a justice of the peace forthwith as provided by law and a continuance is granted and the defendant, not being able to furnish bond for appearance at the time set for trial and a commitment is issued committing him to jail, the officer serving the commitment is entitled to One Dollar as a fee. If the officer happens to be a State Highway Patrolman, it must be taxed as costs and paid into the state treasury. If the constable served the commitment, he is entitled to the One Dollar as allowed by statute for taking to jail.

After conviction and a judgment of imprisonment or imprisonment for nonpayment of the fine and costs where a commitment is issued committing the defendant to jail, the officer serving the commitment is entitled to another dollar as a fee, and the same rule applies to the State Highway Patrolman as to the payment of the fee into the state treasury.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

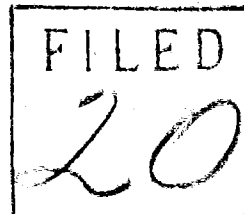
WJB:DA

AGRICULTURE * -
(Cattle Condemed)

Mode of certification by the State
Veterinarian for payment of cattle
condemned on account of reacting to
the agglutination blood test for
Bang's disease.

July 29, 1941 7/30

Mr. H. E. Curry
State Veterinarian
Department of Agriculture
Jefferson City, Missouri



Dear Sir:

This acknowledges receipt of yours of recent date
wherein you request an opinion upon the following state-
ment of facts:

"There is enclosed herewith a list of names
of citizens of Missouri who have had cattle
condemned on account of reacting to the
agglutination blood test for Bang's disease
under the provisions of Sections 14,208 to
14,213, inclusive, Article 11, Chapter 102,
Revised Statutes of Missouri, 1939.

"The Sixty-first General Assembly in House
Bill No. 582, Section 34, appropriated the
sum of Fifty Thousand Seven Hundred Ninety-
three Dollars and Six Cents (\$50,793.06)
to be used in the payment of indemnity,
in cooperation with the Federal govern-
ment, for cattle condemned as reacting
to the agglutination blood test for Bang's
disease, for the period June 15, 1939, to
December 31, 1940. No provisions are made
for the paying of indemnity to owners of
cattle condemned as reactors to the ag-
glutination blood test for Bang's disease
from January 1, 1939, as House Bill 667,

Mr. H. E. Curry

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passed by the Sixtieth General Assembly, (Laws of 1939) was not approved until June 15, 1939.

"Section 14,210, Revised Statutes of Missouri, 1939, provides for the appraisal of condemned cattle suffering with Bang's disease and sets forth the procedure to be followed in the certification of such claims for payment. Section 14,212 provides conditions under which indemnity shall be paid.

"The Bang's disease control and eradication program is a Federal project carried on by veterinary inspectors in the employ of the United States Bureau of Animal Industry, and the program has been under the direction of the Inspector in Charge of the United States Bureau of Animal Industry, Jefferson City, Missouri.

"Section 14,210 provides in part:

"The said State Veterinarian shall certify to the Governor the amount to be paid by the State, which amount shall not exceed one-third of the difference between the appraised value of such cattle and the salvage thereof and this shall constitute a legal claim against the State, and the Governor shall approve the same and endorse thereon his order to the State Auditor for the payment thereof, and thereupon the State Auditor shall issue his warrant on the State Treasurer thereof: PROVIDED, however, that in no

Mr. H. E. Curry

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case shall the State pay more than eight and 33/100 dollars (\$8.33) as indemnity on any one head of grade cattle nor more than sixteen and 66/100 dollars (\$16.66) as indemnity on any one head of registered purebred cattle upon which registration certificates are presented at time of appraisal: PROVIDED, that if and when the United States elects to pay in excess of one-third of the total indemnity on cattle condemned on account of Bang's disease, then the Commissioner of Agriculture and the State Veterinarian shall reduce accordingly the amount of indemnity to be paid by the State: PROVIDED, further, that the total amount of the United States indemnity and the State indemnity shall not exceed two-thirds of the difference between the appraised value and the salvage on any one head of grade or registered cattle.'

"In view of the fact that I, as State Veterinarian of Missouri, have not had an opportunity to determine whether provisions 1,2,3, 4,5 and 6 of Section 14,212 have been adhered to and faithfully carried out, I find myself confronted with the problem of certifying to claims in the amount of \$50,793.06 to the Governor and the State Auditor for payment.

"As State Veterinarian, I am anxious to do everything in my power to expedite the payment of the claims in question; therefore, I respectfully request a ruling from your office as to the proper procedure to be followed in bringing this matter to conclusion.

"First, would it be in keeping with the provisions of Sections 14,210 to 14, 212

Mr. H. E. Curry

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for the Inspector in Charge of the United States Bureau of Animal Industry to furnish this office with certification that all claims included in the list furnished to us by the Bureau office are eligible for payment and that he has certified to the Disbursing Officer of the United States Department of Agriculture at Washington, D. C. to that effect. Could I take such certification by the Inspector in Charge as a basis for my certification to the Governor and the State Auditor, as provided for in Section 14,210 that the claims are in order, and, therefore, subject to payment by the State?

"Second, will it, in your opinion, be necessary for me, as State Veterinarian, to receive an affidavit from each owner whose name appears on the list, stating that the provisions in Section 14,212 have been adhered to as to replacements of animals in the herd and that the cleaning and disinfection of premises have been carefully followed?

"Third, may I, as State Veterinarian, certify to the claims as they appear in the list which was furnished to the Chairman of the Appropriation Committee of the Senate and House and upon which they based their action in making the appropriation, or will it be necessary to prepare individual claims for each individual herd?"

Together with your request we find a letter from you to the Chairman of the Appropriations Committee, dated March 4, 1941. In this letter you state that since you

Mr. H. E. Curry

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July 29, 1941

had received an opinion from the Attorney General's Office, holding that the appropriation of 1939 to your Department for carrying out the provisions of the law pertaining to the condemnation of cattle for Bang's disease, was illegal, that the Department of Agriculture had never initiated any testing on behalf of the State of Missouri.

In your request you intimate that the Bang's Disease Control and Eradication Program is a Federal project and is carried on by the Inspectors in the employ of the United States Bureau of Animal Industry.

Section 14212 R. S. Missouri, 1939, which contains the conditions under which indemnity may be paid to owners of cattle slaughtered as reactors to the agglutination blood test for Bang's Disease, provides as follows:

"Indemnity for animals slaughtered as reactors to the agglutination blood test for Bang's disease shall be paid the owner only under the following conditions: That he sign an agreement with the commission of agriculture or the United States department of agriculture agreeing to permit the application to each animal of his herd of such number of separate tests as the commissioner of agriculture and state veterinarian shall determine to be necessary; that the said owner following each test hereunder will cause to be slaughtered, under State or Federal supervision within 15 days, all cattle in his herd six months of age or over, which, after each test, are designated by the state veterinarian or a representative of the United States department of agriculture, as reacting to the test. All such animals to be slaughtered hereunder, shall until re-

moved from owner's premises, be kept separate and apart from non-reactors; that the said owner will confine additions to his herd, as follows:

- "(1) To cattle from herds officially certified to be free from Bang's disease.
- "(2) To non-pregnant animals from other than Bang's free herds, which must pass the test and then be segregated for at least sixty days, at which time such animals must pass a second test before being added to the herd.
- "(3) To pregnant animals, which after passing the test, must be kept in isolation for at least 60 days after calving without being re-bred, at which time they must pass a second test before being added to the herd.
- "(4) That the said owner at his own expense, after each test and the removal of reactors, clean and disinfect his premises as required by the state veterinarian and with a disinfectant approved by the United States bureau of animal industry.
- "(5) That no abortion vaccine or preparation made from or through the agency of Brucella micro-organisms has been used in any of the cattle to be tested hereunder after they have passed the age of 8 months, and no such products have been used within 18 months in any of the cattle presented for test; that the owner has not acquired cattle for the purpose of entering into this agreement so as to

collect indemnity.

"(6) That there is no substantial evidence that the owner or his agent has in any way been responsible for any attempt unlawfully or improperly to obtain indemnity funds for condemned cattle: Provided, that no indemnity shall be paid by the State on the following: Animals belonging to Institutions maintained by State, county or Municipal governments or the government of the United States; unregistered bulls; purebred cattle one year old and over, unless registration certificates are presented at time of appraisal; animals affected with Bang's disease if such animals became diseased through any willful neglect or scheming on the part of the owner or proprietor; animals brought into this State from outside the state of Missouri unless such animals are accompanied by a health certificate approved by the livestock sanitary official of the state of origin or a health certificated issued by a veterinary inspector of the United States bureau of animal industry, showing that such animal or animals have passed a negative agglutination blood test within thirty days prior to importation into this state: Provided further, that such animal or animals shall have passed at least one official negative agglutination blood test for Bang's disease after being brought into this state, which test shall not have been made until said animal or animals shall have been within the state not less than ninety days."

Mr. H. E. Curry

(8)

July 29, 1941

It will be noted that under the provisions of this Section the owners of such cattle may enter into the agreement with the Commissioner of Agriculture of the state of Missouri, or the United States Department of Agriculture. In your case, as stated above, all of these agreements have been entered into with the United States Department of Agriculture.

Together with your request you included a list of condemnations of cattle which have been condemned under the provisions of the foregoing Sections. This list also shows the amounts due as indemnity to each claimant by the State and the Federal Department. The Sixty-first General Assembly by House Bill 582, and especially Section 34, thereof, appropriated the sum of \$50,793.06, for indemnity and relief to persons, firms and corporations, for their cattle condemned and slaughtered as reactors to the agglutination blood test for Bang's disease, in cooperation with the United States Bureau of Animal Industry for the period from June 15, 1939, to December 1, 1940. This Section referred to accounts on file in the office of the State Auditor.

It is our understanding from your correspondence, and oral conversation that the accounts referred to in the appropriation act are the same as those which you included with your request. It appears from the correspondence in files that the United States Department of Agriculture is carrying on the project for the Bang's disease control and eradication program and that its Inspectors have been carrying on this program in Missouri for the period for which this appropriation was made. We assume that the Inspectors in carrying on this program have complied with the provisions of Sections 14209, 14210, 14211, 14212, 14213 and 14214 R. S. Missouri, 1939, and that they have informed the owners of all condemned cattle of their rights. We also presume that the United States Department of Animal Industry has the records and information on whether the owners of such cattle, with whom they have made these agreements, have complied with the provisions of Section 14212, supra. Under Section 14210 it is the duty of the State Veterinarian to certify to the Governor the amount to be paid by the State. The State Veterinarian is not to make such certification until he has information or a proper certificate that the owner of the condemned cattle has complied with the provisions of Section 14212, supra.

Mr. H. E. Curry

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July 29, 1941

Since this program has been carried on by the United States Bureau of Animal Industry, (and we assume proper records have been kept thereof), then a certificate from the United States Bureau of Animal Industry, to the effect that the owners of the condemned cattle have complied with Section 14212, would authorize the State Veterinarian to certify to the Governor the amount to be paid by the State.

In your request you ask whether it would be necessary for you to require an affidavit from each owner whose name appears on the list. We think the statement from the United States Bureau of Animal Industry would be sufficient to authorize the Veterinarian to make the certificate without an affidavit from each owner.

CONCLUSION.

It is the opinion of this Department that you would be in keeping with the provisions of Sections 14210 to 14212 R. S. Missouri, 1939, to require the Inspector in charge of the United States Bureau of Animal Industry to furnish your office with a certification that all claims included in the list, upon which appropriation was made, are eligible for payment, and, that he has certified the same to the disbursing officer of the United States Department of Agriculture; or, you could take the certification by the Inspector in charge, as a basis for your certification to the Governor and State Auditor, that the claims are in order and subject to the payment by the State.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

(Acting) Attorney General

TWB:RW

TAX:
COLLECTOR'S COMMISSION:
DRAINAGE TAX:

Collector's commission for collecting
delinquent drainage taxes should be paid
out of drainage tax funds.

August 4, 1941

2182
Mr. Marshall Craig
Attorney at Law
Charleston, Missouri



Dear Mr. Craig:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the following statement of facts:

"We have several County Court Drainage Districts in this County. We recently filed suit for delinquent taxes and obtained judgments for such taxes in a County Court District. The land owner takes the position that the 2% commission due the Collector should be taken from the amount collected as taxes and interest and should not be added or collected from the land owner. It is our position that the 2% is additional penalty that the land owner must pay. We feel that this is in accordance with sections of law requiring the Collector to collect delinquent taxes and we feel that the same rule prevails with reference to County Court Drainage Districts with reference to State and County taxes."

Since the question here involves the imposition of additional tax or penalty on the tax payer, we think the rule which requires the taxing authority to point out the law under which he proposes to collect the tax, or impose the penalty, would be applicable here. In the case of Artophone Corporation vs. Coale, 133 S. W. (2nd) 343, 347, the rule is stated as follows:

" * * * * Generally it may be said that taxing statutes are to be strictly construed in favor of the taxpayer and the fact that a particular subject of taxation, claimed to be taxed, is within the purview

and intendment of the taxing statute must clearly appear from the statute so to be.
* * * * *"

Article 30, Chapter 79, R. S. Mo. 1939, pertains to county court drainage district. Section 12417 of this article provides in part as follows:

"All drainage taxes provided for in this article, including maintenance taxes, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee to be fixed by the court and taxed as costs in the action brought to enforce payment, shall from date of the levying of the same by the county court as provided herein, until paid, constitute a lien, to which only the lien of the state for state, county, school and road taxes shall be paramount, upon all of the lands assessed, and shall be collected, in the same manner as state, county and school taxes upon real estate are collected. The said tax shall become delinquent if not paid on or before the thirty-first day of December of the year for which said taxes were levied, and when so delinquent shall bear interest at the rate of one per cent per month until paid, each fractional month being counted as a full month. * * * * *"

This section authorizes penalties for default in the payment of drainage taxes to be charged against the land and provides that such charge be a lien against the lands taxed.

Section 12470 provides for a commission to the collector for collecting drainage taxes, both current and delinquent. This section reads as follows:

"The county and township collectors for collecting current taxes for drainage and levee districts shall receive one per cent of all such taxes collected, and for the collection of delinquent taxes for such they shall receive two per cent of all sums collected."

If the tax payer could be charged with the collector's commission for collecting delinquent drainage taxes, under this section, he would also be chargeable with the collector's commission for collecting current taxes.

In your letter it appears that you are under the impression that the same rule as to commissions for delinquent taxes applies to the drainage tax laws as does the general tax law. Section 11182 provides for a commission to the collector for collecting delinquent real and personal taxes. This section reads as follows:

"Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in *such cities, two per cent on all sums collected; in such cities, two per cent on all sums collected -- such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

*"such cities" refers to cities described in Sec. 11202.

It will be noted that the section particularly authorizes the collector's commission for collecting the delinquent tax to be charged as costs. The drainage tax act does not so provide.

Section 12470, supra, has not been before the court for a construction on your question, however, we find that Section 12513 in the article pertaining to levee districts was considered by the Supreme Court in St. Francois Levee District vs. Dorroh, 289 S. W. 925, 933, wherein the Court said:

"The judgment taxes against defendant, as costs in the case, a commission for the county collector of 4 per cent on the aggregate amount of the judgment. Appellant insists that there is no authority in law therefor. In ruling this contention we must advert to the statute applicable to levee districts organized by circuit courts, under which plaintiff

brings this action. Section 4619, R. S. 1919, provides:

"The said collector shall retain for his services one per centum of the amount he collects on current taxes and two per centum of the amount he collects on delinquent taxes."

Section 4620 provides:

"All levee taxes provided for in this article, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee, to be fixed by the court and taxed as costs in the action brought to enforce payment, shall, from date of filing the certificate hereinafter described in the office of the recorder of deeds for the county wherein the lands and properties are situate, until paid, constitute a lien, to which only the lien of the state for general state, county, school and road taxes shall be paramount, upon all the lands and other property against which such taxes shall be levied as is provided in this article."

Section 4621 provides:

"In all suits for the collection of delinquent taxes, the judgment for said delinquent taxes and penalty shall also include all costs of suit and a reasonable attorney's fee to be fixed by the court, recoverable the same as the delinquent tax and in the same suit."

"As we read the statute, there is no authority given therein for the taxing of the collector's commission as costs in the case. Section 4619 allows the collector to retain for his services 'two per centum of the amount he collects on delinquent taxes.' Section 4617 of the statute makes it the duty of the collector of revenue of each county

in which lands of any levee district organized under the statute are situate to receive the levee tax book each year and to collect the tax therein set out, and said collector is required to --

"**make due return of all 'levee tax books' each year to the secretary of the board of supervisors of the aforesaid levee district, and shall pay over and account for all moneys collected thereon each year to the treasurer of said district at the same time when he pays over state and county taxes."

It is further provided that:

"Said collector shall proceed to collect such delinquent levee taxes and demand payment therefore in the same manner as herein provided for the collection of current levee taxes."

"Section 4619 provides for a penalty of 10 per cent. on the amount of his delinquency for failure of the collector to pay over to the treasurer of the levee district the tax, or any part thereof, collected by him, for which the collector's bondsmen shall be liable upon his official bond. Obviously, in view of the language of Section 4619 that the collector shall retain for his services 'two per centum of the amount he collects on delinquent taxes,' taken in connection with the language of the other sections of the statute above quoted, it is the intention and purpose of the Legislature that the levee district, rather than the landowner and taxpayer, shall compensate the collector for his services in collecting the tax and penalties thereon. The judgment is therefore erroneous in taxing the defendant with the collectors commission."

The sections quoted, supra, in the St. Francois Levee District case contain language very similar to the tax collection commission sections in Article 3 of Chapter 79, R. S. 1939, relating to drainage districts formed by the county courts.

Comparing Section 12417 R. S. Mo. 1939, with Section 12516, R. S. Mo. 1939, which is the same as Section 4620 R. S. St. Francois Levee District case, supra, it would be seen that these sections contain quite similar language.

Section 12470, supra, contains the same language as did Section 4575, R. S. 1919, after it was amended. Before this section was amended, it read as follows:

"The county and township collectors for collecting current taxes for drainage and levee districts shall receive one per cent. of all such taxes collected, and for the collection of delinquent taxes for such districts they shall receive two per cent. of all sums collected: Provided, that when it shall appear to the county court that, because of excessive additional expense incurred in collecting drainage or levee taxes, the collector should receive more than one per cent. of current taxes collected, the county court shall allow such increase as to the court shall seem just, not to exceed an additional one per cent. of the amount collected."

The proviso clause was taken off this section by the amendment. In considering this section, the court in the said Little River Drainage District, l. c. 718, said:

"It is our conclusion that sections 4398, 4426, and 4575 can be read together and completely harmonized, and that the proper construction of the three sections, when so read together, is that township collectors are entitled to the same compensation for collecting drainage district taxes as county collectors, and that county collectors ordinarily are entitled to retain only one per cent. for collecting current drainage

August 4, 1941

district taxes, but that county courts may increase such compensation to an amount not exceeding an additional 1 per cent. of the taxes collected, where such collectors incur excessive additional expenses in collecting such taxes."

Before this section was amended, it could not be successfully maintained that the collector's commission was to be charged against the land owner, because if it had been, there would have been no need for the county court to allow, or disallow, the charge as provided in the proviso clause. By the amendment the discretion of the county court in making the allowance was taken away and the first part of the statute remained as it is now, with no provision to collect the collector's commission as cost.

CONCLUSION

From the foregoing, it is the opinion of this department that the additional penalty chargeable as a commission by the collector for collecting delinquent drainage taxes in districts formed on the order of the county court should not be charged against the land owner, but should be charged against the funds collected and claimed by the collector in his settlement with the county court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROBERT L. HYDER
(Acting) Attorney General

TWB:NS

PROSECUTING ATTORNEY: Not entitled to fee from person receiving
SCHOOLS: school fund loan for examination of abstract.

September 2, 1941

9-3

Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri



Dear Sir:

This will acknowledge receipt of your letter of August 20, requesting an official opinion, and which reads as follows:

"I would like to have your opinion concerning the making of a charge for the examination of an abstract where a school fund loan is made. I feel sure that you have heretofore rendered an opinion on this subject and can send me a copy of same.

"It has been the practice for the Prosecuting Attorney to charge the land owner a fee for examining the abstract where the County makes a loan. The fee in no wise is charged against the County.

"I would like to know whether or not this practice should be continued and whether as a matter of policy, it is common practice for Prosecuting Attorneys to do so."

We are enclosing a copy of an opinion rendered by this Department under date of February 19, 1935 to the Honorable W. D. Griffin, Barton County, Missouri,

September 2, 1941

wherein we held that the Prosecuting Attorney was entitled to no fee from the county for examining abstracts for school fund loans.

The law providing for the county court to make loans from school funds is set out in the enclosed opinion. It requires the county court to secure the loan by a mortgage on real estate, clear of all liens and encumbrances, and the abstract of title to such real estate shall be filed with the county court.

It is the duty of the county Prosecuting Attorney to represent the county court relative to all legal matters, give his opinion, without fee, regarding the law in all matters in which the county is interested. Certainly, the county court should require the county Prosecuting Attorney to examine such abstracts of title for any defects therein. Such loans from school funds should never be made until a thorough examination of the abstract has been made by the Prosecuting Attorney and he has certified said abstract conveys good title to said real estate and same is clear of all liens and encumbrances.

Rule 35, subdivision 6 of the Supreme Court Rules prohibits any lawyer from representing conflicting interests and forbids the accepting of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client,

it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed."

To represent a person requesting a loan would be in effect acting in a dual capacity. The time may come when it will be necessary that certain litigation regarding this abstract of title may be instituted wherein the county may be an interested party. In such case the county Prosecuting Attorney could not represent both parties.

The charging of a fee by the Prosecuting Attorney for the examination of an abstract of title to real estate to secure a loan from school funds is almost analogous to an officer holding two offices which are incompatible, and which is prohibited under the law. In State ex rel. McAllister v. Dunn, 277 Mo., 38, l.c. 44, the court said:

"It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing. It is elementary law that one may not hold two offices the duties of which are incompatible. What greater incompatibility could be conceived than the duty of paying and the duty of receiving and granting acquittance for public money? If one person could be both collector and treasurer, he would pay over the money as collector and receive it as treasurer, and, as treasurer, issue a receipt to himself, as collector. Under the general law it is settled no man could have held these two positions. * * * * *

Hon. Marshall Craig

-4-

September 2, 1941

There is definitely no statutory provision prescribing a fee for such services. Therefore, it is the opinion of this Department that a Prosecuting Attorney cannot charge a person receiving a school fund loan a fee for the examination of an abstract of title, neither should he examine said abstract for said person since such service would be incompatible with his official duties.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARH: EAW

TAXATION: PAYMENT OF TAXES WITH PROTESTED WARRANTS: Only the owner of a protested warrant may use same for the payment of taxes.

November 10, 1941

✓ 11-13
Mr. Lieu. Cunningham, Jr.
Attorney at Law
Camdenton, Missouri



Dear Mr. Cunningham:

This is in reply to your letter of recent date in which you request an opinion on the following statement of facts:

"The County Collector of this County has requested I obtain an opinion from you concerning the following matter:

"In the past, certain banking corporations of this County have assigned their protested warrants to certain large tax payers of the County, to be applied upon their current county taxes, which of course, is permissible.

"However, it is the understanding of the Collector this year, that the banking corporations intend to obtain powers of attorney, or appointments of agents, for their banking corporations, from several of the larger tax paying corporations in the County, and then let the bank use their 'the Bank's' protested warrants for the payment of the tax paying corporations' current county taxes.

"I informed the Collector that it was my opinion that an agent could not use the agent's protested warrant for the payment of his principal's taxes, as only the legal holder of a protested County Warrant could apply their 'the Holder's' taxes. However, I would appreciate your opinion concerning this matter."

The section of the statutes which authorizes payment of taxes with protested warrants is 11082, R. S. Mo. 1939. This section reads as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district, and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

From a statement of facts which you have submitted it appears that the banking corporations would be attempting to do indirectly that which they could not do directly. In other words, the banking corporations which are the legal holders of protested warrants contemplate obtaining powers of attorney from land owners and then using the protested warrants belonging to the banks for the purpose of paying county taxes.

We do not find any questions of this nature in cases reported, but we think that the law clearly indicates that it was the intention of the lawmakers to only permit the legal holder of the protested warrant to pay the taxes on his property with that warrant. On the question of which warrants may be used, I find that this department on February 13, 1935, by an opinion to the prosecuting

Hon. Lieu. Cunningham, Jr. -3-

November 10, 1941

of Miller County, discussed this point. I am enclosing a copy of this opinion for your information.

CONCLUSION

From the foregoing, it is the opinion of this department that banking corporations may not use protested warrants belonging to such a bank for the purpose of paying current county taxes of tax payers who are not the legal holders of such warrants.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
-(Acting) Attorney General

TWB:NS
Enc.

ATTORNEY and CLIENT: - A corporation or association can only transact its legal affairs through a duly licensed and practicing attorney and not by a laymen.

November 25, 1941

11-28

Hon. Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri



Dear Sir:

We are in receipt of your request for an opinion, as of November 13, 1941, which request reads as follows:

"We have had some difficulty in this County with illegal practice by laymen. This is particularly true of Corporations, such as the Bank and Ginners. The principal violations are with writing deeds and deeds of trust. Notary Publics and Justices of the Peace are also writing deeds of trust.

"I would like to have the advise of your department and your opinion and instructions with reference to such violations."

From reading the above request we see that you are asking two specific questions: First, can a corporation or association have its legal matters transacted by a layman - second, when is a layman practicing law.

We call attention to the case of Clark v. Austin, 101 S. W. (2d) 977, 1. c. 982, wherein the Court had this to say:

"It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. * * * The

law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed for others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys. * * * * *

"Since a corporation cannot practice law, and can only act through the agency of natural persons, it follows that it can appear in court on its own behalf only through a licensed attorney. It cannot appear by an officer of the corporation who is not an attorney, and may not even file a complaint except by an attorney, whose authority to appear is presumed; in other words, a corporation cannot appear in propria persona. A judgment rendered in such a proceeding is void." California Jurisprudence, 1932 Supplement, "Practice of Law," p. 34, citing *Bennie v. Triangle Ranch Co.*, 73 Colo. 586, 216 P. 718. * * * * * Whether or not one is engaged in the practice of law depends upon the character of acts he performs and not the place where he performs them. * * *

"The practice of law is not confined to appearance in court in a representative capacity as an advocate. A person may never appear in court and yet be engaged in the practice of law. One engaged in the practice of law in this state without a license authorizing him so to do is in contempt of this court regardless of whether he appears as an attorney in this court or in any other court of record. (citing cases) * * * * * The theory of above

holding is that the practice of law outside of court proceedings is a contempt of this court and punishable as such 'because the wrong doer has affronted this court by usurping a privilege solely within the power of this court to grant.'

* * * * *

Next we copy excerpts from the case of Liberty Mut. Ins. Co. v. Jones, 130 S. W. (2d) 945, 1. c. 951, 954, where the Court said:

"Appellants' petition filed pursuant to the above leave sets out at great length their method of doing business under said code adopted in May, 1937, denies that their lay employees are practicing law or doing law business, and assails Secs. 11692 (now Sec. 13313 R. S. Mo., 1939) and 11693, (now Sec. 13314 R. S. Mo. 1939) R. S. Mo. 1929, Mo. St. Ann. Secs. 11692, 11693, pp. 621, 622, as violating Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, U. S. C. A., and Secs. 4 and 30 of Article II and Sec. 1 of Article VI of the Constitution of Missouri, Mo. St. Ann. The former statute defines 'practice of the law' and 'law business'; and the latter prohibits any association, corporation, or person other than a licensed lawyer, from practicing law or engaging in the law business, and makes a violation of the statutes a misdemeanor. * * * "

From a reading of the two above cases, it will be noted that the Court has directly held that a corporation or association cannot transact its legal matters through layman but must proceed in such matters through duly licensed practicing attorneys

Hon. Marshall Craig

(4)

November 25, 1941

We are enclosing herein a copy of an opinion rendered by this Department on April 19, 1935, to Mr. Ralph Varble, which we believe answers your second question.

CONCLUSION

In conclusion, we are of the opinion that a corporation or association must in every instance transact its legal matters through duly licensed and practicing attorneys.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

OFFICERS: County can recover on county treasurer's bond after settlement where a fraudulent settlement was made.

December 16, 1941

Honorable W. W. Crockett
Prosecuting Attorney
Ralls County
New London, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this office under date of December 12, 1941, which is as follows:

"Our County Treasurer has embezzled about \$13000.00 according to his own admissions and I have him under bond. His misdeeds cover the period from July 1st, 1939 to the present time.

"I would like an opinion from your office as to the effect of the semi-annual settlements as to the recovery from the Surety Company. Can we recover for the full amount of his shortage or only the shortage since the July 1st, 1941 settlement? There is no way to tell how frequently and the amounts held out by him when he made deposits in the County Depository. The discrepancy is only apparent at settlement time.

"He altered the balance shown in his pass book, each time, to correspond with the amount the County Clerk's and the Treasurer's books show he had in the depository."

Section 13795, R. S. Missouri 1939, provides as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, with-

in ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Section 13798, R. S. Missouri 1939, provides as follows:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court shall provide said county treasurer with suitable rooms, and a secure vault in the court house or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Under the two above sections the county treasurer must give a bond in an amount not less than Twenty Thousand Dollars as approved by the county court conditioned on his faithful performance of the duties of his office. It is also his duty to receive all moneys payable into the county treasury and disburse the same on warrants drawn by order of the county court.

Section 13814, R. S. Missouri 1939, provides as follows:

"He shall settle his accounts with the court semiannually, at its first and third regular terms in each year; and at the end of his term, or if he resign or be removed from office, he, or if he die, his executor or administrator, shall immediately make such settlement,

and deliver to his successor in office all things pertaining thereto, together with all money belonging to the county; and at each settlement the court shall immediately proceed to ascertain, by actual examination and count, the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it appertains, and cause to be spread on its records, in connection with the entry of such settlement, the result of such examination and count."

Under the above section the county treasurer shall make a semiannual settlement with the county court, or if he resigns or is removed from office he shall make such a settlement. It is the duty of the county court in the settlement to ascertain, by actual examination, the amount of balances and funds in the hands of the treasurer to be accounted for, and make a entry in the court records of this examination and count.

Under Section 13816, R. S. Missouri 1939, if any county officer refuses to make a settlement, the county court can estimate the balance due the county. Under the facts in your request the county treasurer made a settlement semiannually but fraudulently used as evidence a false balance used in his bank pass book so that it corresponded with the amount of the county clerk's and treasurer's books.

The main question in your request is whether or not the county can only recover the shortage since the last settlement in which the shortage was probably discovered, or whether the suit on the bond can be had for the full amount of the shortage. In asking this question I am assuming that you are confusing the settlement of the county treasurer with that of a settlement of other county officers, such as clerks of circuit courts and clerks of county courts. The procedure of other officers other than that of county treasurers differs in many respects in reference to the filing of a suit upon the officer's bond but in all instances of suits on county officers' bonds where the officer has not followed the statutes in reference to his settlement and covers up violations of law by fraudulent settlements it is not necessary for the county court to make a demand for the shortage

and the county is not limited to filing a suit upon the bond to the amount discovered in the single settlement in which the fraud is discovered. In the case of State ex rel. Christian County v. Gideon, 158 Mo. 327, 1. c. 337, the court, in holding that a recovery could be had on a bond upon a fraudulent settlement without following the mode of procedure as set out where a lawful settlement was made, said:

"While the statute prescribes the mode of procedure for the recovery of the balance ascertained to be due upon the quarterly settlements of the clerk, and in such an action, it was held in State ex rel. v. Dent, 121 Mo. 162, that an order, requiring him to pay over the excess to which he was not entitled, and in case of his failure to do so, an order requiring suit to be brought on his bond, were conditions precedent, without which such action could not be maintained. It did not undertake to prescribe the mode of procedure for the recovery of damages for a breach of duty by the clerk in failing to make true and proper returns as required by the statute. The breaches assigned in the petition in this case are not for failure to pay over the excess found to be due on the settlements with the clerk, but for his failure to make true returns by which such excess could have been properly ascertained. To such a case the orders required by this statute are obviously not applicable, and their existence or averment is not essential to plaintiff's cause of action, as has been expressly ruled by this court. * * * * *

The law is fully set out in the case of State v. Hunt, 152 S. W. (2d) 77, 1. c. 81, where the court said:

"In State ex rel. Callaway County v.

Henderson the petition alleged that the county clerk had made false quarterly returns, omitting therefrom the fees sued for and concealing the fact that he had collected them. There was no averment in the petition that the county court had complied with the statutory requirement that it ascertain the amount of excess, etc., and make an order directing the clerk to pay it into the county treasury. The court distinguished the Dent case on that point, as was done in *State ex rel. Jackson County v. Chick*, supra, and held that as to the fees received by the clerk and not reported it could not be said they were acted upon by the county court and that: 'The partial returns made by the clerk and approved by the court, do not stand in the way of an action at law for money had and received to the use of the county; for they only cover a certain class of fees, and were so understood by both the clerk and the court.' (142 Mo. 598, 44 S. W. 739.) In that case, however, the petition alleged that the county court had made an order directing suit to be brought for the excess fees. The petition was held to state a cause of action.

"In *Callaway County v. Henderson*, supra, the Dent case is not referred to but the petition alleged that the clerk had made a 'pretended return' purporting to show the total amount of fees received by him but that said return was false in that it omitted fees (those sued for) which he had collected.

"*State ex rel. Christian County v. Gideon et al.*, 158 Mo. 327, 59 S. W. 99, was a suit against the circuit clerk and ex officio recorder and his bondsmen to recover fees alleged to have

been collected in excess of the sums he was entitled to retain. The suit was brought after the expiration of Gideon's term of office. The petition alleged that Gideon had failed to keep correct accounts of fees received and that, while he had made returns to the county court purporting to show all fees received such returns were false, omitting many fees (set out) which he had collected and had not reported; that the county court, in ignorance of the falsity and omissions of the quarterly returns, had approved them, but upon discovery of the facts had made an order directing Gideon to pay into the county treasury the excess ascertained by the court to be due and when he failed to do so within fifteen days ordered suit brought on his bond. The trial court sustained a demurrer to the petition. This court reversed that action, holding the petition sufficient and again distinguishing (but not disapproving or criticizing) the Dent case, saying, 158 Mo. loc. cit. 337, 59 S. W. loc. cit. 101: 'While the statute prescribes the mode of procedure for the recovery of the balance ascertained to be due upon the quarterly settlements of the clerk, and in such an action, it was held, in State (ex rel. Hickory County) v. Dent, 121 Mo. 162, 25 S. W. 924, that an order requiring him to pay over the excess to which he was not entitled, and, in case of his failure to do so, an order requiring suit to be brought on his bond, were conditions precedent, without which such action could not be maintained, it did not undertake to prescribe the mode of procedure for the recovery of damages for a breach of duty by the clerk in failing to make true and proper returns as required by the statute. The breaches assigned in the petition in this case are not for failure to pay over the excess

found to be due on the settlements with the clerk, but for his failure to make true returns by which such excess could have been properly ascertained. To such a case the orders required by this statute are obviously not applicable, and their existence or averment is not essential to plaintiff's cause of action, as has been expressly ruled by this court.' Citing State ex rel. Jackson County v. Chick, State ex rel. Callaway County v. Henderson and Callaway County v. Henderson, supra."

It was also held in the case of State v. Maryland Casualty Co., 66 S. W. (2d) 537, par. 3, that where the county treasurer did not follow the statutes in reference to making this settlement the county court, the bonding company or the sureties were still liable for the full amount of the shortage on its bond. The court in that case, paragraph 3, said:

"In this connection defendant contends that the quarterly statements of the Matkins, as treasurer, submitted to the county court furnished no ground for liability on the bond for the reason Matkins, as ex officio collector, did not comply with sections 9927 and 9932, R. S. 1929 (Mo. St. Ann. sections 9927, 9932, pp. 7972, 7974).

"It is provided in section 9927 that collectors and ex officio collectors shall, on or before the fifth day of each month, file a statement with the county clerk showing the amount of taxes and licenses collected by him during the preceding month, and that they shall, on or before the fifteenth day of the month, pay said amount, less commissions, into the state and county treasuries.

"And it is provided in section 9932 that upon payment by the collector to the treasurer of the amount found due

on said monthly settlements with the county court, the treasurer shall give the collector duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant the collector a full quietus.

"Defendant Matkins did not comply with these sections. However, as stated, he made quarterly statements and settlements with the county court as treasurer. We do not think that Matkins should be permitted to profit by his failure to perform his duty as an official. Indeed, we have so ruled. In State ex rel. Dunklin County v. Blakemore, supra, we held that a treasurer under township organization and the surety on his bond are estopped to set up the failure of the treasurer to perform his duty as a defense to an action on the bond given to secure the faithful performance of the official duties of the treasurer."

Also, in connection with a suit on the bond of a county treasurer in the case of State v. Blakemore, 205 S. W. 626, 1. c. 628, the court, in holding that the action of the county treasurer in not following the statute did not become a defense that could be set up by the surety, said:

"* * * The bringing of the action for the whole deficiency on the bond involved would have bound the county, as an application of payment, in any other proceeding. Haynes v. Waite, 14 Cal. 446, and cases cited. It was substantial evidence of the county's intent to make the application to the funds mentioned in the instruction. Starrett v. Barber, 20 Me. loc. cit. 461. There is no question of 'shifting responsibilities' by the application made. The bond was executed in contemplation of every applicable principle of law, the law of the application of payments as well as any other.

"The court instructed, in substance, that if Blakemore failed to pay over a balance he owed, and if it was found he mingled the several funds so they lost their identity and it became impossible to tell which fund, if any, was short, 'then defendants are estopped to deny that such shortage belonged to the funds covered by the bond sued on,' etc."

The fact that the county court, previous to July 1, 1941, made a settlement with the county treasurer through fraud on the part of the county treasurer and did not discover the shortage, does not affect a suit upon his bond for the full amount for the reason that the county court is not bound by the fraudulent actions of the county treasurer nor is his fraudulent actions a defense that can be set up by the bonding company on a suit on the bond.

It was so held in the case of United States Fidelity & Guaranty Co. v. Huckstep, 72 S. W. (2d) 838, 1. c. 841, where the court said:

"* * In other words, the approval of the county court is final only as to the fees actually reported to the clerk, and upon which it must necessarily have acted. State ex rel. v. Henderson, 142 Mo. 598, 44 S. W. 737; State ex rel. v. Chick, 146 Mo. 645, 48 S. W. 829; State ex rel. v. Gideon, 158 Mo. 327, 59 S. W. 99; Callaway County v. Henderson, 139 Mo. 510, 41 S. W. 241.

"The trouble with all of defendants' argument regarding the applicability of the above statutes is that the suit is not bottomed upon breaches of the bond occurring by reason of noncompliance with such statutes. There is no issue here of Huckstep's having failed to pay into the county treasury the excess in his hands over and above what he was allowed to retain for himself and for his clerk

December 16, 1941

hire. Rather his bond was breached (taking the petition at its face value), in that he collected from the state and withheld from the county certain sums in excess of the statutory fees due him for making the tax books for certain years. Moreover his indebtedness was not discovered in connection with his quarterly returns to the county court, but upon an examination of his books by the state auditor, whose audit was not made until after Huckstep's death."

The above case applied to the clerk of the county court, but the same law would apply to a county treasurer.

CONCLUSION

In view of the above authorities it is the opinion of this department that Ralls County can recover for the full amount of the shortage of the county treasurer as set out in your above statement of facts and is not limited to the single item of shortage discovered by reason of the county treasurer's settlement on July 1, 1941.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

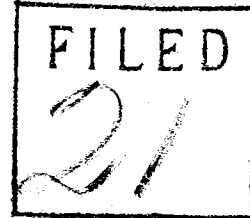
WJB:DA

TAXATION: Tax liens on property acquired by county at school fund foreclosure are extinguished.

May 2, 1941

5.7

Mr. George O. Dalton
Collector
Marion County
Hannibal, Missouri



Dear Sir:

This will acknowledge receipt of your letter of March 8, 1941, which is as follows:

"The Marion County Court of this county has foreclosed on the school mortgages which they held, and there are several years of delinquent taxes due on these properties."

"Will you please advise if the county is liable for these delinquent taxes up to the date of conveyance to the county, or do they have authority by court order to declare these taxes void?"

Under Sections 10385 and 10387, R. S. Missouri, 1939, county courts are authorized to foreclose school fund mortgages. Section 10389, R. S. Missouri, 1939, authorizes the county court "on behalf of the county," by agent, to bid on the property offered at such foreclosure sales. If the bid of the county court's agent be the highest, this same statute then provides that the county court may:

"* * * take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school

Mr. George O. Dalton

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funds, the property it may acquire
at such sale. * * * * "

Under this latter statute it is to be seen that the title to property bid in by the agent of the county court is taken either in the name of the county, to the use of a particular township, or in the name of the county alone, depending upon the source of the funds that were invested in the property foreclosed and bid in by the court's agent.

Section 6 of Article 10 of the Missouri Constitution provides in part:

"The property, real and personal, of the state, counties and other municipal corporations * * * * shall be exempt from taxation."

The Legislature has reiterated this constitutional provision in Section 10937, R. S. Missouri, 1939, wherein it is provided:

"The following subjects are exempt from taxation: * * * * fourth, lands and other property belonging to any city, county or other municipal corporation in this state, * * * * *"

It makes no practical difference here whether the funds involved in the foreclosure are those of the township school fund or the general school fund. In either event, the title is in the county and under Section 10937, supra, said property is exempt from taxation.

The question you present is one upon which there exists no express constitutional provision, but it has been before the courts of the land many times.

In *City of Harlan v. Blair*, 64 S. W. (2d) 434, (Ky) the point involved was whether a city was liable for taxes accruing prior to the time the property was acquired by the city. This opinion reviews the authorities at length holding the lien to be merged in the non-taxable ownership and therefore non-existent. The court said, l. c. 435:

"We have been unable to find any case wherein this question has been decided by this court. In volume 26, R.C.L. 400, sec. 358, it is in part stated: 'It sometimes happens * * * that land in the hands of private persons and subject to taxation when it is assessed is before the tax is paid acquired by a corporation the property of which is exempt from taxation, and the question then arises whether the lien can be enforced and the land sold for nonpayment of the tax. When the corporation which acquired the property is a religious, charitable, or educational institution, the exemption of the property of which depends upon the express provisions of statute, the exemption does not go to the extent of exonerating the property of the corporation from existing tax liens. In the case of state or a municipal corporation, the exemption of which is based upon the futility of collecting a tax from a body corporate which would levy another tax to pay it, land acquired by such a body corporate cannot be sold for nonpayment of taxes assessed prior to such acquisition.'

"Also in 61 C. J. 418, Sec. 450, it is stated: 'On the other hand, taxes levied on private property and are not paid are not a charge on the property subsequent to its acquisition by the state or city, the public property exemption operating to exempt property acquired by the state from any further liability for taxes assessed prior to the acquisition, although there are decisions to the contrary.'

"And in support of the text cites in footnotes 48 and 49 thereunder the cases of *State v. Minidoka County*, 50 Idaho, 419, 298 P. 366; *State v. Locke*, 29 N. M. 148, 219 P. 790, 30 A.L.R. 407; *City of Wichita v. Anderson*, 119 Kan. 241, 237 P. 1024; *Gasaway v. City*

of Seattle, 52 Wash. 444, 100 P. 991, 21 L.R.A. (N.S.) 68.

"In 2 A.L.R. 1535, the learned annotator in note annotation to the case of Triange Land Co. v. City of Detroit, 204 Mich. 442, 170 N.W. 549, 2 A. L.R. 1526, discusses this question of tax sale of land acquired by a municipal corporation after levy and before sale, and cites as 'a well-considered case on this point.' Gachet v. New Orleans, 52 La. Ann. 813, 27 So. 348, and comments thereon as follows:

"In this case the city acquired property and took the same, subject to the state taxes for a designated year. These taxes had been assessed, but were not due and exigible at the time title was acquired by the city, nor did such taxes become delinquent until after this time. In holding that the subsequent sale of the property for these taxes, and the acquirement of the title by a third person, did not affect the title of the city, the court said: "The moment public ownership of the lot attached, the moment it passed from the hands of * * * to the city, developing liability to taxation was arrested, and in point of fact and law the state taxes for 1885 on the lot, under the assessment made in the name of the * * * vendor, never reached the point of maturity. * * * It follows that the tax collector was without authority to proceed as he did in the attempt to enforce payment of taxes claimed to be due the state for 1885, and that his action in the premises was void. * * * 'The tax law of a state' says Desty, in his work on Taxation, vol 1, p. 48, 'applies to persons only, and not at all to political bodies like municipal corporations, which exercise in different degrees the sovereignty of the state.' Hence it is that, when property upon which state taxes are assessed is acquired by a political subdivision of the state, * * * which property is acquired for purposes of public utility coming within the scope of the powers so delegated, and is immediately dedicated or applied to such purposes of public utility, the taxes so assessed in favor of the state upon the same cease

to be exigible. It pertains to the public policy of the state not to exact taxation on property so held and used. Within the scope of the powers delegated to it the city stands for the state, and property acquired by the city in the due execution of its mandate from the state stands in consimili casu with property owned by the state itself, and taxes assessed in favor of the state upon such property must be held abated. * * * *."

"This distinction is also clearly made in *Foster v. Duluth* (1913) 120 Minn. 484, 48 L. R. A. (N.S.) 707, 140 N. W. 129, in holding that property of the city could not be sold for taxes which were a lien upon the land at the time the city acquired it. The court said: "After its purchase by the city in July, 1905, the property was devoted to public uses, and became public property. It was not thereafter subject to taxation. * * * * It is technically inaccurate to say that it was exempt from taxation, for the term 'exemption' rather presupposes a liability removed by some constitutional or statutory provision. The property is 'exempt,' not because of any such provision declaring it exempt, but because of its character as public property devoted to a public use. The property of the state and of its political subdivisions, arms, or agencies, such as cities within its borders, when used exclusively for public purposes, is not subject to taxation, in the absence of constitutional or statutory provisions making public property subject to the tax laws of the state. This is the undisputed rule; but it is no better established than is the proposition that proceedings for the assessment of taxes against public property, or for their collection by judgment and sale, are absolutely void. * * * * A reason for the rule is that a sale of the property to enforce collection of taxes assessed against it would destroy its character as public property, to the public injury."

"To the same effect is *State v. Snohomish County*, 71 Wash. 320, 128 P. 667, and *Smith v. Santa Monica*,

162 Cal. 221, 121 P. 920, 921. In the last-named case the court said: 'The state does not tax the property of a municipality for state and county purposes, because this would be a taxation of its own property. For the same reason, when the property has come into the ownership of a municipal corporation, it will not attempt to enforce the tax by the sale of the property.' See, also, *Laurel v. Weems*, 100 Miss. 335, 56 So. 451, Ann. Cas. 1914A 159; *Independent School Dist. v. Hewitt*, 105 Iowa, 663, 75 N. W. 497.

"The doctrine of exemption from tax is thus in *Foster v. Duluth*, 120 Minn. 484, 140 N. W. 129, 131, 48 L.R.A. (N.S.) 707, stated: 'We think * * * * that it must be held that all proceedings taken after the property became public property were void, notwithstanding that the taxes for the current year may have been a lien on the property before its transfer. It by no means follows * * * * that because there was a valid lien, the proceedings to enforce that lien were valid. Nor is it important here what becomes of the lien. * * * * All that is necessary to decide * * * * is that all proceedings to assess the land for taxes, taken after it became public property, and all proceedings in attempting to enforce and collect the tax, were void.'

"Numerous other cases holding to like effect may be found in 2 A.L.R. 1538. Also see *State v. Locke*, 29 N. M. 148, 219 P. 790, 30 A.L.R. 407, cited supra, wherein many cases are quoted and considered, and in which it is held that property acquired by the state or one of its municipal subdivisions, in its public capacity, is thereby absolved from further liability for taxes previously assessed against it, and that a subsequent sale thereof for such taxes is void. The learned annotator states in 30 A.L.R. 413, that:

"This annotation supplements an annotation upon this same subject in 2 A.L.R. 1535.

"As shown in the annotation referred to, with the exception of the supreme court of Michigan, the cases are agreed that where property, subject to the lien

of a tax, is acquired by the state or any of its agencies for a public purpose, it thereby becomes freed from such lien, and further steps to enforce it are without effect.'

"Our examination of the decisions of other sister states upon this question shows that, with the exception of some two or three states holding contra, the generally announced rule is one of exemption as above announced.

"In view of the applicable rule announced in these cited cases, and the reasoning supporting it, we are of the opinion that the appellant's water plant was, upon its purchase or acquisition by the city, a public property, operated for its municipal use; that it then became tax exempt, and the city was thereby relieved from liability for the payment of such prior lien tax, * * * * *

In *Davis v. City of Biloxi*, 184 So. 76 (Miss), the same question was presented as in the *Kentucky Case*. The court, in holding the assessment extinguished, said l. c. 77:

"The city relies upon the case of the *City of Laurel v. Weems*, 100 Miss. 335, 56 So. 451, Ann. Cas. 1914A, 159, in which the Court held that although the taxes had been assessed to, and accrued on, the property in the hands of the private owner before the city acquired title, when the city acquired title, prior to the sale of the land for taxes, the tax lien was discharged by reason of the acquisition of title by the city; that the property being exempt from taxes when owned by the city, the exemption in favor of the city being made because of the public use of the property and in furtherance of the public policy, displaced the tax lien which had accrued against the private owner and the property in the hands of such owner. In the course of this opinion the Court said (page 452): 'The exemption of the property of a municipality is founded on the fact that the municipality is a governmental agency of the state, vested by the state with a part of its

sovereignty, and employed in aiding the state in matters of government and the execution of its laws. It is undisputed law that the general rule is that statutes granting exemptions from taxation must be strictly construed, and must not be extended beyond what the terms clearly express; but this rule of construction has no application to the property of the state, county, or municipality when it is sought to collect a tax on the property of either, or to take away their property because of a failure to pay the tax claimed, followed by a sale of same on account of the delinquency. The rule of strict construction of the statute may apply to religious and charitable institutions, and to all subjects of exemption save those belonging to a governmental agency of the state.' The Court ruled that there was a distinction between the case then before it and the case of McHenry Baptist Church v. McNeal, 86 Miss. 22, 88 So. 195, and held that a tax sale, made after the city had acquired title, was void, and that the purchaser at the tax sale secured no title.

"In the case of Alvis et al. v. Hicks, 150 Miss. 306, 116 So. 612, where the title of the municipality arose through its tax sale which had matured when the property was sold by the sheriff and tax collector for county and state taxes, the Court reaffirmed the doctrine that when the city had acquired title before the sale for taxes was made, the acquirement of the title by the city extinguished the assessment, and the purchaser at such tax sale secured no title as against the city. It was held in that case that it made no difference whether the property was acquired by the city for governmental purposes, or in its proprietary capacity -- that the property of the city was exempt from taxation under the law; and reappraised the case of City of Laurel v. Weems, supra.

"The city also relied upon the case of City of Meridian v. Phillips, 65 Miss. 362, 4 So. 119, where the city had purchased a tract of land and erected thereon a pesthouse, the land was assessed to the city, and approved by the board of supervisors without objection, and the land sold to the state for taxes claimed to be

due thereon. The Court held in favor of the city, and in the course of its opinion said: 'The judgment of the court below cannot be maintained. It is not disputed that the property in controversy belonged to appellant when it was attempted to be sold for taxes. Section 468 of the Code exempts from taxation, among other things, property belonging to the United States, or to the state, or to any county, or to any incorporated city or town in the state. Liability of property to taxation is the basis of the power to sell it for taxes; and, where property is exempt by law from taxation, it cannot be subjected thereto by any action of the board of supervisors, or the officers charged with the assessment and collection of taxes, and a sale of it for taxes under such circumstances is void.'

Another case directly on this point is *State v. Locke*, 219 P. 790, 30 A.L.R. 407 (N.M.). In this case the point was whether a tax lien on property could be enforced where the State of New Mexico had acquired the property after the lien had attached. The court held that said property was absolved and freed of further liability for the taxes previously assessed against it, citing and reviewing many of the cases cited in the Kentucky Case. In the A.L.R. annotation appended to this case, the authorities are collected on this subject. There is also an annotation on the same subject in 2 A.L.R. 1535. The cases collected in these annotations clearly demonstrate the correctness of the rule announced in the Kentucky Case previously quoted from. Further, it appears that there has been only one court in America that has reached a different conclusion, that being the Supreme Court of Michigan in the case of *Triangle Land Co. v. Detroit*, 170 N. W. 549. We are inclined to the view supported by the cases heretofore cited.

CONCLUSION

Therefore, it is our opinion that a tax lien on land acquired by the county at a foreclosure sale under a school

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fund mortgage loan is merged into the exemption enjoyed by the county and extinguished by such purchase, and the county is not liable for or authorized to pay said delinquent tax.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv

LABOR: Female employees engaged in hotel work not subject to provisions of Section 10171, R. S. Mo. 1939.

August 21, 1941.

8-75

Mr. George N. Davis
Prosecuting Attorney
Macon County
Macon, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of August 18th, wherein you state as follows:

"The Department of Labor has insisted that the Jefferson Hotel, which is an ordinary hotel operated on the European plan, is subject to the provisions of Section 10171.

"Mr. Meador, the proprietor of the hotel, has a written opinion from Mr. Waldo Edwards, an attorney of this city, telling him that the management of the Jefferson Hotel is not subject nor required to operate under and obey the provisions of said section.

"I am writing you to ask you your interpretation as to whether or not the hotel comes within any of the classifications set out in that section, so that female workers may be employed no more than nine hours during any one day, nor more than fifty-four hours during one week at the hotel."

Section 10171, R. S. Mo. 1939, provides the number of hours that female employees may be permitted to work in certain occupations:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: Provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year: Provided further, that nothing in this section shall be construed and understood to apply to telephone companies; and be it further provided, that the provisions of this section shall not apply to towns or cities having a population of 3,000 inhabitants or less."

If a hotel operates a restaurant, whether the same be under the European or American plan, the female workers employed therein would be specifically within the terms of the above section. The question then is whether female employees engaged strictly in hotel work would come within the terms of the above section?

It is obvious that a hotel would not come within the meaning of a factory, workshop, bakery, place of amusement, manufacturing or mechanical establishment. This leaves

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for consideration the possibility of whether a hotel comes within the meaning of a "mercantile establishment."

In the case of Hotchkiss v. District of Columbia, 44 App. Cases, Dist. of Columbia 73, l. c. 79, the court in defining "mercantile establishment" said:

"The term 'mercantile establishment' may be said to refer to a place where the buying and selling of articles of merchandise as an employment is conducted. 'It implies operations conducted with a view of realizing the profits which come from skilful purchase, barter, speculation, and sale.' Graham v. Hendricks, 22 La. Ann. 523."

It is apparent that a hotel is not a place where the buying and selling of articles of merchandise as an employment is conducted, and, consequently, a hotel cannot be said to be a mercantile establishment.

From the foregoing we are of the opinion that a hotel does not come within the provisions of Section 10171, R. S. Mo. 1939, requiring that female workers be not employed more than nine hours during any one day nor more than fifty-four hours during any one week.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG

COUNTY COURTS AND ARMORY APPROPRIATIONS:

COUNTY BUDGET LAW: County courts may make appropriations for armories provided such appropriations are not in violation of the provisions of the County Budget Act and are not in violation of the provisions of the constitution, and especially Section 12, Article 10, thereof.

October 25, 1941

Hon. Wilbur F. Daniels
Prosecuting Attorney
Fayette, Missouri



Dear Sir:

We are in receipt of your request for an official opinion under date of October 7, 1941, as follows:

"On Monday, June 17, 1940, in the matter of 'Contribution to Armory' the County Court of Howard County, Missouri, made the following order to-wit: 'in the matter of contribution to the building of an armory in the City of Fayette, it is ordered by the court that the sum of \$5000 and the same contributed for the said purpose provided that the city of Fayette contribute an equal amount. Said amount is to be paid one-half in the year 1940, and one-half in the year 1941.

Vote: Biswell - Yes Johnson - Yes Cuddy - No."

"The above order was made on the date aforesaid and the City of Fayette contributed \$5000 and thereby satisfied the proviso in the order but the County Court never did pay any sum nor was the Court ever called upon to do so until Monday, October 6, 1941. At this time the Court voted two to one not to contribute \$5000 and made an order accordingly.

"Now the question is, is the County Court liable for the payment of \$5000 by reason of the order made on Monday, June 17, 1940? The Treasury of the county is in such a condition at this time that warrants are being protested. However, this is merely seasonable activity and is due to the fact that the 1941 tax collections have not as yet come into the Treasury."

Section 7364 R. S. Mo. 1939 provides that:

"All cities, towns, villages and counties in this state are hereby given power and authority to build or acquire, by purchase, lease, gift or otherwise, suitable armories, drill halls and headquarters, and the land necessary therefore, for such organizations of the National Guard of Missouri as may be stationed or located therein, and to provide for the maintenance and repair of the same."

The power and authority given the county by the wording of the statute "to build or acquire" a suitable armory, drill hall and headquarters, and the land necessary therefor, contemplates that the county in order to comply with the statute is in some manner to build or acquire the armory and the site itself or together with the City of Fayette for the purpose stated and take title thereto itself or together with the City of Fayette. Assuming that this method is being followed in the establishment of the armory with the building to be under a county control--and that the appropriation of the county court is not a bare contribution or donation to an institution, corporation, association, company or individual for the purpose of building and establishing an armory which would be violative of Section 6 of Article IX and Section 46 and 47 of Article IV of the Missouri Constitution--then by the above statute, Section 7364, the Legislature made it lawful for the county court to appropriate funds to build an armory in the county, where an organization of the National Guard of Missouri is stationed or located.

Section 6 of Article IX of the Missouri Constitution provides as follows:

Sec. 6. Municipalities not to subscribe to capital stock nor aid corporations or institutions. -- No county, township, city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning or other institution, whether created for or to be controlled by the State or others. All authority heretofore conferred for any of the purposes aforesaid by the General Assembly, or by the charter of any corporation.

is hereby repealed: Provided, however, that nothing in this Constitution contained shall affect the right of any such municipality to make such subscription where the same has been authorized under existing laws by a vote of the people of such municipality prior to its adoption, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the liquidation or payment of such subscription, or of any existing indebtedness."

Section 47 of Article IV of the Missouri Constitution provides as follows:

"Sec. 47. Municipalities not to lend credit or grant public money * * *. The General Assembly shall have no power to authorize any county, city, town or township or other political corporation or subdivision of the state now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. * * *".

Section 46 of Article IV of the Missouri Constitution provides as follows:

"Sec. 46. Public money, grant of prohibited.-- The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

The above constitutional provisions prohibit an appropriation or donation, grant of public money or loan in aid of any corporation or association, individual, company or institution of a private nature. The test of the constitutionality

of a statute such as Section 7364, supra, is whether or not the appropriation authorized is for a recognized public purpose. Under the Supreme Court decisions, these provisions of the Constitution are inapplicable to Section 7364 as the appropriation is for an authorized public purpose as now recognized by law. In the case of Jasper County Farm Bureau v. Jasper County, 315 Mo. 560, 286 S. W. 381, the Supreme Court held that an appropriation of the County Court for the use of the Jasper County Farm Bureau was lawful and the statute authorizing the appropriation therefor out of general county funds was constitutional and not violative of Section 6 of Article IX or Section 46, 47 of Article IV of the Missouri Constitution. See also State ex rel Zoological Board of Control v. City of St. Louis, 318 Mo. 910, 1 S. W. (2d) 1021; State ex rel Jones v. Chariton Drainage District No. 1, 252 Mo. 345, 158 S. W. 633.

The appropriation made by the County Court of Howard County for an armory building for a stated public purpose and the statute authorizing same is not in violation of the Missouri Constitution. The Missouri courts uniformly hold that statutes of this kind providing for the construction or acquisition of buildings, structures and improvements of a public nature by counties and cities are lawful and not inconsistent with the provisions of the Missouri Constitution. See Halbruegger v. City of St. Louis, 302 Mo. 573, 262 S. W. 379. This case also cites the rulings in other states relative to the erection of public buildings out of public funds, if the buildings in question serve or may serve a public use, as now recognized by law, within the Constitution. See State ex rel City of Boonville v. Hackmann, 293 Mo. 313, 240 S. W. 135; State ex rel Excelsior Springs v. Smith, 366 Mo. 1104, 82 S. W. (2d) 37; Laret Investment Co. v. Dickmann, 135 S. W. (2d) 65, Haussler v. St. Louis, 205 Mo. 656, 103 S. W. 1034; State ex rel Russell et al v. State Highway Commission, 328 Mo. 942, 42 S. W. (2d) 196.

The County Court of Howard County is authorized under the statute and the Missouri decisions to appropriate funds toward the building of the armory even though it does not furnish all the necessary funds or the land required therefor, if there is a county control to be had over the property.

The rule that county courts have only such authority as is expressly granted to them by Statute is qualified by the rule that the express grant of powers carries with it such implied powers as are necessary to carry out or make effective the purposes of the authority expressly granted. Sheidley v. Lynch, 95 Mo. 487; Walker v. Linn County, 72 Mo. 650; King v. Maries County, 297 Mo. 488, 249 S. W. 418; State ex rel Wahl v. Speer, 223 S. W. 655.

County courts act and speak through their records only. *Dennison v. St. Louis*, 33 Mo. 168; *Thompson v. City of Malden*, 118 S. W. (2d) 1059; *Decker v. Deimer*, 129 S. W. 936.

The County Court of Howard County by its order of record, by a two to one vote, on Monday, June 17, 1940, duly appropriated \$5000 from the general revenue fund of the county for the building of an armory in the City of Fayette. The county court order contained the proviso that the City of Fayette should contribute or appropriate an equal amount and the proviso having been complied with and the City of Fayette having appropriated and paid its \$5000, then the County Court of Howard County should pay the \$5000 for the county out of general county funds in accordance with its court order made and entered of record on June 17, 1940, if such appropriation did not violate the provisions of the County Budget Act or the Constitution of Missouri.

The fact that the County Court of Howard County now votes two to one not to appropriate the money and makes its order of record not to contribute or pay the \$5000 for the armory does not rescind the court order and appropriation previously made for a lawful purpose and in our opinion the county should pay and is liable for the \$5000 as an appropriation lawfully made for said authorized public purpose on June 17, 1940, if such appropriation did not violate the provisions of the County Budget Act or the Constitution of Missouri.

It was held in the following Missouri decisions that orders of a county court duly made and entered of record have the effect of a judgment and that final orders of the county court cannot be set aside at a subsequent term by the county court or on the ground of error. *Peake v. Redd*, 14 Mo. 79; *Aslin v. Stoddard County*, 341 Mo. 138, 106 S. W. (2d) 472; *Mead v. Jasper County*, 305 Mo. 476, 266 S. W. 467; *State ex rel St. Joseph and I. R. Company v. Sullivan County Court*, 51 Mo. 522.

We have considered this question only from the standpoint that the county court may make appropriations for armories and the effect of the order made in 1940. It must also be considered from the standpoint of whether or not it violates the County Budget Act, or any provisions of the Constitution. In other words, if the appropriation made in 1940 for the armory was in excess of the anticipated revenue for that year, and in excess of the estimated Budget for that year, then under the County Budget Act, it was void. Article

2, Chapter 73, R. S. Mo. 1939, provides for the County Budget Act. Under the provisions of this act it would be unlawful for any county officer to issue or pay warrants under the foregoing circumstances. Section 10917 of said act provides in part as follows:

"* * * Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

In the case of Missouri-Kansas Chemical Corporation v. New Madrid County, 345 Mo. 1167, the court had before it a bill against the county court for the payment of supplies purchased by the sheriff. It was contended that the contract by the sheriff for purchase of supplies would violate the Budget Act because it was in excess of the budget allowance. In discussing the Budget Act, its purposes, etc., the court said: (l. c. 1168 (1))

"(1) But in 1933 the General Assembly enacted the 'county budget law' (Laws 1933, pp. 340 et seq.), which provides for an annual budget presenting a complete financial plan for the ensuing year. We refer to some, not necessarily all, of its provisions influencing our conclusions. Section 1 makes Secs. 1 to 8 inclusive, thereof applicable to counties having 50,000 inhabitants or less and requires the preparation of an annual budget of estimated receipts and expenditures by the respective county courts. Section 2 provides a classification for proposed expenditures. Section 3 makes it the duty of every officer claiming any payment for supplies to 'submit an itemized statement of the supplies he will require for his office.' Section 4 requires the county court to balance its estimated budget. Section 5 requires the county court to show the estimated expenditures by specified classes. Sections 6 and 7 require officers expecting to receive supplies to be paid for from county funds to submit certain specified information, estimates, etc., including the separate listing of each item of supplies. Section 8 requires the county court to go over, revise and amend the estimates to promote efficiency and economy, the public

interest and balance the budget; requires the recording and filing of certified copies of the revised estimate, and also provides: 'Any order of the county court of any warrant contrary to any provision of this act shall be void and of no binding force or effect . . . ' Section 9 provides that Secs. 9 to 20, inclusive, apply to counties having more than 50,000 inhabitants. Section 22 repeals all laws or parts of law insofar as they conflict with the county budget law.

"New Madrid county has less than 50,000 inhabitants. It is admitted of record that the budget of New Madrid county for 1934 and 1935 and 1936 for the purchase of disinfectant, etc., for the county jail, with the exception of the \$200 paid on account, had been exhausted at the time the several respective purchases here involved were made and that the balance sued for consists of items purchased in excess of the budget allowances therefor in the respective years. Plaintiff's representative testified he had been informed the budget 'was low', and, as we read the record, some statements were dated as of the year following the actual delivery of the supplies. On the record made any order of the county court seeking to effect the payment of the balance due, under the quoted provision of Sec. 8, supra, would be void and of no binding force and effect. Now, absent exceptional circumstances, a sheriff's authority to obligate his county is restricted to his budget allowances. The directed verdict for the county was proper. Consult Traub v. Buchanan County, 341 Mo. 727, 731 (3), 108 S. W. (2d) 340, 342 (3); Carter-Waters Corp. v. Buchanan County (Mo.), 129 S. W. (2d) 914 (2)."

We do not have before us the amount of levee as fixed by your court for county revenue purposes, but suggest here that if the contract and appropriation provided for in the order exceeded the constitutional limitations provided in Section 12, Article X of the Constitution, it would be void for that reason. In other words, the county court is not authorized under that section of the Constitution to issue warrants in excess of its revenue for the year in which the warrant is issued.

Said Section 12 of Article X of the Constitution provides in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in case requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; * *

* * * * *

This provision was construed and discussed in the case of Trask v. Livingston County, 210 Mo. 583, 592, wherein the court said (1. c. 592):

"The constitutional provision found in section 12 of article 10 of that instrument has often been construed by this court. In Book v. Earl, 87 Mo. 1. c. 252, it was well said: 'The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration

of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

And at l. c. 594 and 595:

"* * * The language of the Constitution is 'No county . . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding any year the income and revenue provided for such year.' It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created and prohibits the anticipation of the revenues of any future year. * * * * *"

Your letter indicates that the county court intended to pay one-half of this appropriation in 1940 and one-half in 1941. Under the rule announced in the Trask case, supra, you can readily see that the appropriation for 1941 would be in violation of the foregoing Section 12, Article X of the Constitution, because it was made in anticipation of revenues of a future year. As to the appropriation for 1940, if this item was estimated in the budget for 1940, and there were sufficient funds out of the revenue for that year, in the class from which it would be paid, then the county court would be authorized to order a warrant drawn thereon and the treasurer would be authorized to pay the same. However, if the revenue for 1940 was not sufficient to pay this amount

October 25, 1941

and if it was not considered in the budget for 1940, the order of the county court of June 17, 1940, would be void.

CONCLUSION

From the foregoing, it is the opinion of this department that the county court order of June 17, 1940, appropriating money for an armory at the City of Fayette, Missouri, would be void as to that part of the appropriation which was to be paid out of the 1941 revenue, because it violated said Section 12 of Article X of the Constitution of Missouri.

We are further of the opinion that the part of the order providing for payment out of the 1940 revenue would be legal if this item was considered by the county court when making up its budget for 1940, and if it was in the class of funds from which it was to be paid, a sum sufficient to pay same, or if a sum sufficient to pay same could be anticipated out of the revenue for the year 1940.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

(20)

BARBERS - (1) Article 5 R. S. Mo., 1939, which has to do with the trade of cosmetology, hairdressing and manicuring, has no application in cities having a population of less than five hundred inhabitants. (2) Persons practicing the trade of barbering must procure a barber's license in cities having a population of less than five hundred, whether they have complied with Art. 5, R. S. Mo., '39 or not.

October 15, 1941

Mr. L. N. Dixon
Secretary
State Board of Barber Examiners
Princeton, Missouri



Dear Sir:

We are in receipt of your letter of September 24, together with clipping from paper, each of which reads as follows:

"I am enclosing a copy of a letter received from J. E. Stephenson, a barber at Rockport, Missouri. Now here is what the situation sums up to; and why the barbers are up in arms over it. The barber shops in Atchison County all charge 25¢ for shaves and 50¢ for hair cuts. Now it seems under Section 9811 R. S. Mo. 1939 that a beauty operator under Class A can cut hair yet under Section 9831 R. S. Mo. 1939 the provision of this article shall not be held to apply within any city of this state which now or hereafter has a population of less than 500 inhabitants. Watson has a population of 269.

"I am not an attorney but have talked to W. S. Thompson, prosecuting attorney for Mercer County and he said he did not know what to do and the best thing I could do was to write to the Attorney General for an opinion.

"Would you please give an opinion in this matter so that I can take whatever steps are necessary."

"The ad

HAIR CUTTING

25c

Men's and Boys' Hair-
Cutting A Specialty

DOROTHY'S
BEAUTY PARLOR
Watson, Mo."

From a reading of Article 5, of Chapter 57 R. S. Missouri, 1939, which Article has to do with cosmetologists, hair-dressers and manicurists, including Section 9810 to 9831, inclusive. We call particular attention to Section 9831 of said Article, which Section reads as follows:

"Provided, the provisions of this article shall not be held to apply within any city of this state which now or hereafter has a population of less than 500 inhabitants."

Therefore, from a reading of this Section the legislature in the enactment of said Section directly and emphatically provided that the Sections contained in Article 5, supra, should have no application in any city of this State which now, or hereafter, has a population of less than five hundred inhabitants.

Now, from a reading of your opinion request, together with the exhibit placed thereto, the question arises whether or not the person referred to in the opinion request is amenable to any other Statutes of this State. In this connection we call attention to Sections 10127 R. S. Missouri, 1939, which reads as follows:

"It shall be unlawful for any person to follow the occupation of a barber

in this state, unless he shall have first obtained a certificate of registration, as provided in this chapter: Provided, however, that nothing in this chapter contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided."

Section 10131 R. S. Mo., 1939, -

"Such board shall hold public examinations at least four times in each year, at such times and places as it may deem advisable, notice of such meetings to be given by publication thereof at least ten days prior to such meetings, in at least two newspapers published in this state, in the locality of each proposed meeting."

And a part of Section 10133 R. S. Mo., 1939 - which reads as follows:

"Any person not following the occupation of barbering at the time this chapter goes into operation, desiring to obtain a qualified certificate of said occupation in this state, shall make application to said board therefor and shall pay to the treasurer of said board an examination fee of ten dollars, and shall present himself at the next regular meeting of the board, for examination of applicants,
* * * * *

It will be noted from reading the above Sections that the legislature through these Sections has provided that any person desiring to procure a barber's license must appear before the Barbers' Board and pass the examination which entitles them to a barber's license.

In 37 C. J., P. 167, we find the following, in Par. 2:

"A privilege is the exercise of an occupation or business which requires a license from some proper authority, designated by some general law, and is not free to all, or any, without such license. To constitute a privilege the grant must confer authority to do something which, without the grant, would be illegal, for if what is to be done under the license is open to all without it, the grant would be nugatory."

The Court in the case of State v. Parker Distilling Company, 236 Mo. 219, at l. c. 268, had this to say, quoting from Vol. 5, Words & Phrases 4137 (Old Series):

"A license is essentially a grant of special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belongs. A common right is not the creature of a license law." (5 Words and Phrases, p. 4137; State v. Frame, 39 Ohio l.c.413.)

"The popular understanding of the word license is a permission to do something which, without the license, would not be allowable, and such is the legal definition." (Youngblood v. Sexton, 32 Mich. 406, l. c. 419.)

"'A license is permission granted by some competent authority to do an act which, without such permission, would be illegal.' (State v. Hipp, 38 Ohio 199, 1. c. 226.)

"'A license in its proper sense is a permit to do business which could not be done without the license.' (City of Sonora v. Curtin, 137 Cal. 583.)

"'The object of a license is to confer a right which does not exist without a license. A license is a privilege granted by the State, usually on payment of a valuable consideration. To constitute a privilege the grant must confer authority to do something which without the grant would be illegal; for if what is to be done under the license is open to everyone without it, the grant would be merely idle and nugatory, conferring no privilege whatever.' (Cooley on Taxation (3 Ed.), 1037.)"

Therefore from reading the above case and excerpt from C. J. we find that a license is a grant by the State and gives the holder of said license the privilege to perform the service that is designated in the particular license. The State has the right to either withhold, or to grant, the license or privilege. It also has the right to pass such laws as it deems necessary setting up the method which must be followed by one who desires to procure the license.

We call attention, also, to Section 10138 R. S. Missouri, 1939, which reads as follows:

"Any person who is engaged in the capacity so as to shave the beard

Mr. L. N. Dixon

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October 15, 1941

or cut and dress the hair for the general public, shall be construed as practicing the occupation of barber, and the said barber or barbers shall be required to fulfill all requirements within the meaning of this chapter."

From a reading of this latter Section we find that any person who desires to shave the beard or cut and dress the hair for the general public shall be construed as practicing the occupation of barber. Therefore, in towns having a population of less than five hundred inhabitants, in view of the fact that Article 5 has no application, but when we view Chapter 67, which contains the Sections applicable to the barber trade, we find that no such exception is contained therein.

Therefore, all of the Sections pertaining to the barber trade are applicable to each and every city in the State regardless of size.

CONCLUSION.

In conclusion it is our opinion that a person who may or may not have fulfilled the requirements of Article 5, of the Statutes of 1939, if he or she desires to practice the barber trade as defined in Section 10138, he or she must procure a license as was provided for in Chapter 67 R. S. Missouri, 1939, in cities less than 500 inhabitants.

APPROVED:

Respectfully submitted

VANE C. THURLO
(Acting) Attorney General

B. RICHARDS CREECH
Assistant Attorney General

BRC:RW

TAXATION AND EQUALIZATION: County Board not bound by valuations of tracts fixed by the Assessor.

June 5, 1941

6-11

Honorable W. N. Doss
Secretary
State Tax Commission
Capitol Building
Jefferson City, Missouri



Dear Mr. Doss:

The writer has been directed to furnish you with an opinion upon the following question:

"First: Does the County Board of Equalization have authority to increase the valuation on real estate above the valuation placed thereon by the assessor?"

Article 3 of Chapter 74, Revised Statutes of Missouri, 1939, creates the County Board of Equalization for each county and prescribes its powers and duties. A search of the constitution reveals there is no provision in the constitution concerning a County Board of Equalization. Therefore, it is solely a statutory body and in considering its duties and powers, we must look to the statutes and cases construing these statutes.

Section 11001, Article 3, Chapter 74, R. S. Missouri, 1939, creates the County Board of Equalization; Section 11002, of the same Article and Chapter prescribes its duties and powers. This last mentioned section is as follows:

"Said board shall have power to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, and, having each taken an oath, to be administered by the clerk,

fairly and impartially to equalize the valuation of all the taxable property in such county, shall immediately proceed to equalize the valuation and assessment of all such property, both real and personal, within their counties respectively, so that each tract of land shall be entered on the tax book at its true value: Provided, that said board shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by said state board of equalization."

Section 11003 of the same article and chapter prescribes the rules to be followed by County boards of equalization and Section 11004, also of the same article and chapter, grants to the county boards of equalization jurisdiction to hear appeals of persons who wish to have the valuation placed on their property by the assessor reviewed. Section 11004 is as follows:

"The said board shall hear and determine all appeals made from the valuation of property made by the assessor in a summary way, and shall correct and adjust the assessment accordingly. The county clerk shall keep an accurate record of the proceedings and orders of the board, and the assessor shall correct all erroneous assessments, and the clerk shall adjust the tax book according to the orders of said board and the orders of the state board of equalization: Provided, that in adding or deducting such per centum to each tract or parcel of real estate as required by said board, he shall add or deduct in each case any fractional sum of less than fifty cents, so that the value of any separate tract shall contain no fractions of a dollar."

The County Board of Equalization, in performing its duties, acts judicially. In this connection the case of Black v. McGonigle, 103 Mo. 192, is cited, from which case the following quotation is taken at l. c. 198:

"The propositions contained in this objection must, of course, be determined by the statute. Section 6672, Revised Statutes, 1879, gives to the board power 'to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county,' and it is then made the duty of the board 'to equalize the valuation and assessment of all such property, both real and personal * * *, so that each tract of land shall be entered on the tax book at its true value.' According to the plain letter of the statute, the board has not only the power to hear complaints, but it has the power, of its own motion, to equalize the valuation for the purposes named in the law, namely, so that each tract of land shall be entered at its 'true value.'"

"In performing these duties the board acts judicially; this has been often held, and the very nature of the duty to be performed makes it a judicial one. St. Louis Mutual Life Ins. Co. v. Charles, 47 Mo. 465; Railroad v. Maguire, 49 Mo. 483; Cooley on Taxation (1 Ed.) 291. The board has jurisdiction over all the lands in the county, and generally in practice its actions will be confined to raising and decreasing the assessed value of particular parcels, so as to bring all the lands in the county to a uniform value. The law, however, clearly contemplates that all property shall be assessed at its true value (sec. 6711), and if, in the opinion of the board, this has not been done, then

the assessment may be increased so as to comply with the spirit and intention of the law. * * * * *

From the foregoing quotation it is apparent that the County Board of Equalization not only acts judicially, but that it may on its own motion change the valuation placed on real estate upon the assessment rolls.

In the case of State ex rel. Thompson, State Auditor v. Bethards, County Clerk, the Supreme Court had before it a question involving the power of the County Board of Equalization and the performance of its duties in connection with the equalization of real estate values. This case was decided by the Court in Banc in October, 1928, and is reported in volume 9 Southwestern Reporter, 2nd Series, page 603 and following. In discussing the valuation placed upon real estate by the assessor and the action of the County Board of Equalization and the State Board of Equalization, the Court, at l. c. 604, said:

"There is no such thing as an absolute true value of land. The 'values' mentioned in the statutes are the valuations of the officials whose duty it is to make them. Land is not like commodities which have a fixed market price at a given period. Its value is determined always by the estimate of the party who values it. The requirement of section 12802, that the assessor assess the property at its true value in money, means nothing more than that such true value is his estimate, his valuation. The law contemplates that, in accordance with that section, he does assess it at its true value as he judges it. State ex rel. v. Western Union Tel. Co., 165 Mo. loc. cit. 516, 65 S. W. 775. The allegation of the petition that he assessed it at its true value adds nothing to the general statement that he assessed it according to that section. To say that he

assessed it at a certain value means that such is the true value just as clearly as if the words 'at its true value in money' were added to the statement. According to the argument of respondent, such valuation is absolute and could never be questioned by any board of equalization. Yet the statute provides that the county board of equalization may equalize such valuations, and that the state board of equalization, under section 12855, may add to the valuation of each class. The presumption that such added valuation is the true value attaches just as well to the action of the state board of equalization and county board of equalization as it does to the valuation of the assessor. The allegation of the petition as to the true value in money is merely an allegation that the assessor performed his duty as required by section 12802, and nothing more. It is not conclusive on either the county board nor on the state board."

This case also contains an illuminating discussion of the procedure to be followed in the process of equalization, at l. c. 605:

"The regular course is as follows: After fixing the valuation under section 12802, the assessor makes an abstract of his footings and forwards the same to the state auditor. Section 12810, R. S. 1919. The clerk is liable to a penalty if he fails to do that. And when erroneous assessments are corrected by the county court for persons who make complaints (section 12817), the clerk shall correct the tracts on the books under orders made by the county court (section 12818).

"The state auditor, under section 12855, must lay before the state board of equalization the abstracts of all the taxable property of the state returned to him by the respective county clerks. The state board then equalizes the valuations of property between the several counties. Under section 12857, when the state board of equalization shall have completed its labors, it must transmit to each county clerk the per cent, added to or deducted from the valuation of the property of his county. Then the clerk shall furnish one copy thereof to the assessor, and one copy shall be laid before the annual county board of equalization. In this case the copy laid before the county board of equalization was the one upon which that board acted without authority, as noted above."

The question involved in this case was whether or not the County Board of Equalization had the power and authority to reduce the valuation of real estate below that fixed by the State Board of Equalization. The court, in ruling that it had no authority to reduce the valuation below that set by the State Board of Equalization, at l. c. 605, said:

"After the state board of equalization had increased the valuations of lands in the county, the county board of equalization then took a hand, as shown in the order quoted above, and in effect sought to annul the action of the state board of equalization. That is directly in the face of the proviso of section 12821, defining the powers of the county board of equalization as follows:

"Provided, that said board shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by said state board of equalization."

"That section means, if anything, that the state board of equalization fixes values as well as the assessor of the county board. Therefore the county board of equalization of Shelby county had no authority to reduce the valuation fixed by the state board. When it attempted to equalize the values in accordance with the prior valuations fixed by the assessor, which valuations had been annulled by the order of the state board of equalization, the proceeding was a nullity. The entire proceeding of the county board in the matter was of no effect. *Mercantile Trust Co. v. Schramm*, 269 Mo. 489, 190 S. W. 886."

And on the same page the court further said:

"The county board of equalization, under article 3, c. 119, sec. 12821, is authorized to hear complaints and equalize valuations made by the assessor. It is nowhere authorized to increase or reduce the aggregate valuation fixed by the state board of equalization. It has no power to assess. *State ex rel. v. Baker*, 170 Mo. loc. cit. 391, 70 S. W. 872. Its duty is to equalize among the separate tracts the valuations fixed by the assessor. * * * * *

From the above it seems quite clear that the County Board is not bound by the valuation placed upon parcels of real estate by the assessor; that the assessor values the

Hon. W. N. Doss

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June 5, 1941

parcels of real estate according to his judgment which is not final or binding on the County Board of Equalization and that the Board may later exercise its judicial discretion in the valuation of the tracts of real estate, subject only to the qualification that the County Board of Equalization must abide by the class valuations as fixed by the State Board of Equalization.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ/rv

TAXATION AND EQUALIZATION:

State Board of Equalization may reconsider valuation of class of property before certification of its judgment; but has no power to review its judgment after certification by State Auditor except by way of approving recommendations of State Tax Commission

June 7, 1941

6-11



Honorable W. N. Doss
Secretary
State Tax Commission
Jefferson City, Missouri

Dear Mr. Doss:

The writer has been directed to furnish you with an opinion upon the following question:

"Is the State Board of Equalization authorized to reconsider the assessment and valuation of a class of property in a county?"

The State Board of Equalization is a constitutional body, being created by Section 18 of Article X of the Constitution. This section is as follows:

"There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law."

The Constitution contains no further provisions in regard to the State Board of Equalization or its powers and duties and methods of carrying out the direction of the Constitution. However, the Legislature has enacted numerous laws pertaining to the State Board of Equalization and the performance of its duties. These laws are found in Article V of Chapter 74, Revised Statutes of Missouri, 1939. Section 11034 grants to the State Board of Equalization authority to issue subpoenas, send for persons, take evidence it may deem necessary to ascertain the value of the property in the different counties in the State. Section 11035 fixes the time of the meeting, the last Wednesday in February of each year. Section 11036 prescribes the duties of the State Auditor in connection with the meeting of the State Board of Equalization and prescribes the procedure to be followed by the State Board of Equalization in performing its duties. This section is as follows:

"The state auditor shall lay before the board of equalization the abstracts of all the taxable property in the state and the abstracts of the sales of real estate in such counties as returned to him by the respective county clerks and the president of the board of assessors of the city of St. Louis, and the board shall classify all real estate situate in cities, towns and villages as town lots, and all other real estate as farming lands, and shall classify all personal property as follows: First, banking corporations; second, railroad corporations; third, street railway corporations; fourth, all other corporations; fifth, bonds, notes and evidences of indebtedness; sixth, horses, mares and geldings; seventh, mules; eighth, asses and jennets; ninth, neat cattle; tenth, sheep; eleventh, swine; twelfth, farm implements and all other personal property. And the board shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

"First -- It shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value.

"Second -- It shall deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value."

In the case of State ex rel. Wyatt, Collector v. Vaile, 122 Mo. 33, the Supreme Court, at l. c. 47, held the State Board of Equalization, in performing its duties, acted judicially.

"A board of equalization in performing its duties, acts judicially, and its orders can not be impeached collaterally, save for want of jurisdiction or for fraud. Black v. McGonigle, 103 Mo. 193, and cases cited; Black on Tax Titles (2 Ed.), sec. 141. But it is a board of special and limited powers, and when it steps outside of its jurisdiction its acts are void. We can but conclude that the state board had no power to make these orders and that they are void. The question then arises what is to be the effect of this conclusion upon the judgment in this case, the taxes having been extended on the assessment as decreased by these void orders of the state board."

At the time of the rendition of the decision in the case of State ex rel. v. Vaile, supra, the State Board of Equaliza-

tion was limited to equalizing values between counties but by amendment its powers were extended to permit it to equalize between classes.

In the case of Mercantile Trust Company v. Schramm, 269 Mo. 489, the court said, at l. c. 495:

"It is these provisions, in the light of those in pari materia, that we are called upon to construe. It is not questioned that, under the provisions of this section not quoted, the State Board of Equalization can equalize according to classes as it did in the instant matter. This power was expressly confirmed by the amendment of 1899, prior to which time its power was limited to equalizing among the different counties and not between classes. (State ex re. v. Vaile, 122 Mo. 33). * * * *"

Inasmuch as the State Board of Equalization acts judicially, has authority to equalize between classes of property and is authorized to hear, take evidence, et cetera, to determine the proper valuation, it is not believed there would be any question of the power of the Board to take up and reconsider the valuation of a class of property in order to determine its true value in money prior to its final determination and judgment and certification to the county. We fail to find where this power has ever been questioned. In the case of Columbia Terminals Co. v. Koeln, 3 S. W. (2d) 1021, the State Board of Equalization did this and there was no criticism of its action and no question raised.

Section 11038, Article V, Chapter 74, R. S. Missouri, 1939, directs the procedure after the State Board of Equalization had completed its work. This section is as follows:

"When the state board of equalization shall have completed its labors, the state auditor shall immediately transmit to each county clerk the per centum

added to or deducted from the valuation of the property of his county, specifying the percentage added to or deducted from the real property and the personal property respectively, and also the value of the real and personal property of his county as equalized by said board; and the said clerk shall furnish one copy thereof to the assessor; and one copy to be laid before the annual county board of equalization. And it shall be the duty of the state auditor to require of clerks of the several county courts of this state to keep up the aggregate valuation of real and personal property in their respective counties, for those years in which no state board of equalization is held, to the aggregate amount fixed by the last state board of equalization."

It will be observed that this section requires the valuations, as fixed by the State Board of Equalization, to be certified to the various county clerks by the State Auditor when completed. This brings us to a consideration of whether or not the State Board of Equalization would have authority to re-open its proceedings and again consider the matter of the valuation of a class of property in a county after the valuation had been certified to the county by the State Auditor. A search of the cases fails to reveal any case in which this question has been raised, although in the case of *State ex rel. v. Dirckx*, 11 S. W. (2d) 38, a case involving the valuation of bank stock in Cole County, the State Board of Equalization apparently had taken up and reconsidered the valuation after certification and caused to be recertified a lower valuation than the valuation contained in the original certification. The court said, at l. c. 40:

"Prior to the making of the order just set forth, the state board of equalization, on March 28, 1938, in

equalizing the values of the various classes of property among the respective counties of the state, raised the aggregate valuation of the personal property of banks and trust companies of Cole county from \$554,336 to \$630,836, and duly transmitted its order with reference thereto to respondent as county clerk. Subsequently, on May 16, 1928, the state board amended its order, thereby fixing the aggregate valuation of the personal property of the banks and trust companies of Cole county at \$554,336, being the aggregate of such assessments as originally made by the assessor. This amended order it likewise transmitted to the respondent.

"Respondent refuses to correct or adjust the assessor's books of Cole county so that they will conform to the order of the state board of equalization, giving as his reason therefor that he cannot do so without doing violence to and disobeying the order and judgment of the county board of equalization, which he believes and alleges to be a valid and legal order and judgment.

"From the foregoing it is manifest that either the state board of equalization or the county board has exceeded its statutory jurisdiction, or else the statutes themselves engender an irreconcilable conflict. In order to determine where the fault lies it will be necessary to make a brief examination of the statutory scheme of assessing property for the purpose of levying ad valorem taxes."

The Supreme Court issued its writ of mandamus to compel the county clerk to adjust the tax books to conform to the last order of the State Board of Equalization. It is doubtful if

this could be considered authority for such procedure, inasmuch as the question was not raised as to the authority of the Board to make such second order.

In the case of State ex rel. City of St. Louis v. Caulfield, et al., 62 S. W. (2d) 818, a case involving the State Board of Equalization, the Supreme Court, in discussing the State Board of Equalization and its duties, said at l. c. 820-1:

"This board is an agency created by the Constitution of the state, section 18 of article 10, which declares: 'The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law.' The duties enjoined on the board are set out in article 5 of the chapter on taxation and revenue, at page 2705 of the Revised Statutes of 1929 (section 9861 et seq. (Mo. St. Ann. sec. 9861 et seq.)), which requires that the board meet at the capitol on the last Wednesday in February of each year, and, after taking oath according to law (section 9862 (Mo. St. Ann. sec. 9862)), proceed to equalize the valuation of each class of real and personal property among the counties of the state (city of St. Louis being regarded as a county) by adding to or deducting from each class such per centum as will increase or decrease the same to its real value in money (section 9863 (Mo. St. Ann. Sec. 9863)); and upon the completion of the board's labors the state auditor shall transmit to each county clerk the per centum added to or deducted from the real and personal property and also value the real and personal property as equalized by said board, and the same shall be laid before the assessor and the county board of equalization (sec-

tion 9865 (Mo. St. Ann. sec. 9865)). In neither said constitutional provision nor in said article 5 is any power conferred upon said board with respect to real or personal property other than the power to equalize the valuations of the same, in their statutory classifications, among the counties, nor any power or original assessment of such property.

"In the case of First Trust Company of St. Joseph v. Wells, 324 Mo. 306, at page 312, 23 S. W. (2d) 108, 110, in discussing the respective powers of the state and county boards of equalization, this court, speaking through Ragland, J., said: 'The functions of the county board of equalization and the state board of equalization are entirely separate and distinct. The county board's authority is limited to equalizing valuations of property within a class, and in doing so it can neither raise nor lower the aggregate valuation of a class as a whole. State ex rel. v. Dirckx, 321 Mo. 345, 11 S. W. (2d) 38. The state board's authority is limited to the equalization of the valuation of each class as a whole among the respective counties of the state. In so doing it equalizes the valuations of the several classes with respect to each other, because the "real value in money" is the standard applied to all. It has no power to raise or lower the valuations of specific properties within a class. State ex rel. v. Vaile, 122 Mo. 33, 26 S. W. 672.' Regarding the county board's powers, it is provided by statute that such board has no power to reduce the valuation of real or personal property of the county, because the valuation thereof is fixed by said state board. R. S. 1929, section 9812 (Mo. St. Ann. Sec. 9812). Our court has

held that the county board has no power to reassess, State ex rel. v. Bethards, 320 Mo. 1164, 9 S. W. (2d) 603, and no power to make an initial assessment except upon omitted property, State ex rel. Davis v. Walden (Mo. Sup.) 60 S. W. (2d) 24.

"It therefore seems clear that under the constitutional provision and the statutes mentioned the state board of equalization has no greater power of original assessment of real and personal property than is possessed by the bounty board. There is also an apparent legislative purpose that the judgment of equalization made by the state board for the purpose of uniformity of valuation as among the counties and transmitted to the counties for the guidance of the county boards, which completes the regular process of valuations throughout the state and establishes uniformity, shall not be interfered with by any other agency. The process having by that judgment become exhausted, the state board's jurisdiction is also exhausted, except for the board's revision to meet the requirements of the action of the tax commission in making thereafter those original assessments and such reassessments as the law empowers it to make, all subject to the approval of said state board of equalization. And, necessarily, this reserved jurisdiction is no broader than said board's original jurisdiction, as conferred by the Constitution, namely, the power of equalization, among the counties, unless perchance the statutes next to be mentioned confer additional powers."
(Underscoring ours)

In this case the power of the board to reopen and reassess or revalue a class of property was not in question, but this language would seem to clearly indicate the view of the Supreme Court that once having rendered its judgment the State Board of Equalization has exhausted its jurisdiction in a matter unless the matter is placed before it again by the State Tax Commission, where its authority is limited to approving or disapproving the recommendation of the Tax Commission in matters of assessing or reassessing omitted property. This language is supported by the rule that administrative officers and boards having quasi judicial power or special jurisdiction are not authorized to review their judgments unless the authority which gave the officer power, or created the board, expressly conferred authority to review.

In *Cress v. State*, 152 N. E. 822 (Ind), the Court, in discussing the power of an officer to undo an act completed, said at l. c. 826:

"And power to undo an act once done will not be implied from the mere grant of power, in the exercise of a sound discretion, to do the act."

In *Throop's Public Officers*, Section 564, p. 534, it is stated:

"* * * where a quasi judicial power has been exercised, upon which a private individual has acquired rights, the rule is the same, as where a judgment has been rendered by a court of inferior and limited jurisdiction; that is, that the officer or body can exercise the power only once, and can not afterwards alter his or its decision."

In *People v. Cantor*, 180 N. Y. S. l. c. 155, it is also said:

"It is true that, where quasi judicial power is conferred upon an administrative officer or body, the exercise of such power is not generally subject to review by the official or board making the determination, unless the power of review is also conferred by the Statute." (cases cited).

This was a case involving the action of a board of equalization.

This requires an examination of and consideration of the sections of the statutes creating the State Tax Commission and setting out its powers and duties. These sections of the law are found in Article IV, Chapter 74, Revised Statutes of Missouri, 1939. Section 11009 creates the State Tax Commission. Section 1010. Section 11027 of this article and chapter sets out numerous duties of the Tax Commission, and is as follows, in part:

"It shall be the duty of the commission, and the commissioners shall have power and authority, subject to the right of the state board of equalization, finally to adjust and equalize the values of real and personal property among the several counties of the state, as follows:

"(1) To have and exercise general supervision over all the assessing officers of this state, over county boards of equalization and appeal in the performance of their duties, and to take such measures as will secure the enforcement of the provisions of this article, and all the properties of this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed in accordance with the letter and plain provisions of the law.

"(2) To confer with and advise assessing officers as to their duties under this article

and all other laws concerning revenue and taxation, and to institute proper proceedings to enforce the penalties and liabilities provided by law for public officers, officers of corporations and individuals failing to comply with the provisions of this article, or of the revenue and taxation laws. In the execution of these powers the said commission shall call upon the attorney-general, or any prosecuting or circuit attorney in the state, to assist this commission in the enforcement of laws with the supervision of which this commission is charged, and when so called upon it shall be the duty of the attorney-general, and the prosecuting (or circuit attorneys in their respective counties), to assist in the commencement and prosecutions of actions and proceedings for penalties, forfeitures, removals and punishments for violation of the laws in respect to the assessment and taxation of property, and to represent the commission in any litigation which it may wish to institute or in which it may become involved in the discharge of its duties.

"(8) To receive all complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, to investigate the same and to institute such proceedings as will correct the irregularity complained of, if any irregularity be found to exist.

* * * * *

"(8) To raise or lower the assessed valuation of any real or personal property, including the power to raise or lower

the assessed valuation of the real or personal property of any individual, copartnership, company, association or corporation: Provided, that before any such assessment is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in section 11028.

* * * * *

There are several other subsections of Section 11027 but they do not seem to be pertinent to the matter under consideration here and for that reason are not set out.

Section 11028 also of the same article and chapter, sets out the procedure to be followed by the Tax Commission in the matter of assessing omitted property and reassessing property it finds to have been improperly assessed. This section is as follows:

"After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof, and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the

said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. A copy of said order shall be published in at least one newspaper published in said county, if there be one, at least five days before the time at which said assessor is required to appear; or, where practicable, notice by mail may be given prior to said hearing to all persons whose assessments are to be considered. A copy of said order shall be served on the assessing officer at least three days before he is required to appear with said roll. The commission, or any member thereof, or any duly authorized agent, shall appear at the time and place mentioned in said order, and the assessing officer, upon whom said notice shall have been served, shall also appear with said assessment roll. The commission, or any member thereof, or any duly authorized agent thereof, as the case may be, shall then and there hear and determine as to the proper assessment of all property and persons mentioned in said notice, and all persons affected, or liable to be affected by review of said assessments thus provided for, may appear and be heard at said hearing. In case said commission or any member or agent thereof who is acting in said review, shall determine that

the assessments so reviewed are not made according to law, he or they shall, in a column provided for that purpose, place opposite said property the lawful valuation of the same for assessment. As to the property not upon the assessment roll, the said commission, or member or agent thereof, acting in said review, shall place the same upon said assessment roll by proper description and shall place thereafter in the proper column the value required by law for the assessment of said property. The commission shall also spread upon said roll a certificate signed by each member officiating at the proceeding showing the day and date on which said assessment roll was reviewed. For appearing with said roll as required herein the assessing officer shall receive the same per diem as is received by him while in attendance at the meeting of the county board of equalization. His claim shall be presented to and paid by the proper officer of the political subdivision, or municipality, of which he is the assessing officer, in the manner as his other compensation is paid. The action of the commission, or member or agent thereof, when done as provided in this section, shall be final, when approved by the state board of equalization. When any property has been reviewed, assessed and valued by the commission as herein authorized, such property shall not be assessed or valued at a lower figure by the local assessing or equalizing officer for the year the assessment is made."

It will be noted that this last quoted section authorizes the State Board of Equalization to approve such assessing of omitted property or reassessing of property improperly assessed by the State Tax Commission, this in accordance with Section 18

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of Article X of the Constitution creating the State Board of Equalization which authorizes the legislature to place additional duties on the State Board of Equalization.

Neither Section 18 of Article X of the Constitution, which creates the State Board of Equalization and prescribes its duties and authorizes the Legislature to prescribe additional duties, nor the provisions of the statutes found in Article V of Chapter 74, R. S. Missouri, 1939, authorizes the State Board of Equalization to reconsider its valuation of a class of property in a county, except by way of approving or disapproving the recommendation of the State Tax Commission, as is provided in Article IV, Chapter 74, Revised Statutes of Missouri, 1939.

CONCLUSION.

It is the conclusion that prior to final certification the State Board of Equalization may reconsider its valuation of a class of property in a county; that after certification by the State Auditor the State Board of Equalization has no power to reconsider its valuation, except by way of putting into effect the recommendation of the State Tax Commission in the matter of assessing omitted property or reassessing property improperly assessed.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ/rv

BONDS:
FUND COMMISSIONERS:
SCHOOLS:

State Board of Fund Commissioners not authorized to invest Public School Fund in United States bonds, said authority vested in State Board of Education; Fund Commissioners may invest in registered county, municipal or school district bonds of state, but not in drainage or levee district bonds.

July 11, 1941

Honorable Forrest C. Donnell
Governor and President of the
State Board of Fund Commissioners
State Capitol Building
Jefferson City, Missouri

7-21
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Dear Governor Donnell:

We are in receipt of your request for an opinion, under date of July 2nd, wherein you state as follows:

"The Board of Fund Commissioners of the State of Missouri, pursuant to an order of said Board made at a meeting held on the 26th day of June, 1941, respectfully requests your official opinion on the following questions:

- (1) Under the Constitution and Statutes of Missouri, has the Board of Fund Commissioners authority to invest the funds of the State School Fund in United States Government Securities?
- (2) Under the Constitution and Statutes of Missouri, has the Board of Fund Commissioners authority to invest the funds of the State Seminary Fund in United States Government Securities?
- (3) Under the Constitution and Statutes of Missouri, in what type of securities can the Board of Fund Commissioners legally invest the funds of: (a) State School Fund (b) State Seminary Fund?"

July 11, 1941

In reply we are enclosing copy of an opinion rendered by this department to the Honorable Forrest Smith, under date of March 28, 1936, wherein we held that the State Board of Fund Commissioners was without authority to purchase state bonds for the Public School Fund. The writer of said opinion, had the question been presented, would have concluded that said Board was also without authority to purchase United States bonds for the Public School Fund.

Said opinion cites Section 9 of Article XI of the Missouri Constitution as follows:

"No part of the public school fund of the State shall ever be invested in the stock or bonds or other obligations of any other State, or of any county, city, town or corporation; and the proceeds of the sales of any lands or other property which now belong or may hereafter belong to said school fund shall be invested in the bonds of the State of Missouri, or of the United States."

The above section was derived from a portion of Section 6 of Article IX of the Constitution of 1865, which provided that the School Fund could be invested in United States bonds only, but under the present section, the Public School Fund can be invested in either bonds of the State of Missouri or of the United States.

The enclosed opinion also refers to Section 6, Article XI of the Missouri Constitution, which details how the "Public School Fund", mentioned in Section 9, Article XI, supra, is derived.

"The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all

moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund; * * *

Thus, as pointed out in said opinion, "the moneys which are a part of the public school fund set up and described in Section 6 of Article XI may only be invested in bonds of the State of Missouri or of the United States."

Section 10871, R. S. Mo. 1939, is substantially a reenactment of Section 6 of Article XI of the Constitution of Missouri except that it provides that the Public School Fund is to be invested under the direction of the State Board of Education, and provides that same may be in "state certificates of indebtedness" in addition to the bonds of the United States and bonds of the State of Missouri.

There is no mention of investment in "state certificates of indebtedness" in Section 6 of Article XI, supra. We find same referred to in Section 8044, R. S. Mo. 1889, but not in the revision of the Revised Statutes of Missouri, 1879, Section 7095. The duty to invest the Public School Fund was first imposed upon the State Board of Education by the Legislature in 1870 (Laws of Missouri, 1870, Section 74,

page 154), and same was to be only in bonds of the United States in conformance with Section 6, Article IX of the Constitution of 1865. In 1874 (Laws of Missouri, 1874, Section 82, page 166) this was broadened to include bonds of the State of Missouri.

Section 10874, R. S. Mo. 1939, is more specific in its terms with respect to the investment of the money belonging to the capital of the Public School Fund and provides in part that:

"Whenever there shall be in the treasury or elsewhere, subject to the order of the treasurer, any money belonging to the capital of the public school funds, the state auditor shall make reports thereof to the state board of education, who shall direct the investment of the same in bonds of the United States, bonds of the state of Missouri, or state certificates of indebtedness. * * * "

This section also goes back to the year 1870 (Laws of Missouri, 1870, Section 77, page 155) requiring the State Auditor to make reports to the State Board of Education of moneys belonging to the capital of the Public School Fund, and directing the Board to invest same in United States bonds. This was broadened in 1874 (Laws of Missouri, 1874, Section 84, page 166) to include bonds of the State of Missouri, and again the first mention of state certificates of indebtedness is found in Section 8047, R. S. Mo. 1889.

It seems perfectly clear, by these foregoing sections, that since the year 1870 the State Board of Education has had authority to invest the Public School Fund in United States bonds.

As we previously pointed out, there had been no constitutional authority for the investment of state certificates of indebtedness. However, at the general election held November 4, 1902, the following constitutional provision was adopted (Section 26, Article X, Missouri Constitution):

"All certificates of indebtedness of the State to the 'public school fund'

and to the 'seminary fund' are hereby confirmed as sacred obligations of the State to said funds, and they shall be renewed as they mature for such period of time and at such rate of interest as may be provided for by law. The General Assembly shall have the power to provide by law for the issuing certificates to the public school fund and seminary fund as the money belonging to said funds accumulates in the State treasury: Provided, that after the outstanding bonded indebtedness has been extinguished, all money accumulating in the State treasury for above named purposes shall be invested in registered county, municipal or school district bonds of this State of not less than par value. Whenever the State bonded debt is extinguished or a sum sufficient therefor has been received, there shall be levied and collected, in lieu of the ten cents on the one hundred dollars valuation now provided for by the statutes, an annual tax not to exceed three cents on the one hundred dollars valuation, to pay the accruing interest on all the certificates of indebtedness, the proceeds of which tax shall be paid into the State treasury and appropriated and paid out for the specific purposes herein mentioned."

Whether the above constitutional provision was enacted among other things to give some validity to state certificates of indebtedness, we can only surmise. In our previous opinion it was pointed out that "At the time of that election the bonded indebtedness of the State of Missouri was practically extinguished, and, therefore, the provisions of Section 9 of Article XI of the Constitution would prevent the investment of the public school fund and the seminary fund in anything other than bonds of the United States." Investments being thus limited, it was undoubtedly the intent of the voters to broaden same to include investment in registered county, municipal or school district bonds of the state.

Pursuant to Section 26 of Article X, supra, the Legislature in 1909 (Laws of Missouri, 1909, Section 57, page 896) enacted Section 10883, R. S. Mo. 1939 (formerly Section 9724, R. S. Mo. 1929) authorizing the State Board of Fund Commissioners to invest the money in the Public School Fund and in the Seminary Fund in registered county, municipal and school district bonds of this state. The section provides as follows:

"The state board of fund commissioners shall invest all money belonging to the 'public school fund' and to the 'seminary fund' that has accumulated or may hereafter accumulate in the state treasury, in registered county, municipal or school district bonds of this state, or in their discretion in the approved registered bonds of any drainage or levee district in this state, at not less than par value, and shall at all times keep said fund so invested as far as possible. Whenever said board shall contract with the holder of any such bonds for the purchase thereof, the bonds shall be delivered to the state treasurer and a certificate of that fact filed with said board, and thereupon a requisition shall be made by the board of fund commissioners upon the state auditor for a warrant upon the state treasurer, payable out of the fund for which the investment is to be made, in favor of the holder of such bonds, for the purchase price agreed upon between him and said board. The board of fund commissioners shall enter in full upon its records a description of all bonds purchased by it, the particular fund out of which the bonds were purchased, the person from whom the said bonds were bought, the price paid therefor and the date of the transaction, and shall also require

the state treasurer to give a receipt for said bonds, which shall be filed with the state auditor."

The present section differs from the original enactment in that it contains a provision for the purchase of registered bonds of any drainage or levee district in this state. This amendment was made by the Legislature in 1911 (Laws of Missouri, 1911, page 415).

The same Legislature that in 1909 enacted Section 10883, supra, authorizing the State Board of Fund Commissioners to invest the school funds in registered county, municipal and school district bonds of this state, also reenacted Section 10874 (Laws of Missouri, 1909, Section 76, page 801) placing the investment of the bonds of the State of Missouri, the bonds of the United States and state certificates of indebtedness in the State Board of Education. This is a clear indication of the Legislature's intent to retain in the State Board of Education the investment of school funds in bonds of the United States, bonds of the State of Missouri, and state certificates of indebtedness.

Section 10884, R. S. Mo. 1939, provides as follows:

"The treasurer shall be the custodian of the certificates of indebtedness of the state to the 'public school fund' and of the certificates of indebtedness of the state to the 'seminary fund,' and of all renewals thereof, and of all registered county, municipal or school district bonds of this state in which the 'public school fund' or the 'seminary fund' shall be invested, and also of all money belonging to either of said funds, and no money shall be paid out of said funds by the state treasurer except upon warrants drawn by the state auditor, in accordance with requisitions made by the board of fund commissioners, as hereinbefore provided."

The above section, at first blush, seems to indicate that no moneys may be paid out of any of the school funds without requisitions made by the Board of Fund Commissioners. However, the words "hereinbefore provided" clearly refer to school funds authorized by Section 10883, supra, to be invested by the State Board of Fund Commissioners in "registered county, municipal or school district bonds of this state."

It is true that Section 13081, R. S. Mo. 1939 (formerly Section 11464, R. S. Mo. 1929) would permit the Governor, Treasurer and Auditor to invest the Public School Fund and the Seminary Fund in bonds issued pursuant to authority of the first three subsections of Section 44 of Article IV of the Constitution. However, said investment would not be by the State Board of Fund Commissioners since said section does not name all the members of said Board, and it furthermore would be authority only as to certain specific state bonds.

We find no authority given the State Board of Fund Commissioners to invest the State School Fund or the Seminary Fund in United States Government securities.

The above constitutional and statutory provisions may appear to be in conflict, but a thorough and careful consideration of same will reveal that same are in perfect harmony.

There is a well known rule of statutory construction that where different sections of the law deal with features of the same general subject matter, they must be construed together and harmonized, if possible. *Johnson v. Kruckemeyer*, 224 Mo. App. 351, 29 S. W. (2d) 730.

The sections hereinabove dealt with are readily harmonized. The State Board of Education has the authority to invest the Public School Fund in state certificates of indebtedness, State of Missouri bonds and bonds of the United States. The State Board of Fund Commissioners has the authority to invest the Public School Funds in registered county, municipal or school district bonds of this state.

It has been suggested to us orally that the State Board of Fund Commissioners has in the past purchased bonds of the United States, and that great weight should

be given the construction of a statute by those charged with the duty of enforcing it. Said rule is well recognized in the case of *State ex rel. Hanlon v. City of Maplewood*, 231 Mo. App. 739, 99 S. W. (2d) 139. Our Supreme Court has declared, however, that same is not the rule where the executive construction is plainly wrong. *Williams v. Williams*, 325 Mo. 963, 30 S. W. (2d) 69.

We are of the view that the construction placed upon Section 10883, *supra*, by prior members of the State Board of Fund Commissioners, as giving them authority to purchase United States Government bonds, was plainly wrong, and, for that reason, we cannot give any great weight to such executive construction. We surmise again that if the Board of Fund Commissioners did purchase United States Liberty Bonds in 1918, it was laudable as a gesture of patriotism, but unauthorized under our law.

Our previous opinion did not pass on the constitutionality of that portion of Section 10883, R. S. Mo. 1939, which permits the State Board of Fund Commissioners to invest money belonging to the Public School Fund and the Seminary Fund "in the approved registered bonds of any drainage or levee district in this state." Since the question is raised, however, as to what type of securities may be purchased by the Board of Fund Commissioners out of the Public School Fund under our Constitution and statutes, it is necessary that we consider the constitutionality of the portion of said statute hereinabove quoted.

Harris on Municipal Bonds defines the term "municipal bonds" thus:

"By the term 'municipal bonds' is meant evidences of indebtedness, issued by cities, incorporated towns, counties, townships, school districts, and other public corporate bodies, negotiable in form, payable at a designated future time, bearing interest payable annually or semi-annually, and usually having coupons attached evidencing the several installments of interest."

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Said definition is adopted by the Court in the case of Muskingum County Commissioners v. State, 85 N. E. (Ohio) 562, 1. c. 566, and a similar definition is to be found in the case of City of Stanford v. Town of Stanford, 141 Atl. (Conn.) 891, 1. c. 896. It is to be noticed, however, that the question of whether "municipal bonds" included drainage and levee district bonds was not a matter of issue in the above case.

Drainage and levee districts being public corporate bodies (Deekroeger v. Jones, 151 S. W. (2d) (Mo.) 691, 1. c. 693), it would appear that bonds issued by said districts would be municipal bonds.

Evidently the Legislature in 1911 did not consider the term "municipal" as including drainage and levee districts. Otherwise, obviously there would have been no need for amending the section.

While, for some purposes, the issuance of bonds by drainage and levee districts might be considered as municipal bonds, we do not believe that the word "municipal," as used in the Constitution, was intended to be used in its broader significance. If same be true, it would have been unnecessary to distinctly specify "county" and "school district" since, under the above definitions, these terms also come within the meaning of "municipal."

By specifically enumerating in the Constitution the type of bonds that money could be invested in, it is obvious that other types of bonds were intended to be excluded. This conclusion is sustained by the well known rule of statutory construction "expressio unis est exclusio alterius," which means that the expression of one thing is the exclusion of another. (State ex rel. Kansas City Power and Light Company v. Smith, 342 Mo. 75, 111 S. W. (2d) 513) Although this is a statutory rule, it is equally applicable to construction of provisions in a Constitution since the established rules of construction applicable to statutes apply also to the construction of Constitutions. (State ex rel. Buchanan County v. Imel, 242 Mo. 293, 146 S. W. 783.)

The legislative amendment authorizing the investment of public school moneys in drainage and levee district bonds is clearly beyond the scope of the constitutional authorization and, consequently, invalid.

In the case of State v. Smith, 81 S. W. (2d) 613, 1. c. 614, the Supreme Court of Missouri said:

"It is elementary that the statute could not authorize an expenditure out of the proceeds of the bond issue not sanctioned by the constitutional amendment itself. In other words, the purposes for which the statute directs expenditures can be no broader than the restrictions placed thereon by the constitutional amendment."

Having determined the investments that may be made by the respective boards, the question arises as to which board is to have priority in investing the school funds of the state.

Again, we refer to Section 26 of Article X, which provides in part as follows:

" * * * provided, that after the outstanding bonded indebtedness has been extinguished, all money accumulating in the state treasury for above named purposes shall be invested in registered county, municipal or school district bonds of this state of not less than par value."

Here we have a specific limitation as to when the school funds may be invested by the State Board of Fund Commissioners, viz., "after the outstanding bonded indebtedness has been extinguished." Thus, we find not only a limitation as to the kind of bonds the State

July 11, 1941

Board of Fund Commissioners may invest the school funds in, but also a limitation that before the funds may be invested by the Commissioners, the bonded indebtedness of the state must first have been shown to be extinguished. The State Board of Education clearly has the preference as long as there is an outstanding bonded indebtedness.

CONCLUSION

It is therefore the opinion of this department that under the Constitution and statutes of this state, the authority to invest the money in the State School Fund and State Seminary Fund in United States Government securities is in the State Board of Education and not in the State Board of Fund Commissioners.

It is our further opinion that when the bonded indebtedness of the state has been extinguished, the State Board of Fund Commissioners can legally invest the moneys designated in Section 26, Article X, of the Missouri Constitution in registered county, municipal or school district bonds of this state. The use of said moneys, however, for investment in approved registered bonds of any drainage or levee district in this state is prohibited.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

MW:VC

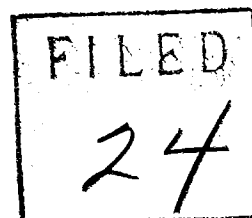
GOVERNOR:

Has 30 days after final adjournment of General Assembly to act upon legislation presented him after final adjournment.

July 18, 1941

7-18

Honorable Forrest C. Donnell
Governor of Missouri
State Capitol Building
Jefferson City, Missouri



Dear Governor:

We have your request for an opinion based upon the following facts:

"The 61st General Assembly adjourned finally on July 12, 1941. Within 10 days prior to its adjournment several bills passed by that Legislature were presented to the Governor for his action. Since its adjournment several bills have also been presented to the Governor. It is understood that by virtue of Section 12 of Article V of the Constitution the Chief Executive has 30 days after such final adjournment to act upon legislation presented to him within 10 days before such adjournment. However, the question arises as to the time allowed on enactments presented after adjournment."

Section 12, Article V of the Missouri Constitution prescribes the governor's duties with respect to legislation presented to him:

"The Governor shall consider all bills and joint resolutions, which, having been passed by both houses of the General Assembly, shall be presented to him. He shall, within ten days after the same shall have been presented to him, return to the house in which they respectively originated, all such bills and joint resolutions, with his approval indorsed thereon, or accompanied by his objections: Provided, That if the General Assembly shall finally ad-

journal within ten days after such presentation, the Governor may, within thirty days thereafter, return such bills and resolutions to the office of the Secretary of State, with his approval or reasons for disapproval."

By virtue of the above section the governor has thirty days after final adjournment of the General Assembly to approve or disapprove legislation presented to him within ten days before such adjournment. The question presented, however, is as to the amount of time allowed the governor to pass on legislation presented to him after final adjournment of the Legislature.

Section 40, Article IV of the Missouri Constitution prescribes what action is to be taken provided the governor fails to perform the duty imposed on him by Section 12, Article V, supra:

"Whenever the Governor shall fail to perform his duty, as prescribed in section 12, article V of this Constitution, in relation to any bill presented to him for his approval, the General Assembly may, by joint resolution, reciting the fact of such failure and the bill at length, direct the Secretary of State to enroll the same as an authentic act, in the archives of the State, and such enrollment shall have the same effect as an approval by the Governor: Provided, That such joint resolution shall not be submitted to the Governor for his approval."

It is clear that Section 40, Article IV of the Missouri Constitution, supra, has no application to the facts presented for the obvious reason that the Legislature has finally adjourned.

We find no constitutional or statutory provisions prescribing the time allowed the governor to pass upon legislation presented to him after final adjournment of the Legislature. Absent such provisions, we must look to the language of the constitutional provisions dealing

July 18, 1941

with the same subject matter in order to determine whether we can discover the intent and purpose of the framers of the Constitution. *Graves v. Purcell*, 337 Mo. 574, 85 S. W. (2d) 543.

By failing to declare the time allowed the governor for passing upon legislation presented to him after final adjournment, the constitutional framers evidently contemplated by Section 12, Article V, *supra*, that all legislation would be presented to the governor at least before final adjournment of the Legislature. Inasmuch, however, as they set a maximum of thirty days for all legislative matters presented to him within the closing days of the Legislature, we believe it was their intention that thirty days be the maximum time allotted to the governor under any circumstances for consideration of legislation.

We are, therefore, of the opinion that the governor has thirty days after final adjournment of the General Assembly to act upon legislation presented him after said final adjournment.

Respectfully submitted

APPROVED:

MAX WASSERMAN
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

MW:DA

APPROPRIATIONS: Section 5 of House Bill No. 556 valid.

2-6-12
July 22, 1941
7-73

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

FILED

24

Dear Governor:

In reply to your request for an opinion with reference to Section 5 of House Bill No. 556, appropriating certain moneys for the payment of aid to dependent children, we respectfully submit the following.

Section 5 of House Bill No. 556 appropriates Four Million Five Hundred Thousand Dollars (\$4,500,000.00) out of the state treasury, chargeable to the general revenue funds, for the payment of aid to dependent children. The Federal Government matches the state funds dollar for dollar, and Section 5 of House Bill No. 556 purports to appropriate the Federal Funds for that purpose. Section 5 is as follows:

"Section 5. Federal aid to dependent children. The State Social Security Commission shall have power to receive and disburse all allotments and contributions of funds from the Federal Government for the benefit of citizens and residents in the State of Missouri entitled under the provisions of the Aid to Dependent Children to participate in the distribution of any funds under rules and regulations as may be prescribed by Federal authority for the allotment and distribution of such funds, and should said Commission be required by any law of this State, or new rule or regulations of the Federal authorities to deposit any such funds in the State Treasury, then, and in that event all such funds so de-

posited in the State Treasury shall stand, and are hereby appropriated to said Commission to be used and applied in the manner and for the purposes set forth in an Act passed by the 59th General Assembly--1937 Laws of Missouri, pages 467 to 478 inclusive, and as amended by the Acts of the 60th General Assembly, and in accordance with the rules and regulations of the Federal authority under which funds may be deposited in the State Treasury. The State Auditor is hereby authorized and directed to pay such funds on order of the State Commission for the purposes for which the same were deposited, and for said purposes, there is hereby deposited in the State Treasury, coming from any allotments or contribution from the Federal Government during the period beginning January 1, 1941 and ending December 31, 1942 the sum of Three Million Five Hundred Thousand Dollars (\$3,500,000.00), or so much thereof as may be necessary for said purposes; the amounts hereby appropriated being in addition to the appropriations made by Section 1 of this Act."

Article IV, Section 43 of the Missouri Constitution provides:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. * * * * *"
(Underscoring ours.)

Article X, Section 19 of the Missouri Constitution provides:

"* * * every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. * * * *"

(Underscoring ours.)

The first of the above constitutional provisions clearly requires that all money received by the State, from any source whatsoever, shall go into the treasury. These Federal funds are certainly money received by the State and the constitutional provisions should set at rest the doubt which the Legislature seemed to have entertained concerning where this money should be deposited. Section 5, supra, however, requires it be deposited in the state treasury if the same should be required by any law of this State. Article IV, Section 43, makes that requirement, and therefore, all funds received by the Federal Government for the participation in the State's aid for dependent children program must be deposited in the treasury.

The second constitutional provision, above cited, requires that an appropriation act "shall distinctly specify the sum appropriated and the object to which it is to be applied." It will be noted that Section 5, supra, bears an opening statement as follows: "Federal aid to dependent children." This section title was placed there by the Legislature.

This section purports to authorize the State Social Security Commission to receive and disburse all funds received by the state from the Federal Government for the benefit of the citizens and residents in this state for the purpose of providing aid to dependent children. Said section then, in line 12, provides "all such funds * * * * shall stand and are appropriated to said Commission." We think that the title of Section 5, when considered in connection with reference made in line 6 of "aid to dependent children" sufficiently specifies the object of this appropriation, in that it is for the purpose of making payments to dependent children as provided under the laws of this state. This purpose can be gleaned without resorting to the further specifications by reference to another law in lines 15, 16 and 17 of Section 5, and therefore, that

portion of Article X, Section 19 of the Constitution, wherein it is provided that "it shall not be sufficient to refer to any other law to fix (the) * * * object" of an appropriation, does not cause Section 5 to be wholly void. It is a familiar rule that even though a portion of an act is void, if enough remain to carry out the purpose of the Legislature, then that remainder will be held valid. Leaving out the reference to other laws to ascertain the object of the appropriation, there remains a sufficient specification of the object to which the appropriation is to be applied and we therefore think Section 5 is sufficient in this respect.

As pointed out above, Article X, Section 19 of the Constitution requires that an appropriation act should distinctly specify the sum appropriated, and it will be noted that Section 5 contains no reference to any definite sum of money except the figure of \$3,500,000.00, provided in line 28 thereof. However, that figure is not set out as an amount appropriated. That figure is used in connection with authorizing and directing the State Auditor to pay over certain funds to the State Social Security Commission, and purports to deposit \$3,500,000.00 in the state treasury in order that the auditor can make such payments.

Section 9414, R. S. Missouri, 1939, provides the authority and duty of the auditor with respect to drawing his warrant in payment of allotments made to dependent children. Section 9415 provides that the special fund in the treasury for payment of this aid shall "consist of moneys appropriated by the state, and such moneys as may be received from the Federal Government * * *." Since there is no limitation fixed, this latter provision must necessarily include all Federal funds. These statutes cannot be changed by an appropriation act and therefore that portion of Section 5 purporting to authorize the auditor to do certain things and only directing the deposit of \$3,500,000.00 of Federal funds in the treasury for the purpose of aid to dependent children is void. *State ex rel. v. Smith*, 75 S. W. (2d) 828 (Mo. Sup.)

This view, then, leaves the appropriation act specifying the object of the appropriation and appropriating "all such funds," that is, the funds received from the Federal Government. This question remains as to whether or not the language "all such funds" is in compliance with the Constitution, which requires the act "to distinctly specify the sum appropriated."

In State ex rel. Toomey v. State Board of Examiners, 238 P. 316 (Mont.) the appropriation was for a "sufficient amount to meet the principal and interest payments" on certain bonds. It was contended that such was not a "specific" appropriation as was required by the Constitution. The court ruled against this, saying 1. c. 321:

"The rule that 'that is certain which can be made certain' applies to appropriations."

In 59 C. J., p. 250, Section 389, we find this, with reference to the need of an appropriation to state a specific amount:

"Even where a specification of the amount is required, it is not essential or vital to an appropriation that it should be for an amount definitely ascertained prior to the appropriation; and an appropriation, the amount of which will be made certain by a mere mathematical computation, if the provisions of the act are carried into effect, sufficiently complies with this requirement. Where such a requirement is recognized, if there is no constitutional provision requiring the fixing of a maximum in dollars and cents, an appropriation may be valid when its amount is to be ascertained in the future from the collection of the revenue; but it cannot be when it is to be ascertained only by the requisitions which may be made by the recipients."

The amount of money received from the Federal Government is certain, because it is capable of being ascertained. That is all that is required.

Hon. Forrest C. Donnell

(6)

July 22, 1941

Section 5 is therefore sufficient by only considering that portion of the section down to the word "Commission" in line 14. All the rest may be disregarded as contrary to the Constitution and statutes.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

W. O. JACKSON
Assistant Attorney General

APPROVED:

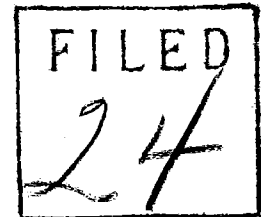
ROY McKITTRICK
Attorney General

LLB/rv
WOJ/rv

TAXATION: Mode of apportioning for taxation the valuation of the distributable property of telephone, telegraph, electric power and light companies and electric transmission lines.

July 30, 1941

State Board of Equalization
Jefferson City, Missouri



Gentlemen:

This is in reply to your request of recent date wherein you request an opinion from this department on the mode of apportioning for taxation the valuation of the distributable property of telephone, telegraph, electric power and light companies and electric transmission lines among the counties, municipal townships, cities or incorporated towns in this state.

On this question we find that Section 11295 R. S. Mo. 1939 provides in substance that all property, real and personal, of telephone and telegraph companies shall be subject to taxation, and that the taxes levied thereon shall be collected in the manner provided by law for the taxation of railroad companies, and the county courts and county and state boards of equalization are required to perform the same duties and are given the same powers in assessing, equalizing and adjusting taxes on the property of telephone and telegraph companies as said courts and boards of equalization have in assessing, equalizing and adjusting taxes on railroad property, and the president or chief officer of such telephone and telegraph companies is required to render statements of the property of such companies in like manner as the president or chief officer of railroads is required to render for the taxation of railroad property.

Section 11253, R. S. Mo. 1939, requires the Board of Equalization of Missouri to apportion the aggregate value of all distributable property of railroads to each county, municipal township, city, or incorporated town in which said railroad is located, "according to the number of miles of such road completed in such county,

July 30, 1941

municipal township, city, or incorporated town shall bear to the whole length of such road in this state."

After the State Tax Commission has placed a valuation on the distributable property of a railroad company, subject to the approval of the State Board of Equalization, it then becomes the duty of the State Board of Equalization to apportion this valuation among the various political subdivisions of the state, in accordance with Section 11253. In making this apportionment of the total value, the State Board of Equalization has no discretion. It must follow the rule. It performs a ministerial duty as expressed by the court in *State ex rel. Union Electric Light and Power Company vs. Baker, et al*, 293 S. W. 1.c. 404:

"In *State ex rel. vs. Railroads*, 215 Mo. 479, local citation 494, 114 S. W. 956, we referred to this as the 'mileage rule' for assessment of railroad property by the state board of equalization. It was first promulgated as Section 8 of the original act, passed in 1871, entitled, 'An Act to provide for a uniform system of assessing and collecting taxes on Railroads' (Laws of Missouri 1871, pp 56-59), and is clearly part and parcel of 'this scheme for the assessment of distributable railroad property,' so called in *State ex rel. vs. Stone*, 119 Mo. 668, local citation 677, 25 S. W. 211, 213. The apportionment here contemplated was not in the nature of a power conferred upon the board of equalization, but rather a ministerial clerical duty required of that body before the record of its proceedings should be filed with the State Auditor. It seemingly marked the completion of the assessment. 3 Cooley on Taxation (4th Ed.) Sec. 1171." (Under-scoring ours)

The rule for the apportioning the valuation of the

distributable property of railroads has been stated in State ex rel Murphy vs. Stone 119 Mo. 668. In that case Jackson County sought by a mandamus action to compel the State Board of Equalization to add the length of the side tracks to the main lines of the railroads for the purpose of apportionment of taxes under what is now Section 11235 R. S. Mo. 1939. The question of apportionment was squarely before the court in that proceeding. The petition of the plaintiff was dismissed and the court in decisive language held that for the purpose of apportionment only the main line of the railroad, consisting of all the elements of distributable railroad property between terminal points, is to be considered. This case which was decided in 1893 settled the method and defined the rule for the apportionment of taxes on railroad property and it has been followed by the State Board of Equalization to this time.

The Attorney General, in his brief in that case, at l.c. 669, stated:

" * * There can be but one way to arrive at the length of a railroad. It is the distance between the terminal points * * There may be a double track one-half of the way and innumerable side tracks or sidings, but the length of the road remains the same, whether there is one track or a dozen. That these double tracks or sidings serve to enhance the value of the road cannot be doubted but they do not increase its length. * * * "

At l.c. 676, the court, in speaking of the manner of assessing railroads and apportioning the value to the several municipalities, said:

"After the board has ascertained the value of this thing made up of tracks, depots, water tanks, turntables, rolling stock, etc., known in common parlance, and denominated in this

statute as a railroad, they are to apportion that value among the several municipalities of the state, in which any part of this whole thing is located by a certain standard in length - a mile - a mile of what? There can be but one answer. A mile of that thing called a railroad, made up of the items mentioned, in Section 7718, the value of which as a whole is to be apportioned for such purpose. The number of miles of the railroad in this state, or within any municipal subdivisions thereof is not to be measured by the length of its main tracks or of its main track and side tracks combined, any more than it is to be measured by the combined length of its main tracks, side tracks, rolling stock and the other property which go to make up the road value to be apportioned. It is the length of the whole thing, a railroad, which these several constituents, in place, go to make up that is to be measured. Its length between its terminal points in this state, and its length in the several municipal subdivisions of the state is to be ascertained, and its value apportioned to each of said municipalities in the ratio that its length in the municipality bears to its whole length in the state. This is the obvious meaning of the statute, and the construction that has been placed upon it by the board of equalization from the beginning."

This rule is also stated in Vol. 61, C. J., page 696:

"Where the amount of a tax against a railroad company is to be based upon the number of miles of its road, or on the average valuation per mile, the mileage of 'second tracks,' or additional tracks, more than one, laid in the same right-of-way, is not to be taken into account but only the mileage of the line as a whole."

The rule of the Stone case, supra, was reaffirmed by the Supreme Court en banc in the recent case of State ex rel. St. Louis County vs. Evans, et al, 139 S. W. (2nd) 1.c. 970, decided in 1940, in which the court said:

"In determining the length of the road for the purpose of apportionment, only the length of its main track is to be considered. State ex rel. Murphy et al vs. Stone et al, 119 Mo. 668, 25 S. W. 211."

In the case of State ex rel Union Electric Light and Power Company vs. Baker, 293 Southwestern 399, the relator sought by certiorari proceedings to quash the record and judgment of the State Tax Commission and the State Board of Equalization, alleging that the assessment of the company under the then recently amended Section 11295 which added electric power and light companies to those utilities whose taxation came under the provisions of the railroad law, was unauthorized, unjust, illegal and without authority and beyond the jurisdiction of the State Board. The relator further alleged that the taxation system was impracticable and unworkable and set forth no specific mode of taxing the various classes of property that go to make up an electric power and light company. The court denied the writ of certiorari, holding that there were common characteristics of railroad and power and light property in traversing the various political subdivisions of the State and that the assessment of power and light companies could be applied to the railroad law by analogy. While the court in its opinion used the expression "wire mileage basis," the question of method or rule of allocation was not an issue.

It is apparent from the pleadings and opinion in the Baker case that the parties did not have in mind the distinction between a wire mileage theory and the pole line theory. At 1.c. 400, in the Baker case, supra, the relator's

petition is quoted as follows:

" * * respondents apportioned said assessed valuation to several counties aforesaid and to the City of St. Louis according to the wire mileage basis, apportioning to each such subdivision such part of the entire valuation as the number of miles of transmission line within such subdivision bore to the entire mileage of the relator's system within the State of Missouri."

In the Baker case, the court found common characteristics and analogous properties as between electric power and light companies and railroad companies as expressed at l.c. 403:

"The business of generating and distributing light, heat and power by transmission lines and their necessary appurtenances has the same inherent characteristic of traversing counties, municipal townships, and incorporated cities, towns, and villages, and when the statute requires its president or other chief officer to render a statement of its property "in like manner" as a railroad president or chief officer, we think he should be guided by this same distinction which we have heretofore recognized as controlling in the return of railroad property." (Underscoring ours)

In this case, in discussing the common characteristics and analogous properties of electric power and light companies and railroad companies, the court found that miles of right-of-way with poles, cross arms and wires were comparative to miles of railroad consisting of right-of-way tracks, ties, etc. As expressed at l.c. 402:

"Now, it may be that relator, an electric power and light company engaged in the business of generating and distributing light, heat, and power as a public utility, operates no locomotive engines with freight or passenger cars, and neither owns, uses, nor leases any roads, double or side tracks, depots, water tanks or turntables, engines or cars of any kind, but the very nature of its business requires it to own, use, or lease many miles of right-of-way with poles, cross arms, wires and other facilities and equipment located thereon and thereover"

From the foregoing it will be seen that the rule for apportioning the valuation of the distributable property of railroad companies among the various political subdivisions of the State has been definitely established by the Stone case and has been and is now the settled law in this State. That rule is that only the main line of a road between terminal points can be considered for apportionment regardless of the number of tracks that may be along the right-of-way of such line.

Section 11295 R. S. Mo. 1939 provides that telephone, telegraph and electric power and light companies are to be taxed in the same manner, and the boards of equalization have the same powers and the companies are required to report in the same manner as are railroad companies. In the Baker case, supra, the court found that miles of right-of-way with poles, cross arms, wires and other facilities and equipment located thereon have the same common characteristics as miles of railroad and a logical inference and conclusion is that miles of wire can no more be used for allocation purposes than miles of single track with respect to railroads, but that miles of transmission and distribution

July 30, 1941

lines complete with all the accessories and appurtenances thereto which includes all of the distributable property of such lines between certain termini are the unit for apportioning values of telegraph, telephone and electric power and light companies among the various political subdivisions of the State.

CONCLUSION

From the foregoing, it is the opinion of this department that the state taxing authorities in apportioning the valuation of wire utility companies for taxation should apportion the valuation of the distributable property of such companies among the counties, municipal townships, cities or incorporated towns in the state on a trench or pole mile basis, viz., the value of the distributable property of said company shall be apportioned to each county, municipal township, city or incorporated town in the proportion that the total trench or pole miles of the company in such county, township, city or town bear to the total trench or pole miles of the company in the state without regard to the number of lines, wires, cables, trenches or poles which may lie adjacent or parallel within such county, township, city or town.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

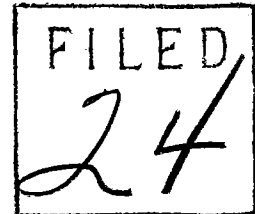
APPROVED:

VANE C. THURLO
(Acting) Attorney General
TWB:RT

GOVERNOR: Time within which to approve or disapprove bills in his hands at the time of adjournment of the Sixty-first General Assembly.

August 4, 1941

Honorable Forrest C. Donnell
Governor of the State of Missouri
State Capitol Building
Jefferson City, Missouri



Dear Governor Donnell:

The Senate Journal of the proceedings had on July 12, 1941, the one hundred thirty-third legislative day of the Senate, reflects the following:

"Senator Searcy moved that, under the terms of House Concurrent Resolution No. 27, the hour of adjournment having arrived, the 61st General Assembly do now adjourn sine die.

"Which motion prevailed.

"The President declared the Senate of the 61st General Assembly, convened in regular session on January 8, 1941, adjourned sine die.

Frank G. Harris,
President of Senate

R. E. L. Marrs,
Secretary of Senate."

The House Journal of the proceedings had on July 12, 1941, the one hundred thirty-seventh legislative day of the House, reflects the following:

"Mr. Lauf moved, that under the terms of the resolution, the hour of adjournment having arrived, the Sixty-First General Assembly do now adjourn sine die.

"Which motion prevailed.

"The Speaker declared the House of Representatives of the Sixty-First General Assembly, convened in regular session on January 8, 1941, adjourned sine die.

Morris E. Osburn,
Speaker of the House

Joseph A. Bauer,
Chief Clerk."

It is clear from the above recitals, which are conclusive (Cox v. Mignery & Co., 126 Mo. App., 1. c. 679; 59 C. J., Sec. 198, p. 634), that the Sixty-first General Assembly adjourned sine die, July 12, 1941.

On this day you advise that certain bills were in your hands for approval or disapproval, said bills having been placed with you within the ten days preceding adjournment and which had not been approved or disapproved on July 12, 1941. In view of this, you ask when the time will expire within which you may approve or disapprove any such bills.

Article V, Section 12, of the Constitution of 1875 is as follows:

"The Governor shall consider all bills and joint resolutions, which, having been passed by both houses of the General Assembly, shall be presented to him. He shall, within ten days after the same shall have been presented

to him, return to the house in which they respectively originated, all such bills and joint resolutions, with his approval indorsed thereon, or accompanied by his objections: Provided, That if the General Assembly shall finally adjourn within ten days after such presentation, the Governor may, within thirty days thereafter, return such bills and resolutions to the office of the Secretary of State, with his approval or reasons for disapproval."

Only that part of the section following the proviso is pertinent to this question, and our research does not disclose any case in this state which has dealt with the above provision. However, the Constitution of 1865 contained a similar provision. Article V, Section 9, of the Constitution of 1865 is as follows:

"Every bill which shall have been passed by both houses of the general assembly before it becomes a law, shall be presented to the governor for his approbation. If he approve, he shall sign it; if not, he shall return it, with his objections, to the house in which it shall have originated; and the house shall cause the objections to be entered at large on its journals, and shall proceed to reconsider the bill. After such reconsideration, if a majority of all members elected to that house shall agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall, in like manner, be reconsidered; and if approved by a majority of all the members elected to that house, it shall become a law. In all such cases the votes of both houses shall be taken by yeas and nays, and the names of the members voting for and against the bill

shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within ten days, (Sundays excepted) after it shall have been presented to him, the same shall become a law, in like manner as if the governor had signed it, unless the general assembly, by its adjournment shall prevent its return; in which case it shall not become a law, unless the governor, after such adjournment, and within ten days after the bill was presented to him (Sundays excepted), shall sign and deposit the same in the office of the secretary of state; in which case it shall become a law, in like manner as if it had been signed by him during the session of the general assembly."

Beaudean v. The City of Cape Girardeau, 71 Mo. 392, was an action for damages resulting from the obstruction of a highway by the City of Cape Girardeau. That action to some extent depended on whether the obstruction was within or without the city limits of Cape Girardeau. The proof on this question consisted of the Journal of the Senate at the 1875 Session showing the date upon which the Governor vetoed a certain bill, changing the corporate limits of said city, which bill would have excluded from the corporate limits the highway in question. It was contended by the defendant city that said bill was not returned by the Governor within the ten days allowed, and that, therefore, it became a law without his signature. In commenting on the validity of this veto, the court stated, l. c. 397:

"The bill was presented to the governor on the 5th day of February, 1875, and was returned with his veto on the 17th day of February. Not counting the two Sundays which intervened between these periods, they being expressly excepted by the constitution from being counted,

August 4, 1941

and applying the rule of excluding the first and including the last day, as laid down in the cases of Reynolds v. M., K. & T. R. R. Co., 64 Mo. 70, and Hahn v. Dierkes, 37 Mo. 574, the veto of the governor was returned within the time required by the constitution, * *

* * * *

This case deals with that part of the 1865 Constitution that is comparable to the second sentence of Article V, Section 12, of the 1875 Constitution, but we see no reason why the method laid down as to the computation of time under that provision should not apply to the provision in question here. The rule laid down in Beaudean v. The City of Cape Girardeau is that followed in numerous other jurisdictions as may be seen by reference to the annotation appearing in 54 A. L. R. 339, et seq.

Applying the above rule, we see that by excluding July 12th, the thirty day period allowed expires at the end of the day of August 11, 1941. It is therefore our opinion that on bills passed by the Sixty-first General Assembly, which were in the hands of the Governor and not yet approved or disapproved on the date of adjournment, the time in which the Governor may act with reference to giving his approval or disapproval expires August 11, 1941, at midnight.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:VC

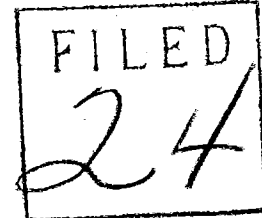
GOVERNOR:

In the absence of a protest as contemplated by Art. V, Sec. 37, presumption is that bill was not amended on passage so as to change its original purpose, which presumption is conclusive; the amendment made by Senate to H. B. 431, does not change its original purpose.

August 11, 1941

8/11

Hon. Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor:

You have presented the following for our opinion:

"House Bill 431 originated in the House of Representatives as an Act to define certain terms as used in Section 5720, R. S. Mo. 1939. After its passage by the House of Representatives, the Bill was amended in the Senate to include the exemption from regulation by the Public Service Commission of interstate busses and trucks operating in the state only in 'border' cities.

"There is here attached the House Bill as introduced and passed by the House of Representatives, the Senate amendments thereto, the truly agreed to and finally passed Bill, and a copy of the protest of Representative H. P. Lauf that was attached to the Bill when presented to the Governor. Apparently Senator Donnelly protested the Bill in the Senate. See page 1384 of the Senate Journal for Thursday, July 10, 1941.

"The question arises as to whether the Bill, as finally passed, violates Section 25 of Article IV of the Constitution."

Section 25 of Article IV of the Constitution is as follows:

"No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose."

Section 37 of Article IV pertains to the signing of bills by the presiding officer of each house and provides, in part, as follows:

"* * * If in either house any member shall object that any substitution, omission or insertion has occurred, so that the bill proposed to be signed is not the same in substance and form as when considered and passed by the house, or that any particular clause of this article of the Constitution has been violated in its passage, such objection shall be passed upon by the house, and if sustained, the presiding officer shall withhold his signature; but if such objection shall not be sustained, then any five members may embody the same, over their signatures, in a written protest, under oath, against the signing of the bill. Said protest, when offered in the house, shall be noted upon the journal, and the original shall be annexed to the bill to be considered by the Governor in connection therewith."

In State ex rel McCaffery vs. Mason, 155 Mo. 486, 1. c. 495, the above constitutional provisions were under consideration. The court commenting on the effect of a protest noted on the journal, said:

"As no objection or protest is "noted upon the journal" of either branch of the General Assembly, the only natural and reasonable conclusion for us to reach is that benign conclusion of the law itself, sanctioned by the wisdom of ages, which presumes in favor of right, and not in favor of wrong. Similar presumptions are daily indulged in respecting judicial proceedings, and no reason occurs why a similar liberality of inference should not obtain in regard to legislative proceedings in many instances. Viewing the subject in this light, we regard it as unimportant that the journals of the respective houses do not disclose that strict observance of formality which should properly attend the passage of a bill through its various legislative stages, as, for instance, that the presiding officer suspended all other business and declared that such bill would then be read, and that, if no objections were made, he would sign the same, to the end that it might become a law, nor that the bill was immediately sent to the other house. Counsel for respondent fails to observe that section 37, while requiring these things to be done, and these forms to be observed, nowhere requires that they be noted on the journal; the only facts requisite to be noted there, as specified in that section, being that of the signing of the bill and of any protest that may be offered." (State ex rel. v. Mead, 71 Mo. loc. cit. 271, 272.)

"Mead's case received the unanimous approval of the members of this court, and was approvingly followed in State ex rel. v. Field, 119 Mo. 593.

"Under these rulings it must be held that in the absence of a protest, as already indicated, pointing out in what particulars the Constitution has been violated during the passage of the bill, that it will be presumed the Legislature was not remiss in its duty in that regard, although the journals may have failed affirmatively to record the performance of such duty. This presumption forecloses any investigation as to what occurred during the progress of the bill either as to the occurrence of any substitution, omission or insertion, while on its passage, unless it be the failure to conform to some mandatory requirement of the Constitution like that pointed out in Mead's case, when discussing the initial clause of Section 37, supra, which fails to make entry on the journal of the recital of obedience to such mandatory requirement. But, it is obvious that these constitutional provisions which were designed to set forth the formulae incident to the passage of a bill, are wholly separate and apart from the considerations which go to the constitutionality of a bill, regardless of the strictest conformity to constitutional requirements which may have marked its course from its embryonic stage down to its final passage and approval."

Senate Journal, page 1384, reflects the purported protest of Senator Donnelly and shows that the same was offered in connection with raising a point of order at the time the amendment complained of was offered in the Senate. The President overruled the point of order as "not well taken" which ruling was not appealed from.

House Journal, page 1851, shows the purported protest of Representative Lauf and reflects that it was offered at the time it was moved that the House concur in the Senate amendment. No action of any kind was taken, by the Speaker of the House or by the House, on the purported protest of Mr. Lauf.

As above stated, Section 37 of Article IV relates wholly to the signing of bills by the presiding officers of either house and that portion quoted pertains to what a member of either house may do by way of raising an objection to the signing of a bill.

House Journal, page 1891, reflects the signing of House Bill No. 431 in the House and does not show that any protest was made by any member to the signing thereof. Senate Journal, page 1527, reflects the signing of House Bill No. 431, by the President of the Senate, and does not show that any member of the Senate registered any protest to the signing of said bill. On the contrary, each of these journal entries expressly state "no objections being made", the bill is read and signed.

From the above it therefore appears that the purported objections filed by Senator Donnelly and Representative Lauf are not in fact the objections contemplated being made by the constitution and, therefore, should not have been annexed to the bill and sent to the Governor for his consideration.

Further, in the Mason case, supra, the court lays down the rule that in the absence of a protest pointing out in what particulars the constitution has been violated, in the passage of a bill, it is presumed that no violations took place and that that presumption forecloses any investigation as to what occurred during the progress of the bill on passage. The court in that case was speaking of the protest contemplated by Section 37 of Article IV which is a protest at the time the bill is taken up to be signed by the presiding officer of either house.

However, we will assume that a valid protest was entered in proper form in the Journal of Proceedings of the proper House of the Sixty-First General Assembly.

We have examined numerous authorities on this subject, which may be found generally in the Digest under "Statutes" under Division No. 16. The authorities are best summarized in *Moeller v. Board of Wayne County Supervisors*, 272 N. W. 886, 279 Mich. 505, being a case by the Supreme Court of Michigan. The pertinent part of the opinion is as follows, l. c. 889:

"It is next contended by defendants that the act was so amended during its passage through the Legislature as to contravene that part of section 22 of article 5 of the Constitution which provides that 'no bill shall be altered or amended on its passage through either house so as to change its original purpose.' In determining whether or not a bill has been 'altered or changed,' we are not limited by the title or contents of the bill as introduced into either branch of the Legislature, but to the title of the act which is being amended.

"In *Westgate v. Township of Adrian*, 161 Mich. 333, 126 N. W. 422, an original act (Act No. 145, Pub. Acts 1887) was amended by Act No. 71, Pub. Acts 1903. The objection was made that the amendment was unconstitutional, 'for the reason that the title to the act is not broad enough to cover the matter embraced in the amendment, and is therefore in violation of Section 20, art. 4 of the Constitution of 1850.' The court said:

"This court has frequently held that, if the amendment might have been incorporated in the act under its original title, this

section is not violated. * * * It will be noted that the original title contains the word "regulate." Under that term, very broad powers may be exercised. It means both government and restriction. * * *

"Any provisions germane to the subject expressed in the title may properly be included in the act, or added thereto by amendment. It is sufficient if the title fairly expresses the subject, or is sufficiently comprehensive to include the several provisions relating to or connected with that subject. Cooley, Const. Lim (6th Ed.) 172; People ex rel. Drake v. Mahaney, 13 Mich. 481; People v. Kelly, 99 Mich. 82, 57 N. W. 1090; Soukup v. Van Dyke, 109 Mich. 679, 67 N. W. 911; Fortin v. Electric Co., 154 Mich. 316, 117 N. W. 741. We think the title in question is clearly broad enough to comprehend the subject-matter of the amendment."

"See, also Lundstrom v. Township of Ellsworth, 196 Mich. 502, 162 N. W. 990; Detroit International Bridge Co. v. American Seed Co., 249 Mich. 289, 228 N. W. 791; People v. Martin, 235 Mich. 206, 209 N. W. 87.

"The original act of 1851 was entitled as follows:

"An Act to define the powers and duties of the boards of supervisors of the several counties, and to confer upon them certain local, administrative and legislative powers." Pub. Acts 1851, No. 156.

"It is contended by defendant that the act as introduced into the house merely contained provisions relative to the pay of supervisors and did not contain the provisions which deal with the duties of supervisors concerning contracts and provisions relative to holding other public offices. We are of the opinion that the provisions as are now found in the act are comprehended and included in the title of the original act. The amended act relates to the powers and duties of boards of supervisors and is not invalid upon that ground."

Following this opinion, we may refer to the Public Service Commission Act, as passed by the Fifty-Sixth General Assembly in Laws of Missouri, 1931, at page 304. The title to this Act is as follows:

"AN ACT to repeal article 8 of chapter 33 of the Revised Statutes of Missouri, 1929, entitled 'Transportation of persons by motor vehicles,' and to enact in lieu thereof a new article containing seventeen sections, numbered 5264 to 5280, both inclusive, and to be known as article 8 of chapter 33, providing for the supervision, regulation and licensing of transportation of persons and property for hire over the public highways of the state of Missouri by motor vehicles; conferring jurisdiction upon the public service commission to license, regulate and supervise such transportation; providing for the enforcement of the provisions of this act and for the punishment for violation thereof."

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Since the above title provides for the "supervision, regulation and licensing of transportation of persons and property * * * over the public highways of the state of Missouri by motor vehicles," that portion of House Bill 431 which is objected to by the protests of Senator Donnelly and Representative Lauf, which exempts certain motor vehicles from the operation of said laws, is unquestionably contained in said title.

That Missouri has clearly followed the above rule which incorporates the title of the original Act into the later law, is best expressed by the following quotation from *Sherrill v. Brantley*, 66 S. W. (2d) 529, 334 Mo. 497, 1. c. 502:

"It seems appropriate to note in this immediate connection, and before discussion of title is undertaken, that the title prefacing the amendatory act operated to substitute Section 16 thereof in the original act so as to constitute it a part of the latter and in lieu of former Section 16 repealed. The title of the original act became thereby the title of the later law and the constitutionality of the substituted section is to be determined upon whether it comes properly within the purview of this title. (State ex rel. v. Gideon, 277 Mo. 356, 210 S. W. 358.)"

The general rule that any subject not inconsistent with the title may be placed in the Bill by amendment is well stated in *Harris v. State ex rel. Williams*, 151 So. 858, 1. c. 860, where, under Section 5, a long summary of authorities is given.

In *State ex rel. v. Field*, 119 Mo. 593, the Supreme Court en banc had under consideration the question of an amendment to the title of a bill made by the Senate after its passage in the House. In sustaining this amendment, the court stated, 1. c. 608:

"As to the proposition that, because its title was amended in the senate, it became a senate bill and must begin anew its course as an original bill, we think it is opposed to all parliamentary usage and could and would only tend to unnecessary and burdensome delays in legislation, prevent salutary amendments, and would in no sense aid in preventing the mischiefs contemplated by the makers of the constitution."

In view of the above authorities, we conclude that the amendment made by the Senate of the Sixty-First General Assembly to House Bill No. 431, in which the term "motor vehicles" was re-defined to exclude vehicles operating in interstate commerce wholly within border towns and suburban territory, is included in the purposes set out in the title to Article VIII, Chapter 35, Revised Statutes of Missouri, 1939, as found in Laws of Missouri, 1931, at page 304.

CONCLUSION.

It is therefore our opinion that no protest as contemplated by the Constitution was made to the signing, by the Speaker of the House and the President of the Senate, of House Bill 431, and that, absent such protest, calling attention to the fact that said bill was amended during its passage so as to change its original purpose, a presumption exists that such was not done, and that that presumption forecloses any investigation as to what occurred with reference to amending the bill in its passage.

Hon. Forrest C. Donnell

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However, assuming a valid protest was made to the signing of said bill it is the further opinion of this department that the Senate Amendment to House Bill 431, does not violate the provisions of Section 25 of Article IV of the Constitution of Missouri because when the title to said House Bill 431 is read, together with the title to Article 8, Chapter 35, Revised Statutes of Missouri for the year 1939, as found in Laws of Missouri, 1931, at page 304, it will be seen that the original purpose of said House Bill 431 has not been changed and does not therefore violate the above designated constitutional provision.

Respectfully submitted,

ROBERT L. HYDER

LAWRENCE L. BRADLEY

TYRE W. BURTON
Assistant Attorneys-General

APPROVED:

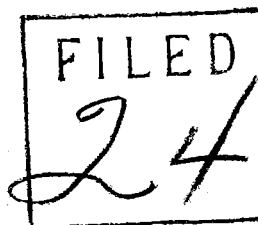
VANE C. THURLO
(Acting) Attorney-General.

GOVERNOR: Time when the Governor shall approve or reject a bill which has been presented to him by the General Assembly.

August 11, 1941.

Honorable Forrest C. Donnell
Governor of the State of Missouri
State Capitol Building
Jefferson City, Missouri

Dear Governor Donnell:



This is in response to your request for an official opinion from this department on the following question:

"A bill is passed by the General Assembly and delivered to the Governor on June 5, 1941. By virtue of Section 12, Article V, the Governor is required to approve or reject a bill within ten days following its presentation to him. The question is: On what day does the ten day period end?"

If the statutory rules of construction are applicable here, then the following rule would be used in determining the time when a bill should be approved or rejected by the Governor. Section 655 R. S. Mo. 1939:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: * * * fourth, the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded: * * *"

This question will be answered when it is determined whether or not the same rules of construction shall apply to constitutional provisions as applies to statutory provisions in this state. We think our courts have answered this in the affirmative. In Vol. 12, C. J., page 699, Section 42, the rule is stated as follows:

"In the main, the general principles governing the construction of statutes apply also to the construction of constitutions. It must not be forgotten, however, that the function of a constitution is to establish the framework and general principles of government; and merely technical rules of construction are not to be applied so as to defeat the principles of the government or the objects of its establishment."

We further think that the statement of the court in Hahn et al. vs. Dierkes et al., 37 Mo. 574 is pertinent to this question because it shows that the provisions of Section 655, heretofore referred to, were brought down from the common law:

"As to how time shall be computed, is a matter which has been litigated ever since the existence of the common law. In the computation of the period of time, the contest has generally been, which day shall be included and which excluded; but it would be difficult to extract any uniform rule from the jarring and conflicting decisions on the question. Our statute, to put all doubt at rest and insure certainty, has declared, that the time within which an act is to be done, shall be computed by excluding the first day and including the last-- R. C. 1855, p. 1027, Section 22. This is a statutory exposition of the common law, and necessarily leads to the exclusion of the first day. * * *"

Our Supreme Court in State ex rel. v. Imel, 242 Mo. 293, announced this rule and followed it in that case, wherein the court stated:

"* * * 'The established rules of construction applicable to statutes also apply to the construction of Constitutions.' (8 Cyc. 729.)"

The Circuit Court of Appeals of the 8th Circuit for the District of Minnesota, in the case of Badger v. Hoidale, 88 Fed. (2d) 208, 211, in discussing the rules on constitutional construction, said:

"* * * Rules applicable to the construction of a statute are equally applicable to the construction of a Constitution. * * *"

Beaudean v. The City of Cape Girardeau, 71 Mo. 392, was an action for damages resulting from the obstruction of a highway by the City of Cape Girardeau. That action to some extent depended on whether the obstruction was within or without the city limits of Cape Girardeau. The proof on this question consisted of the Journal of the Senate at the 1875 Session showing the date upon which the Governor vetoed a certain bill, changing the corporate limits of said city, which bill would have excluded from the corporate limits the highway in question. It was contended by the defendant city that said bill was not returned by the Governor within the ten days allowed, and that, therefore, it became a law without his signature. In commenting on the validity of this veto, the court stated, l. c. 397:

"The bill was presented to the governor on the 5th day of February, 1875, and was returned with his veto on the 17th day of February. Not counting the two Sundays which intervened between these periods, they being expressly excepted by the constitution from being counted,

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and applying the rule of excluding the first and including the last day, as laid down in the cases of Reynolds v. M., K. & T. R. R. Co., 64 Mo. 70, and Hahn v. Dierkes, 37 Mo. 574, the veto of the governor was returned within the time required by the constitution, * *

* * * * "

This case deals with that part of the 1865 Constitution that is comparable to the second sentence of Article V, Section 12, of the 1875 Constitution, but we see no reason why the method laid down as to the computation of time under that provision should not apply to the provision in question here. The rule laid down in Beauden v. The City of Cape Girardeau is that followed in numerous other jurisdictions as may be seen by reference to the annotation appearing in 54 A. L. R. 339, et seq.

CONCLUSION

We are, therefore, of the opinion that the statutory rules of construction for fixing time, particularly subdivision 4 of Section 655 R. S. Mo. 1939, would be the rule under which the time for approving or rejecting a bill under Section 12, Article 5 would be fixed, that is, you would exclude the first day and also the last day if the last day for approving the bill falls on Sunday. That being the case, June 16th would be the date that the ten day period would expire for the Governor to approve or reject the bill which had been delivered to him on June 5, 1941.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

TYRE W. BURTON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

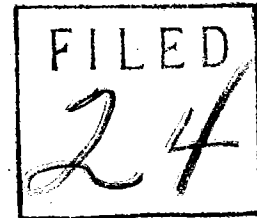
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GOVERNOR: If last day on which Governor may act on legislation falls on Sunday, the following Monday is to be considered as last day.

August 11, 1941

8-11

Honorable Forrest C. Donnell
Governor
State of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

You have requested our opinion on the following matter:

"A bill is passed by the General Assembly and presented to the Governor for his action; the last day of the time set for his action, as provided by Section 12 of Article V of the Constitution, falls upon Sunday. Is Sunday to be included in determining the period within which he must take action?"

The case of *Beaudean v. The City of Cape Girardeau*, 71 Mo. 392, was one involving computation of the time within which the Governor could act on legislation presented to him by the General Assembly. In that case the court stated, l. c. 397:

"Not counting the two Sundays which intervened between these periods, they being expressly excepted by the constitution from being counted, and applying the rule of excluding the first and including the last day, as laid down in the cases of *Reynolds v.*

M. K. & T. R. R. Co., 64 Mo. 70,
and Hahn v. Dierkes, 37 Mo. 574,
the veto of the governor was re-
turned within the time required by
the constitution, * * *

It will be noted that in the Beauden case the court cites as authority for applying the rule of excluding the first day and including the last, two cases. The first of those cases involved the time within which the defendant had to move to set aside a default judgment and the court held that it was to be computed by excluding the first day and including the last. The second of those cases involved the computation of time within which notice of a mechanics lien was to be given and the court applied the rule of excluding the first day and counting the last. In each of these cases the court expressly relies for its authority upon the terms of what is now Section 655, R. S. Mo. 1939, which provides:

"* * * the time within which an act
is to be done shall be computed by
excluding the first day and includ-
ing the last, if the last day be
Sunday it shall be excluded; * * *

It is therefore to be seen that in the Beauden Case the court considered that the terms of the above statute were controlling in computing the time within which the Governor must return a bill presented to him by the General Assembly, at least to the extent of excluding the first day and including the last day. It will be noted that the statutory rule further provides that if the last day falls on Sunday it also shall be excluded, which, in effect, would make the following Monday the last day.

We find no Missouri case which has undertaken to apply this rule to the question presented here. However, in the case of In Re Senate Resolution Relating to Senate Bill No. 56, 21 Pac. 475 (Colo.), that precise question was presented. The Constitution of Colorado allowed the Governor

ten days within which to return a bill after it had been presented to him by the General Assembly. On Senate Bill No. 56 in the Colorado case, the tenth day fell on a Sunday. The court in ruling whether or not the Governor had until the following Monday to approve the bill, said:

"When the law requires an act to be performed within a given number of days from a day mentioned, or from the performance of a certain act, the rule of computation adopted by this court, and sanctioned by the weight of authority on the subject, is to include one of the two days mentioned, and to exclude the other. In accordance with this rule, the bill having been presented to the governor for his signature on March 17th, it would be returnable to the senate on March 27th, unless by the happening of some event, or the intervention of some other principle of construction, the return should be postponed to a subsequent day.

"In certain commercial transactions, as in the presenting for payment or acceptance, or in the protesting and giving notice of dishonor, of bills of exchange, promissory notes, and bank-checks, if the day upon which the act is to be performed falls upon Sunday, by statute and by usage the instruments mature, and the act must be performed, on the day previous. But a different rule obtains as to administrative and judicial acts. If the return-day of a writ, the completion of service by publication, or the day upon which a court is to sit, whether by adjournment thereto or otherwise, falls upon Sunday, the return-day or court-day is continued, and

becomes the Monday succeeding, unless the same should be a legal holiday. In the latter class of cases there can be no curtailment of the full period of time allowed by law. The intervention, however, of Sunday, or of a legal holiday, between the first and last days of the prescribed period, is not to be noticed, unless said day or days is or are expressly excepted by the law itself. The constitutional provision in question does not exclude Sunday from the 10 days allowed the governor for consideration and return of bills presented to him by the general assembly. If, therefore, Sunday had intervened between the days of presentation and the return-day of this bill, it would have legally constituted one of the 10 days. It happened, however, that the return-day, March 27th, fell upon Sunday, and, the general assembly not being in session upon that day, no opportunity was afforded to the governor to communicate with that body. Having, by virtue of the constitutional provision, 10 days within which to return the bill, it follows from reason and principle that the return-day was continued by operation of law until Monday, March 28th."

The similarity between the Colorado case and the question you present is striking in that the Colorado Constitution, like that of Missouri, did not except intervening Sundays and the court there gave application to the rule usually used in connection with ordinary business transactions, though it does not appear that such was based on a statute. Thus it appears that the courts in Missouri have held Section 655, supra, applicable in construing Section 12 of Article V

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of the Constitution in so far as it applies to the computation of time by excluding the first day and including the last. We see no reason why the same statute does not control in excluding the last day if it falls on Sunday. The Colorado case, above cited, gives judicial sanction to that rule.

Conclusion

It is, therefore, our opinion that in determining the time within which the Governor may act on legislation presented to him by the General Assembly, that if the last day set for his action falls on Sunday it is to be excluded and the following Monday considered as the last day.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

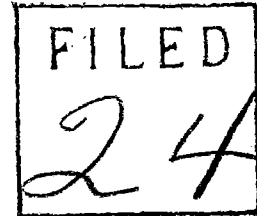
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STATUTES: Constitutionality of exemption provisions of
House Bill No. 431.

August 11, 1941

8-11

Honorable Forrest C. Donnell
Governor of the State of Missouri
State Capitol Building
Jefferson City, Missouri



Dear Governor:

Following our telephone conversation pertaining to House Bill No. 431 by which Section 5720, R. S. Mo. 1939, was amended, I make the following observation pertaining to the proviso clause of sub-section b of this Act, which included in lines 23 to 28 thereof, reading as follows:

"And provided further, this article shall not be so construed as to apply to motor vehicles operated between the State of Missouri and an adjoining state when the operations of such motor vehicles within the state of Missouri are limited exclusively to a municipality and its suburban territory as herein defined."

From the discussion pertaining to this proviso clause, the question has been raised whether or not the lawmakers are authorized to exempt from the provisions of the act the motor vehicles which come under this clause. In the case of Frost vs. Corporation Commission of Oklahoma, 278 U. S. 515, 73 L. Ed. 483, 1. c. 488, the court, in speaking of a classification made by the lawmakers in the application of a tax burden, said:

"Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. * * * "

Further discussing this question, the court said:

"* * * Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. * * * The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. * * *"

While this proviso clause might seem to apply inequally on motor vehicle operators, yet under the rule announced in the Frost case, unless this classification is palpably unreasonable and arbitrary, the lawmakers are authorized to make this classification. The first part of subdivision b of said Section 5720 was before the Supreme Court in State ex rel. Ferguson - Wellston Bus Co. v. Public Service Commission of State of Missouri, 58 S. W. (2d) 312, 313, the court, in speaking of this classification and the purpose thereof, said:

"* * * This proviso was made for the evident purpose of leaving to the municipalities the power to regulate the transportation systems serving the people of such cities and the surrounding territory. * * *"

Apparently, the lawmakers, by this amendment and proviso clause, intended to extend the same exemptions to the motor vehicles operated between the State of Missouri and an adjoining state as it does in the first part of subdivision b of said section.

We, therefore, do not think that this is an unreasonable and arbitrary classification, and that the lawmakers

Hon. Forrest C. Donnell

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are authorized under the constitution to do the same.

Yours very truly,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TWB:LB

TAXATION: Taxpayer who converts assets into tax
TAX EXEMPTION: exempt securities with fraudulent intent
FRAUDULENT EVASION: to evade taxes does not relieve himself
of the liability to pay the taxes.

August 19, 1941

State Tax Commission
of Missouri
Jefferson City, Missouri



Gentlemen:

This is in reply to yours of recent date wherein you submit the following request for an official opinion from this department:

"We are writing you for an opinion concerning the proper assessment of the estate of Sarah L. G. Wilson as of June 1, 1940. The executors take the position that \$31,000 of United States Treasury Bills should not be included, for the reason that they are tax exempt securities. The taxing authorities take the position that same are not legally deductible for the reason that said securities were purchased without an order of the Probate Court of St. Louis County."

Since the answer to this request depends upon the facts in the case, we will set out the facts which were included with your file in this assessment, which are as follows:

"Petitioners are executors of the Estate of Sarah L. G. Wilson, deceased, under appointment of the Probate Court of the County of St. Louis, Missouri. Decedent died on

November 19th, 1938, a resident of St. Louis County, Mo., Clayton School District.

"Petitioners filed a list with the Assessor of St. Louis County, showing that they had in their possession on June 1st, 1940, taxable personal property, consisting solely of one \$5.00 gold piece, having a value of \$5.00.

"That on May 24th, 1940 petitioners purchased from Mississippi Valley Trust Company \$31,000.00 par-value United States Treasury Bills, due June 5th, 1940, being bills Nos. 444164, 322198, 322199 and 322203, at par and one-sixteenth, for a total cost of \$31,019.37, which amount was paid to the Mississippi Valley Trust Company by check drawn by the executors on said date and which cleared on May 25th, 1940.

"That these U. S. Treasury Bills were delivered by the Mississippi Valley Trust Co. to the petitioners on May 24th, 1940 and were immediately placed by them in their safe deposit box in the Mississippi Valley Trust Co. in St. Louis, Mo.

"That these U. S. Treasury Bills were from May 24th, 1940 until June 5th, 1940 at all times in their possession and in said safe deposit box.

"That these bills matured on June 5th, 1940 and at that time were deposited for collection with the Mississippi Valley Trust Company and on the same date were credited to the petitioner's account.

"That at the close of business on May 31, 1940 the petitioners had in their

bank account in the Mississippi Valley Trust Company an overdraft of \$66.42 and that no deposit was made in said account on June 1st, 1940.

"That the petitioners had no other bank account and that the petitioners had no money on hand on June 1st, 1940, except the \$5.00 gold piece above mentioned.

"That on June 1st, 1940 in addition to the \$5.00 gold piece above-mentioned, petitioners had in their possession the following property:

"\$210,000.00 par-value Federal Land Bank Bonds

"\$115,000.00 par-value Territory of Hawaii Bonds

"\$50,000.00 par-value Phoenix Joint Stock Land Bank Bonds

"\$83,000.00 par-value Puerto Rico Bonds

"\$52,000.00 par-value Certificates of Deposit, representing St. Louis Joint Stock Land Bank Bonds.

"\$7,500.00 Face-value U.S. Savings Bonds.

"\$200,000.00 par-value U.S. Treasury Notes.

"That the purchase by the petitioners on May 24th, 1940 of \$31,000.00 U.S. Treasury Bills was made by them because they knew that if the same amount in cash were on hand on June 1st, 1940, such cash would be taxable for general personal property taxes.

"That the purchase of the U.S. Treasury bills on May 24th, 1940 was made by the petitioners without an order of the Probate Court of St. Louis County."

The tax under consideration here is one which the St. Louis County taxing authorities contend should be imposed upon the properties of an estate which is in the process of administration in that county.

The agreed statement of facts show that among other assets on hand in the estate there was on May 24th, 1940, cash in the sum of \$31,000.00. On that date the executors of this estate, without an order of the Probate Court, invested this sum in U.S. Treasury bills due June 5th, 1940. These Treasury bills are tax exempt securities. They were held by the executors of the estate until June 5th, 1940, when they were paid off by the government and the proceeds from same were credited to the account of the estate. It will be noted that the executors, by the agreed statement of facts, stated that they made the purchase of these U.S. Treasury bills because "they knew that if the same amount in cash were on hand June 1st, 1940, such cash would be taxable for general personal property taxes."

The settlement of the executors showing the above transaction was approved by the Probate Court of said County on June 29th, 1940. The record does not indicate whether or not this was a final settlement.

There is no controversy as to the procedure by the taxpayers or the taxing authorities. The Tax Commission sustained the taxpayer who petitioned for reassessment and the matter is now before the State Board of Equalization.

On the question of the authority of the executors to invest estate funds, we find that Section 104, R. S. Mo. 1939, provides as follows:

"If, on the return of the inventory, or at any other time, it shall appear to the satisfaction of the court that there is a surplus of money in the

hands of the executor or administrator that will not shortly be required for the expenses of administration, or payment of debts, it shall have discretionary power to order him to lend out the money on such terms and for such time as may be deemed best."

Section 116, R. S. Mo. 1939, also provides as follows:

"If any executor or administrator apply to the court, or to the judge thereof in vacation, for permission to sell the personal estate of the deceased, or any part thereof, at private sale, for reinvestment or other purposes, and the court, or the judge thereof in vacation, be satisfied that such sale would not be prejudicial to the persons interested in the estate, the court, or the judge thereof in vacation, may order such sale and prescribe the terms thereof."

By Section 104, supra, it will be seen that the Probate Court has a superintending control over the acts of the executors in handling an estate. By Section 116, supra, it will be seen that the executor or administrator must obtain permission to sell or reinvest the personal estate on which he is administering.

In the case of State ex rel. Lefholz v. McCracken, 95 S.W. (2d) 1239, 1. c. 1244, in speaking of the relationship existing between executors and the Probate Court, the court said:

"* * * The probate court has superintending control over the acts and doings of all persons handling estates in the court. * * *"

The record here reveals that the executors purchased these government securities without an order of the Probate Court. However, this record does show that the settlement following this transaction was filed and approved by the court.

In the case of Orchard v. Store Co., 225 Mo. 414, one of the questions before the court was the validity of the sale of personal property made by an administrator. The administrator had asked for permission to make a sale of personal property. He obtained the order of court, but sold the property at private sale. The court held that the sale was void and, in discussing the question, said at l. c. 460:

"* * * But there is no statute directing that an administrator make a report to the court of a sale of personal property at private sale, and none empowering the probate court to approve or confirm such a sale, and hence the court's approval and confirmation of this sale added nothing to its validity, and did not cure any inefficiency in the order authorizing it."

By the same reasoning, if the executors in this estate purchased the government securities and sold them without an order of the Probate Court such transaction is void and cannot be validated by the court order approving the settlement. The Orchard case, supra, is authority for the rule that if an executor or administrator fails to follow the provisions of the statute in the handling of personal property of an estate his acts are unlawful and void and the approval by the court of such acts does not validate them.

In the case of Koelling v. Citizens Bank of Warrenton, 237 S. W. 176, l. c. 180, the St. Louis Court of Appeals in speaking of sales made by executors without an order of court, said:

"Sales of property at private sale held without complying with the terms of the statute are void, and a sale held without complying with the mandatory provisions of the statute conveys nothing to the purchaser. Orchard v. Store Co., supra.

"And the fact that the will in the present case gave to the executrix power to sell the property of the estate after having bequeathed and devised it to her could not dispense with the necessity of complying with the statutes when it came to making sales of the personal property belonging to the estate. A testator has no power to dispense with the necessity of complying with the method of sale prescribed by the law, which was enacted for the benefit of the creditors, the distributees and legatees."

The agreed statement of facts do not state whether or not the will in the Wilson estate authorized the executors to make purchases and sell personal property, but whether it did or not it seems that by the rule announced in the Koelling case, supra, the executors were required to obtain an order of court in the handling of the personal property of the estate.

CONCLUSION.

Since the executors in the Wilson estate, supra, without an order of the Probate Court, attempted to invest in government securities estate funds, and such transactions are

void, and since the approval of the Probate Court of the settlement showing such investments cannot breathe life into this transaction, it is the opinion of this department that the funds of said estate were not legally invested in government securities on June 1, 1940.

On the question of whether or not the transaction, if legal, relieves the estate of liability for taxes we make the following observations:

If the investment was made for the purpose of, and with a fraudulent intent to evade payment of taxes, then the estate is liable for the taxes on the \$31,000 invested in government securities which it held on June 1st, 1940.

In the case of *Stifel v. Brown*, 24 Mo. App. 102, the court held void a conveyance made to avoid payment of a special tax. The record in that case showed that the avowed purpose of the conveyance was to defeat the collection of an assessment of a special tax against a tract of land in the city against which special assessments were levied.

In Vol. 61 C. J. p. 173, Sec. 130, the rule on contracts and agreements evading taxes is stated as follows:

"Transactions are not invalid merely because undertaken for the purpose of escaping taxation, and where the transaction is bona fide and free from fraud, one may escape taxation by converting taxable property into forms which are not taxable, or by transferring his property to another, or by incorporation to avoid future taxes. But liability for taxes cannot be evaded by a transaction constituting a colorable subterfuge, as where there is a temporary change or concealment of property made just before the time for assessment and with the intention of restoring the property to its original form immediately thereafter, as in the case of a colorable conversion of taxable money or property into nontaxable securities, * * *."

In the case of Highland Park Independent School District v. Republic Ins. Co., 80 S. W. (2d) 1053, the Civil Court of Appeals of the State of Texas in considering a question similar to the one here, said at 1, c. 1061:

"Another item in the assessor's corrected rendition is in the sum of \$402,671.87. This item, appellee claims, was an investment in tax free government bonds, made prior to the taxing date of January 1, 1933, and therefore is not subject to taxation, and hence not rendered as taxable property. On the other hand, appellant claims that this amount of money was converted into such bonds, on December 28, 1932, for the fraudulent purpose of escaping the payment of taxes on such sum, with no intention of subsequently keeping and owning said bonds, and was again converted into money, on or about January 28, 1933. If such bonds were purchased with the sole intent of evading taxation, then such an action would be fraudulent and render said sum subject to taxes. This rendition by the assessor made an issue of fact, to be first determined from evidence by the board of equalization. The fact that the bonds were bought about three days before the taxing date of January 1, 1933, and sold within a month after such taxing date, is such a circumstance as calls for an explanation from appellee as to its intent in making the purchase."

The parties, by the statement of facts, agreed that the purchase was made to avoid payment of taxes. Under the ruling in the Highland Park Independent School District case, supra, the taxpayer must explain his intent in making the purchase.

In the case of Tazewell Electric Light & Power Co. v. Strother, 84 F. (2d) 327, the Circuit Court of Appeals for the Fourth Circuit, in stating the rule of construction by the court of transactions similar to the one in your request, said at l. c. 329:

"The Street Railway Company, that originally owned the stock of the plaintiff, first transferred the stock to its stockholders; the property of the plaintiff was then transferred to the trustee. These two transactions were evidently and admittedly made for the purpose of escaping taxation, and while it is true that such transactions are not vitiated for tax purposes because of that fact, (Chisholm v. Commissioner (C.C.A.) 79 F. (2d) 14, 101 A.L.R. 200, and cases there cited), they are, nevertheless, in our opinion, to be construed jealously against the taxpayer. The Supreme Court has spoken disparagingly of such efforts. Shotwell v. Moore, 129 U.S. 590, 9 S. Ct. 362, L. Ed. 827."

In Shotwell v. Moore, 129 U.S. 590, 32 Law Ed. 827, the Supreme Court had before it a question very similar in facts to your request. In order that this case may be fully understood by you we quote as follows at l. c. 828 and 829:

"It is conclusively shown by the finding of facts that prior to the day to which the assessment of property for taxation relates by the Laws of Ohio, Shotwell had in his bank, on general deposit, subject to his order at the Town of Cadiz, in the County of Harrison, in the previous years of 1881, 1882, 1883, 1884,

and 1885, the sums of money on which the taxes here in controversy were assessed; but it is claimed by him that, a day or two previous to that fixed by statute, he had, in each of those years, drawn out the balance of his general deposit account on a check, and, in each case receiving the amount of it in legal-tender notes, had put them into a package, which he inclosed in an envelope, and placed with the bank as a special deposit, writing his name thereon, and requesting the bank to put it in its safe for him, which was done.

"Arguing from the proposition that the assessment for an entire year, under the Laws of Ohio, must be made on the particular day mentioned in the statute, and that these greenbacks were his property on that day, it is insisted, with great earnestness by counsel, that the amount of the package thus on special deposit on that day could not be taxed by the state authorities. To this general proposition there does not appear to be any valid objection if the thing done had been in the ordinary course of business, and the conversion of his general deposit in the bank into a private package of greenbacks, exempt from taxation, were free from illegal purpose or fraudulent motive. But since it is found as a matter of fact that the whole transaction was made for the purpose of evading taxation on the amount of his general deposit on the day it was exchanged for greenbacks, and that there was no purpose of permanently changing the amount of the deposit in the bank subject to his order, and, as such, liable to taxation, it is argued by counsel that it

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was a fraud upon the Revenue Laws of the State of Ohio.

"For all of the years mentioned the same process was gone through with, and in every instance, within a week after the assessment, the plaintiff in error took the same greenbacks which he had placed on special deposit and immediately restored them to the bank as a general deposit, subject to his order; in other words, he remanded the amount to the condition in which it would have been liable to taxation if the period of assessment were not limited to the particular day mentioned in the statute.

"It does not need the finding of the court below as a fact to show that this was an evasion, and a discreditable one, of the taxing laws of the State, if it could be made successful. It is, therefore, urged that on this ground alone--the illegal purpose for which the transactions were made in the bank--the court should hold the plaintiff in error liable to taxation for the amount thus converted. Several decisions on this subject by state courts, holding this view, are cited in the brief of counsel. They are directly in point, and relate to attempts of precisely the same character to effect a similar evasion of taxation on property otherwise liable thereto. * * * * *

" * * * * *

"And this court in *Mitchell v. Leavenworth County*, 91 U.S. 206 (23:302), denounces conduct precisely similar to that of the plaintiff in error in this case, in the following language:

"United States notes are exempt from taxation by or under state or municipal

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authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law.'

" * * * * *

"All these decisions show that the courts look upon this transaction as indefensible, and consider it an improper evasion of the duty of the citizen to pay his share of the taxes necessary to support the Government which is justly due on his property."

Since it is a question of fact for the taxing authorities to determine whether or not the purchase of the tax exempt securities was made for the fraudulent purpose of evading taxes, this department will not pass on that question. We are herewith submitting cases which are as similar in facts as we are able to find.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TWB:CP

CONSTITUTIONAL LAW:
STATE HIGHWAY PATROL:

State Highway Patrol, under Section 44a, Article IV of the Constitution of Missouri can only enforce the law as to motor vehicle laws and traffic regulations.

August 21, 1941

Honorable Forrest C. Donnell
Governor, State of Missouri
Jefferson City, Missouri



Dear Sir:

In compliance with your request for an official opinion as to the powers and duties of the State Highway Patrol, we are herein giving our opinion on this matter. The conclusion of our opinion is based primarily on--

First, Section 8358, Chapter 44, R. S. Missouri 1939;

Second, Section 8359, Chapter 44, R. S. Missouri 1939;

Third, Section 44a, Article IV of the Constitution of Missouri.

Section 8358, Chapter 44, R. S. Missouri 1939, reads as follows:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction

of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

Section 8359, R. S. Missouri 1939, Chapter 44, reads as follows:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such

violator or suspected violator wherever he may be overtaken."

Under Section 8358, supra, it is very noticeable that all of the duties placed under the State Highway Patrol were duties involving the administering of the state motor vehicle law and traffic regulations.

In the above section the Legislature specifically said:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. * * * * *

The above partial quotation of Section 8359, supra, refers not to all laws but only as to the laws set out in Section 8358, supra, which the Legislature saw fit to have the State Highway Patrolmen enforce. The purpose of Section 8359, supra, was to authorize the State Highway Patrolmen to make arrests under their duties set out in Section 8358, supra, in the same manner that other officers have been authorized in their separate territorial jurisdiction. In the case of a sheriff his duties are confined to the county. In the case of constables and other officers their duties are confined to certain territories, and so in the case of State Highway Patrolmen their duties are confined to the territory set out in Section 8358, supra, which duties are mainly upon the highways of this state.

In construing Sections 8358 and 8359, supra, to the effect that the powers of the State Highway Patrol are confined to matters set out in Section 8358, supra, the courts of this state have held that sections of the law originally part of the same act should be read together. It was so held in the case of Consolidated School District No. 4 of Greene County v. Day, 43 S. W. (2d) 428. Since Section 8358, supra, specifically sets out in detail the duties of the patrol, and since Section 8359, supra, declares that members of the patrol are to be officers of the State of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state, we are of the opinion that

this power applies to the duties set out in Section 8358, supra.

In reading other sections in Chapter 44, which is the Missouri State Highway Patrol Act, it can be seen that it was the intention of the Legislature to confine the State Highway Patrol to the enforcing of the state motor vehicle laws and traffic regulations. They enacted Section 8355, R. S. Missouri 1939, which provided a distinctive style of uniform, and also provided that vehicles used by members of the force should be distinctively lighted at night. The Legislature also in Section 8362 of the same chapter prohibited members of the patrol from having the right or power of search and seizure except the disarming of persons under arrest or about to be arrested.

House Bill No. 14 of the Sixty-first General Assembly appropriated to the State Highway Patrol \$1,495,414.00 out of the state treasury chargeable to the State Highway Department Fund. By this appropriation they are permitted to use money out of the Highway Department Fund.

House Bill No. 15 of the Sixty-first General Assembly appropriated to the State Highway Department out of the state treasury chargeable to the State Highway Department Fund certain moneys. The same House Bill appropriated to the State Highway Department out of the state treasury certain moneys chargeable to the State Road Fund. Under the appropriation there is no question but that the State Highway Patrol is using money out of the funds allotted to the State Highway Department and State Road Fund.

Chapter 44 of the Revised Statutes of Missouri 1939, in reference to the Missouri State Highway Patrol, was first enacted and appears in the Laws of Missouri 1931. Chapter 44, as it now appears in the Revised Statutes of Missouri 1939, is practically the same as was first enacted in 1931. The only changes made were to the number, their salary and as to the employment of clerks in the State Highway Patrol offices.

Section 8347 of Chapter 44 of the Revised Statutes of Missouri 1939, defines the word "commission" as used in that chapter to mean the Missouri State Highway Commission.

Section 8348 of Chapter 44 of the Revised Statutes

of Missouri 1939, provides for the appointment of a superintendent of the Missouri State Highway Patrol, sets his salary and places him under the supervision, direction and subject to the approval of the Commission.

Section 8351, Chapter 44, R. S. Missouri 1939, referring to the salaries of different members of the State Highway Patrol, specifically states "with the approval of the State Highway Commission." In view of the above sections there is no question but that the State Highway Patrol is directly under the State Highway Commission and receives its appropriation from the state road fund.

Of course, the State Highway Patrolman has been declared by Section 8359, supra, to be an officer of the State of Missouri and we have held it applies to his duties as set out in Section 8358, supra, yet he may make arrests on misdemeanors committed in his presence and may arrest one who has committed a felony either in his presence or out of his presence.

Section 8363, Chapter 44, R. S. Missouri 1939, reads as follows:

"Neither the governor, the commission, nor the superintendent shall have any power, right or authority to command, order or direct any member of the patrol to perform any duty or service not authorized by this chapter."

Under the above section the governor, the commission, the superintendent of the State Highway Patrol cannot direct any member of the patrol to perform any duty except that which is set out under Chapter 44. In the duties set out under Chapter 44, we find no reference to doing any duty except that of offenses connected with the state highways.

In the past former governors have directed the State Highway Patrol to perform duties not connected with the construction and maintenance of state highways or not connected with the enforcement of the state motor vehicle laws and traffic regulations. They have been ordered to make investigations in criminal cases not connected in any manner with the State Highway Department.

Since the duties of the State Highway Patrol only require them to enforce the laws in connection with the State Highway System as set out in Section 8358, supra, we call your attention to Section 18, Article II of the Constitution of Missouri which reads as follows:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

Section 44a, Article IV of the Constitution of Missouri was submitted by an initiative petition filed with the secretary of state according to law and was adopted at the general election held November 6, 1928, which repealed Section 44a, Article IV of the Constitution of Missouri, which was adopted November 2, 1920. This Section 44a, supra, was an exception to the general limitation of the power of the Legislature as set out in Section 44, Article IV of the Constitution of Missouri. Section 44a, Article IV of the Constitution of Missouri partially reads as follows:

"In addition to the exceptions made and created in section 44, the General Assembly shall, for the purpose of locating, establishing, acquiring, constructing, widening and improving hard-surfaced public highways in the State and in each county thereof, and of acquiring materials therefor and for the purpose of locating and constructing bridges across the rivers and waters of the State and of participating in the construction of toll-free, interstate bridges, have the power to contract or authorize to contracting of a debt or liability on behalf of the State and to issue bonds or other evidences of indebtedness therefor not exceeding in the aggregate one hundred and thirty-five millions of dollars --

* * * * *

"The said bonds and the interest that will accrue thereon shall be paid out of a fund to be provided by the levy and collection of a direct annual tax upon all taxable property in the State. All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law. * * * * *

To complete and widen or otherwise improve, and maintain the state system of primary and secondary highways as designated and laid out under existing law; to reimburse the various counties and political or civil subdivisions (including road districts) of the State for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the State as permanent parts of the state highway system to the extent of the value to the State of such roads

and bridges at the time taken over,
not exceeding in any case the amount
expended by such counties or sub-
divisions in the construction or
acquisition of such roads and bridges;
* * * * *

"After the principal and interest of
all of said bonds shall have been paid,
all state motor vehicle registration
fees, license fees or taxes, authorized
by law, on motor vehicles (except the
property tax on motor vehicles and
state license fees or taxes on motor
vehicle common carriers) and also all
state taxes on the sale or use of motor
vehicle fuels, authorized by law, less
the expense of the collection of such
registration fees and license taxes on
motor vehicles and taxes on the sale or
use of motor vehicle fuels and less also
the cost of maintaining the State High-
way Department and the State Highway Com-
mission and the cost of administering
and enforcing any state motor vehicle
law or traffic regulation, shall be and
stand appropriated without legislative
action to the State Road Fund, to be
administered and expended under the
direction and supervision of the State
Highway Commission for the purposes
and in the manner hereinbefore set
forth.

"It shall be the duty of the State
Auditor, annually, on or before the
first day of July, to determine the
rate of taxation necessary to raise
the amount of money needed for that
year to pay the principal and interest
maturing in the next succeeding year,
* * * * *

It will be noticed under Section 44a, Article IV,
supra, that additional exceptions are made and created to
the exceptions set out in Section 44, Article IV, supra.

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It specifically states that the purpose of Section 44a, supra, was for the creation and purpose of locating, establishing, acquiring, constructing, widening and improving hard-surfaced public highways in the State, and in fact the whole purpose of Section 44a was for road and bridge purposes. It was not the purpose of the voters, who adopted Section 44a, that the money paid by them in taxes on certain commodities or privileges should be used for the purpose of the prevention or prosecution of all crime. The only place in Section 44a, supra, that will authorize an appropriation for the State Highway Patrol might be inferred from the following words which appear on page 93c of the Constitution of Missouri, " * * less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation * * "

The upkeep of the State Highway System depends on many channels of taxation. One of them is that there is to be collected a direct annual tax upon all taxable property in the state for the purpose of retiring the bonds and interest set out in Section 44a, supra. It also depends upon all of the motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles and also state taxes on the sale or use of motor vehicle fuels authorized by law less the expense of the collection of the above taxes and fees. All through Section 44a, supra, the fact that money obtained from registration fees, license taxes, license fees, motor fuel taxes and other taxes was for the main purpose for the construction and maintenance of roads and bridges.

All of the taxes above set out which were framed by the drawers of the constitutional amendment and which were voted upon and passed by the people were for the purpose of collecting public revenue of a very extraordinary kind, especially for the major use of the payment and retirement of the state bonds described in amendment Section 44a. In the case of State v. Hackmann, 282 S. W. 1007, par. 6, the court, in holding that the revenue was of an extraordinary kind, said:

"The money out of which the highway

commission is to be maintained is as much public or state revenue as any money coming into the state treasury from any source. Whether it is called motor vehicle registration fees, license fees, or a tax (all of which designations are used in section 44a of article 4 of the Constitution, vide Laws 1921, 1st Ex. Sess. p. 196), or by any other name, it is a tax levied by the state upon the right of motor vehicles to use the public streets and highways of the state. It is not only levied by the state, but is collected by it, and paid directly from the motor vehicle owners into the state treasury (Laws 1921, 1st Ex. Sess. p. 104, section 28). The state, therefore, is interested in what use is made of revenue from that source. So much is it interested that the people, in amending the Constitution (section 44a of article 4, supra), declared that all such taxes received by the state, less the costs of maintaining the state highway commission, should stand appropriated without legislative action for and to the payment of the principal and interest of certain state bonds and the accumulation of a sinking fund therefor. To say, therefore, that the state is not interested, and vitally interested, in the amount to be taken from this fund for the maintenance of the highway commission is not in accord with the people's action in amending the Constitution and that of the Legislature in creating the commission.

"The term 'state revenue' was recently defined by the court in banc in State ex rel. Thompson v. Treasurer of Teachers' College, 264 S. W. loc. cit. 700, 305 Mo. 64. In that case the court said:

"By revenue, whether its meaning be measured by the general or the legal

lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money.'

"It thus appears that not only is the fund public revenue or state money, but it is public revenue of a very extraordinary kind, levied, collected, and held by the state for two specific public uses, the major use of which is the payment and retirement of state bonds."

Section 44a, supra, further provided, as above set out, that after the principal and interest on all the bonds described in Section 44a have been paid, all state motor vehicle registration fees, license fees and taxes, and also all state taxes on the sale or use of motor vehicle fuels less the expense of collection, should stand appropriated without legislative action to the state road fund under the direction and supervision of the State Highway Commission for the purpose of the construction and maintenance of roads and state highways. In making the above provision, the framers of Section 44a, Article IV of the Constitution of Missouri saw fit, for the second time, to deduct the cost of administering and enforcing any state motor vehicle or traffic regulations.

There is no question but that the purpose of Section 44a, supra, was to construct and maintain the state highways and other roads in the State of Missouri. That it was for that purpose was held in *State v. Smith*, 67 S. W. (2d) 50, 1. c. 56, where the court said:

"* * * * that the commission as created is 'vested with the powers and duties specified in this article, and also all powers necessary or proper to enable the commission, or any of its

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officers or employees, to carry out fully and effectively all of the purposes of this article.' In respect of road construction and its connected incidents, nothing is omitted. The act is a special law; a complete well-rounded harmonious whole, relating to a single homogeneous enterprise that was designed by the people and furthered by the Legislature to 'get Missouri out of the mud.' * * * * *

Section 44a, supra, only mentions criminal prosecution as to enforcement of the state motor vehicle laws and traffic regulations. The wording of the amendment is unambiguous and clearly states the purpose of the section. In the case of State v. State Highway Commission, 42 S. W. (2d) 196, par. 9, the court, in construing Section 44a, supra, said:

"We cannot tell all that was in the minds of those who drew the amendment or of the voters who voted for it. We do not say any of the things we have suggested, were. But we are controlled by what the amendment says, so far as its recitals are consistent and intelligible, and it is our duty to give effect to every part if possible. Castillo v. State Highway Commission, supra, 312 Mo. loc. cit. 264, 279 S. W. 673, loc. cit. 676.
* * * * *

Under the above holding it cannot be implied that the State Highway Patrol, which is not mentioned in Section 44a, supra, would now have the authority to perform criminal duties other than the enforcement of the state motor vehicle law and traffic regulations and as set out in Section 8358, supra.

The taxes other than the direct tax for the State Highway Commission also comes from the gasoline tax which is provided for in Section 8412, R. S. Missouri 1939, which reads as follows:

"For the purpose of providing funds to complete the construction of and

for the maintenance of the state highway system of this state as designated by law, there is hereby provided a license tax equal to two cents per gallon of motor vehicle fuels as defined in this article used in motor vehicles of the public highways of the state, which license tax shall apply and become effective January 1, 1925."

Under the above section it specifically provides for funds to complete the construction and maintenance of a state highway. This tax is paid into the state treasury, subject to appropriation for the State Highway Commission from whose funds the State Highway Patrol, by appropriation, draws its funds. Also, Section 8402, R. S. Missouri 1939, provides that all fees for the registration of motor vehicles, trailers, chauffeurs, and in fact everything pertaining to the automobile shall be paid to the state treasurer who shall deposit the same to the credit of the State Road Fund. In other words, the State Highway Patrol is receiving appropriations from taxes that are earmarked for the construction of roads in the state for their maintenance and are using the funds for the investigation, prosecution and prevention of crimes that are not mentioned in Section 44a, supra, except the crime concerning the state motor vehicle law and traffic violation. The State Road Fund, as provided for under Section 44a, supra, was formulated by a vote of the people for the sole purpose of the construction and maintenance of highways and the mention of the phrase "cost of administering and enforcing any state motor vehicle law or traffic regulation" was merely an incident to the amendment. The money raised by reason of Section 44a, supra, is as sacred to the maintenance and construction of highways as the money earned or formulated under other sections of the Constitution, such as the money earmarked state aid and maintenance of public schools.

CONCLUSION

It is, therefore, the conclusion of this department that the money paid into the state treasury for the bene-

August 21, 1941

fit of the State Highway Commission and other departments thereunder is a sacred fund for the purpose of the construction and maintenance of the State Highway System and cannot be appropriated for any other purpose.

It is further the opinion of this department that Chapter 44 of the Revised Statutes of Missouri 1939, concerning the forming and the duties of the State Highway Patrol, was enacted by reason of the fact that Section 44a, Article IV of the Constitution of Missouri, contained the following incidental clause, "less * * * the cost of administering and enforcing any state motor vehicle law or traffic regulation * *"

It is further the opinion of this department that the only powers of the State Highway Patrol are contained in Section 8358, Chapter 44 of the Revised Statutes of Missouri 1939, which section confines their duties only to the administering of the motor vehicle laws and traffic regulations.

It is further the opinion of this department that any appropriation out of the extraordinary road fund, as formed under Section 44a, Article IV of the Constitution of Missouri, would be unconstitutional as to any appropriation made for the purpose of the State Highway Patrol in performing any other duties except that of administering and enforcing any state motor vehicle law or traffic regulation as set out under Section 8358, R. S. Missouri 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

WJB:DA

GOVERNOR: Governor may issue patent in correction of
PATENTS: a defective one.
PUBLIC LANDS:

September 2, 1941

Honorable Forrest C. Donnell
Governor of the State of Missouri
State Capitol Building
Jefferson City, Missouri



Dear Sir:

This will acknowledge your request for an opinion as to whether the Governor has authority to affix his signature to a patent which is issued in correction of a swamp land patent originally issued in 1859, but which was defective for the reason that there was not affixed thereto the Seal of the State of Missouri.

In a letter directed to you by D. E. Calton, Land Register Clerk, under date of August 6, 1941, we find the following statement:

"The laws relative to Swamp Lands are found in Vol. 2, Revised Statutes of Missouri, 1939, sections 12752 to 12788, inclusive. There seems to be no specific statute directing you to sign a patent, such as you now have before you for the purpose of correcting a defect, however we have records of patents having been issued in the past for similar reasons, signed by the Governor and not attested by the Secretary of State. The Legislature has not anticipated every circumstance that would arise, therefore no provision has been made to correct some of the defects which we may encounter. Prior to the year 1870, Swamp Land Patents were issued to individual purchasers, signed by the Governor and attested by the Secretary of State; the patent now in question was issued

in the year 1859. Now some attorney offers the suggestion that the title to the land is defective because the Seal of the State had not been affixed as provided by law. If this is true, of course there must be some way to remedy the situation. Personally, I believe the title now on record in Grundy County, would be held by the Courts, to be good and sufficient, however since some question has been raised, in order to satisfy all concerned, the best way to dispose of this is to issue the patent to correct the defect. The certificate of the County Clerk is sufficient evidence that the patent is going to the legal owner."

The corrected patent which you are requested to sign reads as follows:

"THE STATE OF MISSOURI,

"TO ALL WHO SHALL SEE THESE PRESENTS,
GREETING:

"Whereas, It appears by the duplicate receipts of the Clerk of the County Court of Grundy County, Missouri, That Benjamin F. Sperry, of the County of Grundy, in the State of Missouri, did, on the Second day of November, in the year of our Lord, eighteen hundred and fifty seven, purchase, among other lands, the North one-half of the Northwest qr. of the Northeast qr. of Section Seventeen (17), in Township Sixty-three (63), North of the Base line, of Range Twenty-five West of the Fifth Principal Meridian, at the price of Fifty Cents per acre, being a part of the Lands selected under an Act of Congress, entitled, "An Act to enable the State of Arkansas and Other States to reclaim the Swamp

Lands within their limits," approved September 28, 1850, and whereas it further appears that the full purchase money for all the land involved in the transaction, was paid by the said Benjamin F. Sperry and that a patent to the Lands purchased by Sperry was issued and recorded in Vol. 4 at page 2063 of the records of Swamp Land Patents in the office of the Secretary of State, however it appears that said patent was defective in that the Seal of the State was not thereto affixed; and Whereas, it now appears that THE KANSAS CITY LIFE INSURANCE COMPANY is the owner through mesne conveyances by Benjamin F. Sperry, the original Purchaser; NOW, THEREFORE, KNOW YE, That I, FORREST C. DONNELL, GOVERNOR of the State of Missouri. in order to correct the title, and by virtue of authority in me vested by law, have GIVEN and Granted and by these Presents DO GIVE and GRANT unto the KANSAS CITY LIFE INSURANCE COMPANY and to ITS ASSIGNS, the LAND herein above described; to have and to hold the same, with the appurtenances, unto the said Kansas City Life Insurance Company and to its assigns forever;

"In witness whereof, I, Forrest C. Donnell, Governor of the State of Missouri, have hereunto set my hand and caused the GREAT SEAL of the State to be hereunto affixed by the Secretary of State; done at the City of Jefferson, this _____ day of August, in the Year of our Lord, Nineteen hundred and forty-one.

(SEAL)

By the Governor _____

DWIGHT H. BROWN Secretary of State."

We have been unable to find any Missouri case governing the above situation. However, we believe that the decision in the case of Newlon v. Allen, 106 Kan. 526, 188 Pac. 248, is controlling. Said case was an original mandamus against the Governor and the State Auditor to procure the issuance of a corrected patent for realty, originally school land. The court said:

"This action was brought by S. F. Newlon, owner of the east half of the northwest quarter of section 16, township 2 south, range 18, Brown county, Kan., to procure the issuance of a corrected patent for this tract originally school land.

"In 1879 this land was patented as lots 3 and 4 of the northwest quarter of section 16. The defendants in their answer admit that the land as last above described constitutes the east half of the northwest quarter of the section in question and is so described on the government plat, and express their willingness to issue the corrected patent applied for if they have the authority so to do.

"When the state enters the realm of business it should transact it on business principles, including that freedom from technicalities which is observed by the business world. No possible reason suggests itself why the owner of the land in question should have his title injuriously affected by a clerical error so easily correctable.

"As already seen, a state may, in the absence of constitutional restrictions, dispose of its property like any other owner, and when acting not in its capacity as a sovereign, but in its proprietary capacity as the owner of the lands, it is bound by the same rules as those which it applies to its citizens.' 25 R. C. L. 389, Section 23.

September 2, 1941

"A state entering into contracts lays aside its attributes of sovereignty and binds itself substantially as one of its citizens does when he enters into a contract, and, in general, its contracts are interpreted as the contracts of individuals are, and controlled by the same laws.' Page 392, Section 25.

"In *Mayse v. Belt*, 84 Kan. 211, 114 Pac. 232, the state was held liable for waiver of forfeiture of a school land certificate the same as a private party might have been.

"Feeling assured that the Governor and auditor will execute the proper patent, we deem it unnecessary at this time to allow the writ prayed for.

"All the Justices concurring."

Inasmuch as it appears that the full purchase price was paid for the land originally patented, and said patent is properly recorded in the swamp land patents in the Office of Secretary of State, we see no reason why the proper state officers may not issue another patent correcting the defect.

From the foregoing, we are of the opinion that the Governor has the authority to affix his signature to a patent which is issued in correction of a swamp land patent originally issued in 1859, but which was defective for the reason that there was not affixed thereto the Seal of the State of Missouri.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

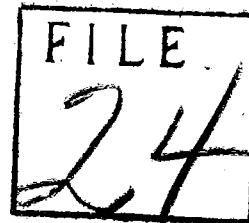
VANE C. THURLO
(Acting) Attorney General

MW:VC

PROSECUTING ATTORNEY: Officer elected for a term, and
PUBLIC OFFICERS: until successor is elected, holds
office until the election of a
properly qualified successor.

September 8, 1941

Honorable Forrest C. Donnell
Governor of the State of Missouri
Capitol Building
Jefferson City, Missouri



Dear Governor Donnell:

We are in receipt of your request for an opinion concerning the existence of a vacancy in the office of Prosecuting Attorney in Shannon County, Missouri, and your power to make an appointment to such office. You have submitted, in connection with your request, a statement, briefs on behalf of each of the parties concerned and the resignation of one A. E. Orchard as Prosecuting Attorney of Shannon County. We quote the following portions of the statement received, which are necessary to a decision on the question:

"At the August Primary Election, held in the year 1940, A. E. Orchard was the only candidate on the Democratic Ticket for the Office of Prosecuting Attorney for Shannon County, Missouri, and was duly nominated for said office.

"At the General Election of the same year he was duly elected to the said office, being the only candidate on either ticket in said election. Was certified, and by the then Governor, L. C. Stark, commissioned and prior to the 1st day of January, 1941, took the oath of office and qualified as Prosecuting Attorney for said Shannon County, Missouri, however, he did fail, at the October Examination of the Bar Board, to make a satisfactory grade, and was not admitted to the practice of law in this state.

"J. Ben Searcy, who was regularly elected, commissioned and qualified as Prosecuting Attorney for said county at the General Election held in the year 1938, has, since the 1st day of January, 1941, continued to function as Prosecuting Attorney for said Shannon County, Missouri; there being no proceeding instituted to try his right to do so.

"Mr. Searcy was, until the first of June of this year, the only resident Attorney, in active practice, in Shannon County.
* * *

The resignation of A. E. Orchard, also submitted, is as follows:

"At the last general election held in this state, I, the undersigned, was elected to the office of Prosecuting Attorney, of Shannon County; that before I was elected I took the bar examination and failed to receive my license to practice law, hence could not exercise the functions of said office; I received my commission from the Governor and qualified by taking the oath of office and having my commission recorded in the County, and since I cannot exercise my duties as said Prosecutor, I am taking this means of informing you that I desire to resign, my resignation to take effect upon the receipt of this letter."

Your authority to fill a vacancy in the office of Prosecuting Attorney in any county in the state is set out in Section 12989, R. S. Mo. 1939, which is as follows:

"If any vacancy shall happen from any cause in the office of the attorney-general, circuit attorney, prosecuting attorney or assistant prosecuting attorney,

the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney-general, prosecuting attorney or assistant prosecuting attorney, as the case may be."

Your decision, under the above section, as to whether or not a vacancy exists may be reached from any information which you may have from any source, but is not conclusive on the parties and is subject to judicial review. While not necessary to the question at hand, we believe that the judicial definition of your powers to determine whether a vacancy exists may be of some assistance. In *State ex rel. Attorney General v. Seay*, 64 Mo. 89, 1. c. 98, we find the following interpretation:

" * * * Hence, that provision of the constitution that 'the governor, upon being satisfied that a vacancy exists, shall issue a writ of election, etc.,' confers no judicial authority, but merely for convenience authorizes him to determine that question, because the public service might suffer if a vacancy could not be filled until after a judicial investigation be had. He determines it upon ex parte testimony or information that is not technically testimony at all, and surely it was not intended that the rights of incumbents were to be conclusively determined by the governor, by the discharge of the duty imposed upon him by that section."

The present incumbent of the office of Prosecuting Attorney of Shannon County was elected under the provisions of Section 12934, R. S. Mo. 1939: -

"At the general election to be held in this state in the year A. D. 1880, and every two years thereafter, there shall

be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified." (Italics ours)

Another provision of the statutes deals with the term of office of the various prosecuting attorneys in the state, which is Section 12988, R. S. Mo. 1939, being as follows:

"The attorney-general, prosecuting attorneys, the circuit attorney, the prosecuting attorney and assistant prosecuting attorney for the city of St. Louis shall be commissioned by the governor, and shall hold their offices until their successors are elected, commissioned and qualified." (Italics ours)

The underlined portions of the two sections above quoted leave no doubt as to the intention of the Legislature with regard to the term of office of the prosecuting attorneys in the state. The term may expire only when a successor has been elected, commissioned and qualified.

Under the facts as submitted, it becomes necessary to determine whether or not a successor to the present incumbent, who was elected at the 1938 general election, has been elected, commissioned and qualified. A. E. Orchard has never been possessed of a license to practice as an attorney at law in this state according to the statement and briefs submitted, and we fail to find his name enrolled as an attorney in the Public Records of the Supreme Court of the State of Missouri.

These are requirements which each prosecuting attorney must possess under Section 12934, supra.

From the statement of facts submitted and the resignation of Mr. Orchard, it is apparent that he never at anytime attempted to exercise the duties of the office, and it is further apparent that the present incumbent has at all times fulfilled those duties. It is admitted that the present incumbent possesses all the necessary qualifications. While we find no authority in which the exact facts here presented were determined, there are numerous authorities in Missouri which decide that the election of a person who does not possess the necessary qualifications for an office has no right to hold that office. In State ex rel. Snyder v. Newman, et al., 91 Mo. 445, the relator was a candidate for Mayor and the respondents were the City Aldermen who withheld a certificate of election to relator on the ground that he had not been a resident of the city for one year next prior to his election, as required by the statutes. A writ of mandamus was sought, which was denied in the following language by the court, l. c. 451:

"The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office. 1 Dill. Mun. Corp. (3 Ed.) sec. 196. As, by reason of his disqualifications, the relator was not entitled to hold the office, surely he has no right, at the hand of the court, to be armed with a certificate of election -- evidence of title to that to which he has no right."

This quotation was approved in State ex rel. v. Roach, 246 Mo. 70.

To the same effect is the following paragraph in 46 C. J. 950:

"Where the legislature has fixed the qualifications for an office pursuant

to its authority so to do, the electors cannot select one not possessing the qualifications prescribed, and one who is not eligible is not regarded as elected to office, although he may receive the highest number of votes cast and is in possession of a certificate of election, although it has been held that his election is not affected but merely his right to hold the office. One who has been elected to an office, but who is ineligible cannot recover the office from another."

Among the authorities there cited is *Jenness v. Clark*, 21 N. D. 150, 129 N. W. Rep. 357, Volume 27, Ann. Cases 1913 B, 357. In that case the appellant's term of office as Superintendent of Schools expired on the first Monday of January, 1909, and respondent, who was the successful candidate at the preceding general election, obtained a certificate of election, duly qualified and was in possession of the office, discharging the duties thereof. The following portion of the court bears directly on the question at hand, Ann. Cases, 1. c. 676:

"In the light of such admission, can it be said that a successor to plaintiff has been elected and qualified so as to terminate her right to the office?

"Appellant's counsel contend that, because of respondent's ineligibility to hold the office, his election was void, and that consequently plaintiff's right to the office still continues, and will continue until a qualified person has been elected and has qualified. That such election was void, we entertain no doubt. Such is practically the unanimous voice of the authorities. 23 Am. & Eng. Enc. of Law (2d ed.) 338 and cases cited; *Sheridan v. St. Louis*, 2 Ann. Cas. 480,

and cases cited in note on page 485 (183 Mo. 25, 81 S. W. 1082). The election being a nullity, it inevitably follows, assuming the constitutionality of Section 764, Rev. Codes 1905, which we will hereafter consider, that appellant is entitled to continue in the office until such time as her successor shall be elected and qualified, unless by some act on her part she has relinquished her right thereto. This court in *State v. Fabrick*, 16 N. D. 97, 112 N. W. 74, expressly so held, citing numerous authorities. Our sister state of Minnesota has likewise so held. *Taylor v. Sullivan*, 45 Minn. 309, 11 L. R. A. 272, 22 Am. St. Rep. 729, 47 N. W. 802. Respondent's counsel contend that appellant, in her amended complaint, admits that respondent was duly elected and has duly qualified; but we do not thus construe such pleading. On the contrary, such complaint expressly alleges facts showing respondent's ineligibility to hold the office at all times mentioned therein. If he was ineligible, as the demurrer admits, then, as we have above decided, no election took place, as the same was a nullity. Respondent's ingenious argument regarding the meaning of the word 'qualified,' as used in the statute, is somewhat misleading, in that it assumes that his right to the office was alone dependent upon the act of qualifying. It is no doubt true, as argued by counsel, that the meaning of the word 'qualified,' as thus used, merely refers to the taking of the required oath of office and giving an official bond as required by statute where that is necessary. Something more than the act of qualifying is required, however, to entitle respondent to the office. He must have first been elected thereto."

Appended to the foregoing case is a note containing a number of authorities to the same effect, and a portion of which we herewith set out, 677, 678:

"The right of the incumbent of a public office, the term of which is fixed at a definite period and 'until his successor is elected and qualified,' to hold over after the expiration of his term if it appears that the person elected as his successor is ineligible to the office, has been recognized in a number of cases. Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802, 22 Am. St. Rep. 729, 11 L. R. A. 272; Hoskins v. Brantley, 57 Miss. 814; State v. Hays, 91 Miss. 755, 45 So. 728; Richards v. McMillin, 36 Neb. 352, 54 N. W. 566; State v. Fabrick, 16 N. D. 97, 112 N. W. 74. See also State v. Boyd, 31 Neb. 682, 48 N. W. 754, 51 N. W. 602, reversed on other grounds in 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103. And see the reported case. In Taylor v. Sullivan, supra, the court said: 'By this proceeding, the relator seeks an adjudication as to the right of the respondent to hold the office of county attorney of Stearns county, for which office he received a majority of the votes cast at the general election in 1890. The point of contention is whether the respondent was legally elected, and can hold the office under such election, he being of foreign birth, and having never declared his intention to become a citizen of the United States until after such election. The contention that the relator has no such private interest in the matter as justifies him to invoke a decision upon it is not sustained. The relator was elected to the office at the election in 1888, qualified and entered upon the discharge of its duties. He is still the incumbent of the office, unless he has

been superseded by the respondent, or unless a vacancy has occurred by force of the statute. The term of office for which the relator was elected was 'two years, and until his successor is elected and qualified.' Gen. St. 1878, c. 8, section 210. If the election of the respondent was not legally authorized, the relator would continue to hold the office by force of this express provision of the statute.' * * * "

The above views express the great weight of authority.

We are aware of that line of cases in Missouri and other jurisdictions which expresses the view that even though a candidate for office may not possess the statutory qualifications at the time of his election, if such requirements are met before the candidate actually takes office, his title is valid.

The latest case of this character in Missouri is State ex inf. Mitchell v. Heath, 132 S. W. 2nd 1001. In that case, determined by Division No. One of the Supreme Court, the respondent was elected School Director, but had not paid the state and county tax within one year next preceding his election as required by the statute. The respondent did, however, after his election and before the time of actual qualification by taking the oath, pay a state and county tax. Judge Hyde held the respondent entitled to the office in the following portion of the opinion, 1. c. 1005:

"In view of our method of assessing and collecting property taxes and the time when common school elections are held, we think it contemplated the payment of the current taxes payable during the calendar year preceding the school election since no other property taxes could become due between the end of that year and the school election. We, therefore, hold that the reasonable construction of

the statutory requirement, 'shall have paid a state and county tax within one year next preceding his * * * election,' is that a person, to be eligible to serve as a common school director, shall have paid the state and county tax which was due and payable within the calendar year next preceding his election. See Sec. 655, R. S. 1929, Mo. St. Ann., Section 655, p. 4899. We further hold that a person, who owns taxable property and owes taxes on it which are due and payable during the calendar year preceding his election, would be eligible to take the office of common school director if he pays such taxes at least prior to the time prescribed for taking his oath of office. It follows that the statute did not prevent respondent from taking office under the circumstances shown by the agreed facts.

"The judgment is affirmed." .

While this case apparently is a departure from the hard and fast rule that an election is void where the candidate does not possess certain statutory qualifications, it can have no application to the facts at hand because there is no contention that Orchard received his license prior to his taking the oath and attempted qualification. We think these cases support the view that the successful candidate must possess the statutory qualifications before taking the oath of office, and, in the absence of such qualifications, the oath is a nullity. Since Orchard did not possess the requirements fixed by Section 12934, we are forced to the conclusion, under the above authorities, that he could not have obtained the office from the present incumbent in a direct proceeding for that purpose. Since Orchard possessed no valid title, his attempted resignation is ineffective and does not create a vacancy.

We next consider whether a vacancy exists which would authorize an appointment because of the expiration of the

term of two years, for which Searcy was elected, and the status of his title to the office by reason of his holdover after the expiration of such term.

The earliest decision on this point appears to be *State v. Lusk*, 18 Mo. 333. In that case the respondent had been elected to the office of Public Printer for a term of two years and until his successor was elected and qualified. At the expiration of the term two years later, no successor was elected, and the Governor appointed the relator to fill the office. The following portions of the opinion express the views of the court:

" * * * The fifth section provides that 'the public printer to be elected at each session of the general assembly shall hold his office for two years commencing on the first day of May next thereafter, and until his successor shall be elected and qualified; and the public printers thereafter elected, shall hold office for two years and until their successors shall be elected and qualified.' * * *

* * * * *

"These provisions of the act are the only ones which materially affect the question in the present case. In behalf of the State, it is claimed that the office became vacant on the first of last May, in consequence of the failure of the assembly to elect a public printer, and as the office itself continued to exist, the governor, under the ninth section of the fourth article of the constitution, was entitled to fill it by appointment. That section is in these words: 'When any office shall become vacant, the governor shall appoint a person to fill such vacancy, who shall continue in office until a successor be duly appointed and qualified according to law.'

* * * * *

"It is next insisted that, as the act itself directs that the person elected by the assembly should hold the office for two years and until a successor should be elected and qualified, the office was not vacant, so as to authorize the governor to fill it by appointment.

* * * * *

"It is insisted for the State, that the term for which the office is to be held is two years, and that the additional time, 'until a successor is elected and qualified,' is added, merely to prevent the office being without some person qualified to discharge its duties, and does not prevent its being considered vacant for the purpose of its being filled by executive appointment.

* * * * *

"That the governor has no power to displace the person elected by the general assembly, is certain, for no such power is hinted at in the law. He cannot displace him during the two years, because the office has been conferred upon him for that time absolutely, and the governor has no control over the office. He cannot remove him after the two years, because the same law that protects him for two years, protects him equally after that period, against every person but a regularly elected and qualified successor. The successor, to whose claims he must yield, is a successor elected under the law, and qualified as the law requires.

* * * * *

"The law providing for the choice of a successor in its own mode, excludes others, and it continues the incumbent in office until that mode is pursued.

* * * * *

"Regarding the respondent, Lusk, as in office under the statute, and that there was no vacancy which the governor was authorized to fill by appointing Tredway, the demurrer of the State to the plea of Lusk ought, in my opinion, to be overruled, and judgment should be given thereon for the respondent Lusk."

Shepard's Citator states that the Lusk case, above cited, was overruled in State ex rel. Attorney General v. Thomas, 102 Mo. 85. However, an examination of that decision discloses that it was overruled in part only, and the part affected does not concern the question at hand. The Thomas case modifies the Lusk decision by stating that where there is a provision in the law for a special election, a vacancy may occur in an office where there is a holdover incumbent. The following quotation summarizes the decision, l. c. 92:

"The case just cited, while it plainly decides the point mentioned, necessarily decides, also, that there is a vacancy in an office notwithstanding there is a holdover incumbent, and a vacancy which may be filled, provided there is a law for the election of his successor. * * "

In State ex inf. Hulen v. Brown, 274 S. W. 965, this question was under discussion, and the Lusk case was followed by the court in the following portion of the decision, l. c. 967:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk, 18 Mo. 333; State ex rel.

Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 78."

Again, in Langston v. Howell County, 79 S. W. (2d) 99, in which the contention was made that Langston's term of one year had expired and his office was therefore vacant, the court decided in favor of Langston's continuation in office in the following language, l. c. 102:

"Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right of a duly appointed and qualified successor attached."

In some of these cases the language of the court may be confusing because of the use of the words "elected" and "appoint" in the same sentence, which might give rise to the belief that an elective office might be filled after the expiration of the term by appointment. However, we think this was clearly decided in State ex inf. Major v. Williams, 222 Mo. 268, where the court approved the following language from the case of Johnson v. Mann, l. c. 285:

"The provision of the Constitution mainly, if not solely, relied on by counsel for petitioner, is the twenty-fifth section of the sixth article. It simply provides for the holding over by the incumbent after the expiration of his term, until his successor shall qualify. The plain, unequivocal import of this section of the Constitution is, that when the regular term expires, the office becomes in the

eye of the Constitution, vacant, but with authority to the incumbent, already qualified, to continue by virtue of such previous qualification, made effective for the purpose by the Constitution, to discharge the functions of the office until he is succeeded in the way preferred by the people, as pointed out in the Constitution made by them, and in the laws made in pursuance of that instrument." (Italics ours)

In other words, if the office was originally filled by appointment, it may be filled by appointment at the expiration of the term. But if the office was filled by election and the incumbent is to hold until his successor is elected, as is the case at hand, the office must be filled by election. This proposition is very clearly stated in State ex inf. Crow v. Smith, 152 Mo. 512, 1. c. 517, as follows:

"The appointment of defendant by the judges named was expressly predicated upon the theory that a failure to elect a successor to Haughton at the regular election in 1898, ipso facto, created a vacancy in that office. This is a misapprehension of the law in the State. Whatever may be the rule in other States, under their constitutions and statutes, it has been the settled law in this State ever since the decision in State v. Lusk, 18 Mo. 333, that the failure to elect a successor to an office at the regular time for holding an election for that office, does not create a vacancy in such office, and does not, therefore, authorize any one to appoint a successor, and that if a person is so appointed as such successor he acquires no title. (State ex rel. v. Ranson, 73 Mo. 1. c. 91, 94 and 95; State ex rel. v. McCann, 81 Mo. 479; State ex rel. v. Manning, 84 Mo. 1. c. 663; State ex rel.

v. Smith, 87 Mo. 1. c. 160; State ex
rel. v. McCann, 88 Mo. 1. c. 390; State
ex rel. v. McGovney, 92 Mo. 1. c. 430;
State ex rel. v. Powles, 136 Mo. 1. c.
381.)

CONCLUSION

It is therefore the conclusion of this department that the election of Orchard, who at no time was possessed of the qualifications necessary to his holding the office of Prosecuting Attorney, did not terminate the office of the incumbent since he could not have recovered the office by any legal action, having no right to hold the same.

It is the further opinion of this department that since the present incumbent was elected for a definite term, and until his successor is elected, commissioned and qualified, and since the present incumbent has continuously held the office and exercised all the duties in connection with same, that there is no vacancy in the office of Prosecuting Attorney of Shannon County, Missouri, which may be filled by appointment.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

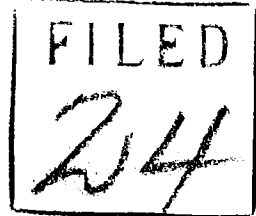
ROY MCKITTRICK
Attorney General

RLH:VC

HIGHWAY PATROL:

Forty-seven questions concerning powers and duties of Highway Patrol.

September 19, 1941



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This department is in receipt of a request on forty-seven questions in reference to the powers and duties of the State Highway Patrol.

It is necessary that we give our official opinion on each and every question separately for the reason that the facts in each question set up a separate statement that cannot be passed upon by this department in a general opinion. It is further necessary to give a separate opinion on each question for the reason that our opinion in some of the questions must be qualified as to the other facts that may be involved in the question.

On August 21, 1941, this department, at your request, rendered an official opinion as to the general powers and duties of the State Highway Patrol. Our conclusion in that opinion reads as follows:

"It is, therefore, the conclusion of this department that the money paid into the state treasury for the benefit of the State Highway Commission and other departments thereunder is a sacred fund for the purpose of the construction and maintenance of the State Highway System and cannot be appropriated for any other purpose.

"It is further the opinion of this department that Chapter 44 of the Revised Statutes of Missouri 1939, concerning the forming and the duties of the State Highway Patrol, was enacted by reason of

the fact that Section 44a, Article IV of the Constitution of Missouri, contained the following incidental clause, 'less * * * the cost of administering and enforcing any state motor vehicle law or traffic regulation * * '

"It is further the opinion of this department that the only powers of the State Highway Patrol are contained in Section 8358, Chapter 44 of the Revised Statutes of Missouri 1939, which section confines their duties only to the administering of the motor vehicle laws and traffic regulations.

"It is further the opinion of this department that any appropriation out of the extraordinary road fund, as formed under Section 44a, Article IV of the Constitution of Missouri, would be unconstitutional as to any appropriation made for the purpose of the State Highway Patrol in performing any other duties except that of administering and enforcing any state motor vehicle law or traffic regulation as set out under Section 8358, R. S. Missouri 1939."

In arriving at the above general conclusion set out in our opinion rendered to you on August 21, 1941, we based it primarily on--

First, Section 8358, Chapter 44, R. S. Missouri 1939;

Second, Section 8359, Chapter 44, R. S. Missouri 1939;

Third, Section 44a, Article IV of the Constitution of Missouri.

The most important reason as to our giving the above described conclusion was the fact that the State Highway Patrol was being paid out of the sacred fund known as the State Road Fund and it was not our intention to say that

the State Highway Patrol could not carry on as regular state police if the appropriation out of which they were paid was drawn upon the general fund. The Legislature of this state has the authority, under the Constitution and their police power, to enact laws providing for state police if they were paid out of the general fund and not out of the State Road Fund.

Section 8359, Chapter 44, R. S. Missouri 1939, provides as follows:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

Section 8358, R. S. Missouri 1939, Chapter 44, provides as follows:

"It shall be the duty of the patrol to police the highways constructed

and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

Section 44a, Article IV of the Constitution of Missouri, provides in part as follows:

"In addition to the exceptions made and created in section 44, the General Assembly shall, for the purpose of locating, establishing, acquiring, constructing, widening and improving hard-surfaced public highways in the State and in each county thereof, and of acquiring materials therefor and for the purpose of locating and constructing bridges across the rivers and waters of the State and of participating in the con-

struction of toll-free, interstate bridges, have the power to contract or authorize to contracting of a debt or liability on behalf of the State and to issue bonds or other evidences of indebtedness therefor not exceeding in the aggregate one hundred and thirty-five millions of dollars --

* * * * *

"The said bonds and the interest that will accrue thereon shall be paid out of a fund to be provided by the levy and collection of a direct annual tax upon all taxable property in the State. All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law. * * * * *

To complete and widen or otherwise improve, and maintain the state system of primary and secondary highways as designated and laid out under existing

law; to reimburse the various counties and political or civil subdivisions (including road districts) of the State for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the State as permanent parts of the state highway system to the extent of the value to the State of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties or subdivisions in the construction or acquisition of such roads and bridges;
* * * * *

"After the principal and interest of all of said bonds shall have been paid, all state motor vehicle registration fees, license fees or taxes, authorized by law, on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels, authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation, shall be and stand appropriated without legislative action to the State Road Fund, to be administered and expended under the direction and supervision of the State Highway Commission for the purposes and in the manner hereinbefore set forth.

"It shall be the duty of the State Auditor, annually; on or before the first day of July, to determine the rate of taxation necessary to raise

the amount of money needed for that
year to pay the principal and interest
maturing in the next succeeding year,
* * * * *

I.

Your first question reads as follows:

"1. Shall the Patrol make national
defense investigations?"

Under Section 8358, Chapter 44, R. S. Missouri 1939, the duties of the Patrol have been designated by the Legislature. As to highways maintained and constructed by the State Highway Commission, it is very noticeable that it specifically sets out that the duty of the Patrol is to police said highways, to regulate the movement of traffic, to enforce the laws of this state relating to the operation and use of motor vehicles on said highways, to enforce and prevent the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and to enforce all laws designed to protect and safeguard said highways. Also, the Legislature saw fit to empower the State Highway Patrol to make investigations as to the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail and other appurtenances constructed by the commission. It also provided that it shall be the duty of the Patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes.

In referring to Section 8358, supra, we find no authority granted the State Highway Patrol to make national defense investigations, and for that reason it is our conclusion that the State Highway Patrol is not authorized to make national defense investigations.

II.

Your second question reads as follows:

"2. Shall the Patrol engage in riot duty in case of emergency?"

In referring to Section 8358, supra, we find no power or authorization for the Patrol to engage in riot duty in case of emergency, but they may be compelled, under Section 4613, R. S. Missouri 1939, herein next set out, as members of the State Highway Patrol, to participate in the suppressing of riots in the same manner as that of an individual.

Section 4613, R. S. Missouri 1939, provides as follows:

"If twelve or more persons, armed with clubs, stones or other dangerous weapons, or if any number of armed or unarmed persons exceeding twenty, shall unlawfully, riotously assemble in any city or town within this state, it shall be the duty of the mayor and each member of the board of aldermen, and each member of the board of delegates or other legislative council of such municipality, and of the sheriff, coroner and marshal and their respective deputies of the county in which such town or city is situate, and of each justice of the peace, including every person who is by virtue of his office a conservator of the peace of the state, to go among such persons so assembled, or as near to them as may be consistent with safety, and to command all such persons so assembled to disperse immediately and repair to their respective places of business or abode, and if such command be not forthwith obeyed, to proceed to arrest all persons so refusing or failing to obey such command, and to command all bystanders or spectators to aid and assist in making such arrests."

Section 4614, R. S. Missouri 1939, provides as follows:

"Every person so commanded to assist in

making such arrests and failing or refusing to assist as required, and every person who shall fail to disperse forthwith on being commanded as aforesaid, shall be deemed to be one of the unlawful assembly, and on conviction thereof, shall be punished as for a misdemeanor."

Under the above sections it becomes the duty of the members of the State Highway Patrol or any individual to obey the order of the officers in said sections designated when commanded to assist in the suppressing of a riot.

It is, therefore, the conclusion of this department that the members of the State Highway Patrol are not empowered or authorized to suppress riots in case of an emergency unless commanded by the proper officer as set out in Sections 4613 and 4614, supra, to aid and assist in the suppressing of a riot.

III.

Your third question reads as follows:

"Shall the Patrol make selective service investigations?"

In answer to this question it is our conclusion that under Section 8358, supra, we find no authority for members of the State Highway Patrol to make selective service investigations.

IV.

Your fourth question reads as follows:

"4. Shall the Patrol arrest felons or misdemeanants on the highway not detected in the commission of the crime?"

This question must be answered in two ways. First, as to the arrest of felons, and second, on the arrest of a misdemeanant either detected or not detected in the commission of a

crime. The principal authority followed in this state upon this question is set out in *State v. Gartland*, 263 S. W. 165, 1. c. 169, where the court said:

"The rule is that where a felony has been committed a sheriff, constable, or other officer has a right, without a warrant, to arrest a person, upon information or reasonable ground to believe that the person to be arrested has perpetrated the crime. Sometimes this is expressed as 'reasonable ground to suspect.' Such officer has no right, without a warrant to arrest for a misdemeanor, unless the misdemeanor is committed in the immediate presence and view of the officer. This is the rule wherever the common law prevails. *Wehmeyer v. Mulvihill*, 150 Mo. App. loc. cit. 206, 130 S. W. 681; *State v. Grant*, 76 Mo. loc. cit. 244, 245; *State v. Boyd*, 196 Mo. loc. cit. 59, 94 S. W. 536; *State v. Underwood*, 75 Mo. loc. cit. 237; *State v. Peters* (Mo. Sup.) 242 S. W. loc. cit. 896. A peace officer, by statute, may be authorized to arrest without a warrant for a misdemeanor not committed in his presence. In cities in this state having 500,000 population such authority is given by section 8953, R. S. 1919. That section is held to authorize police officers, in cities of that class, to arrest without a warrant for misdemeanor the same as in case of a felony, on information and reasonable ground to believe. *Hanser v. Bieber*, 271 Mo. 326, loc. cit. 337, 197 S. W. 68, 70. The reason for this statute as applied to cities is stated in that opinion, where this court, through Judge Walker, said:

"Any one at all familiar with civil conditions in cities as contradistinguished from the country, realizes that greater power should be given police officers to

preserve the peace and arrest offenders in cities than is given to peace officers elsewhere.'

"Other sections of the statutes relating to marshals of villages and of cities of the third and fourth classes, sections 8239, 8248, 8426, and 8575, do not authorize such an officer to arrest for a misdemeanor unless the offense is committed in his presence. State v. Evans, 161 Mo. loc. cit. 109, 61 S. W. 590, 84 Am. St. Rep. 669.

"Under section 7959, R. S. 1919, in cities of the first class, of which St. Joseph is one, policemen are made conservators of the peace and are authorized to arrest any person 'who shall break the peace, or be found violating any ordinance.' Under section 7875, R. S. 1919, such officers are made officers of the state of Missouri. But those sections do not give officers the right to arrest for a misdemeanor unless such misdemeanor is committed in their presence.

"These statutes show that it is the legislative policy of this state to modify the common-law rule in respect to arrest for misdemeanors only in cities of the largest size. In the country and in the smaller towns the officers are bound by the common-law rule. The statute authorizing sheriffs and police officers to arrest for violation of the prohibition act is section 6597. It authorizes sheriffs, marshals, etc., 'to apprehend and arrest any person or persons found violating any of the provisions of this article.'

"It may be implied that such arrests may be made without warrant, but the statute does not say so. But the officer must find the offense being committed. This does not enlarge the common-law authority

to arrest for a misdemeanor unless committed 'in the presence and view' of the officer.

"When is an offense committed in the presence of an officer? The officer cannot arrest upon suspicion, or information, or reasonable grounds to suspect, that a misdemeanor is being committed. The cases are numerous showing the limit of his authority to actual knowledge that the offense is committed. It is not committed in his presence unless he knows it is committed. In *State ex rel. Brennan v. Dierker*, 101 Mo. App. 636, 74 S. W. 153, the defendant was arrested for violating the game law and carrying quail out of a county. Judge Goode, in writing the opinion, said (loc. cit. 643, 74 S. W. 155):

"Peace officers, in the absence of an empowering statute, have no authority to arrest an individual for a misdemeanor without process, except on view; that is, when they witness the perpetration of the offense." (Italics ours.)

"In the case of *State v. Holcomb*, 86 Mo. 371, loc. cit. 380, 381, it was held that an officer without a warrant had no right to arrest a man for carrying a concealed weapon because he did not know that he had the weapon. The rule is general. *Hughes v. State*, 2 Ga. App. 29, 58 S. E. 390; *Roberson v. State*, 43 Fla. 156, 29 South, 535, 52 L. R. A. 751; *O'Malley v. Whitaker*, 118 La. 906, 43 South. 545; *Pickett v. State*, 99 Ga. 12, 25 S. E. 608, 59 Am. St. Rep. 226; *White v. McQueen*, 96 Mich. 249, 55 N. W. 843; *People v. Hochstim*, 36 Misc. Rep. 562, 73 N. Y. Supp. 626; *McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906, 1 Ann. Cas. 924; *Eldredge*

v. Mitchell, 214 Mass. 480, 102 N. E. 69.

"In Re Kellam, 55 Kan. 700, 41 Pac. 960, the court states the common-law rule that felonies are excepted from the rule on account of the gravity of such offense; public safety demands and requires the prompt apprehension of criminals charged with heinous crimes, but the power of officers to make arrests without warrant cannot be extended to minor offenses.

"In Connecticut, Delaware, Illinois, Indiana, Kansas, Maryland, Michigan, Mississippi, North Carolina, Pennsylvania, and other states the rule is stated that an officer without a warrant cannot arrest one for a misdemeanor in carrying a concealed weapon, on suspicion or information that the person arrested has the weapon on his person.

"There are a number of cases directly in point: Where an officer seized a man without advising him that he was under arrest, and in the scuffle a bottle of whisky fell from the defendant's pocket, it was held not admissible in evidence. People v. Margelis, 217 Mich. 423, 186 N. W. 488. So of the search of a defendant's grip without a warrant. People v. Foreman, 218 Mich. 591, 188 N. W. 375. In Ash v. Commonwealth, 193 Ky. 663, 236 S. W. 1032, evidence obtained by search of the defendant's grip was held inadmissible because the search was unlawful. In case of search of a prisoner arrested without warrant and discovery of a concealed weapon the search was unlawful. Pitts v. State, 14 Ga. App. 283, 80 S. E. 510. Where a defendant was searched without being arrested and whisky which was not open to the observation was found in his

pocket, it was held that the search was illegal and the evidence thus discovered was incompetent. Helton v. Commonwealth, 195 Ky. 678, 243 S. W. 918, citing several cases.

"In Hughes v. State, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639, a sheriff had information, and actually saw, the defendant engaged in the whisky traffic, searched and found whisky in his car. The Supreme Court of Tennessee held that it was not an unreasonable search, but, in an exhaustive review of the cases in the United States Supreme Court and other decisions relating to unreasonable search, used this language (145 Tenn. 570, 238 S. W. 595):

"It follows, therefore, that it cannot be said that the plaintiff in error was in the commission of an offense in the presence of the officers, so as to justify the arrest, merely from the fact that, when the arrest was effected, it was found that he was actually committing an offense. Neither is it sufficient to justify the arrest that the officer had information justifying him in the belief that an offense was being committed, for the facts constituting the offense must have been within the knowledge of the officer, and that knowledge must have been revealed in the officer's presence. To illustrate: If a person has in his possession a concealed weapon, if he exposes it in the presence of an officer or uses it, and the officer sees it, then the officer may lawfully arrest him without a warrant. A person may have a concealed weapon upon his person, but if there is no evidence of that fact apparent to an officer his arrest would be unwarranted."

This case was followed in the case of State v. McBride, 37 S. W. (2d) 423, and State v. Raines, 98 S. W. (2d) 580.

The rule of law as to the arrest of a felon without a warrant is stated in 6 C. J. S., Section 8, page 606, as follows:

"It is a general rule, unless changed by statute, that it is both the right and the duty of a private person, who is present when a felony is committed, to apprehend the felon without waiting for the issuance of a warrant; and the arrest may be made at any subsequent time as well as at the time of the commission of the felony. Likewise a private person may lawfully arrest without a warrant, on fresh pursuit, one whom he knows to have committed a felony. Where a private person makes an arrest under these circumstances, he must act in good faith and with a view of assisting in bringing to justice a felon.

"To prevent felony. A private person also has a right to make an arrest without a warrant for the purpose of preventing the commission of a felony, and may arrest without a warrant one whom he finds attempting to commit a felony.

* * * * *

"At common law, and under the statutes of most states, although subject to statutory variations, a private person acting in good faith may arrest without a warrant one who has committed a treason or a felony on an occasion already past.

"In order to justify such arrest, it is necessary and also sufficient, to show that a felony was actually committed, and that there was reasonable ground for

suspecting that the person arrested committed it. Generally, mere proof of reasonable and probable cause for making an arrest without a warrant will not justify a private person unless a felony has actually been committed, since a sharp distinction is made in this respect between an arrest by a private person and an arrest by a peace officer; but, in a few jurisdictions, even a private person may justify an arrest where he reasonably believes that a felony has been committed. The reasonable grounds of suspicion of a felony, however, may be proved in mitigation of damages. In some jurisdictions, it is the rule that it must appear, not only that a felony has been committed, but also that the offense was committed by the person arrested therefor, before the arrest will be justified; but the more generally prevailing rule is that reasonable grounds for believing the person arrested to be guilty is sufficient justification where a felony has been actually committed, although he is in fact innocent."

Also, the rule is stated at page 607, as follows:

"At common law, and except where the rule is changed by statute, it being the duty of every citizen to assist in preserving the peace, any private person may arrest without a warrant one who commits a breach of the peace in his presence, or where it is reasonably suspected that a person is threatening to commit a breach of the peace. Unless modified by statute, it would seem, where the arrest is for a misdemeanor, that the offense must amount to a breach of the peace to justify a private person in arresting without a warrant. Where one commits a misdemeanor in the presence of a private person and seeks forcibly

to resist an arrest by him, the offender is also guilty of a breach of the peace and may be arrested by a private person without a warrant.

"To justify an arrest by a private person, without a warrant, for an offense less than a felony, where permitted by statute, it is essential that such offense shall actually have been committed or attempted. Accordingly, where it appeared after arrest that a person had in fact not committed any offense, the arrest was held unlawful. Furthermore, it is necessary that such offense be committed in the presence of the person making the arrest, and, in this connection, it has been held that it is not sufficient that the private person making the arrest have knowledge of the commission of the offense, but he must also be able to detect the offense, by sight or hearing, as an act of the accused. Also, such arrest must be made at the time when the offense was committed, or while there is a continuing danger of its renewal, and a private person does not have the right to make an arrest for a misdemeanor without a warrant after the event, or on mere information or suspicion."

At common law the process of arrest of a felon without a warrant was had under what was known as the Hue and Cry process. Under our statute the Hue and Cry process is still in effect as set out in Section 3882, R. S. Missouri 1939. Also, under Section 3882, supra, to the effect that when the sheriffs, coroners and constables shall ask for assistance when a felony has been committed, an arrest of a felon can be made by any of such officers or others who are required to assist by such officer without a warrant.

As to whether or not peace officers or individuals can arrest a misdemeanant without a warrant, it was held in *Gray v. Earls*, 250 S. W. 567, 1. c. 572, as follows:

"No statute has been pointed out or found authorizing private persons to make arrests in the circumstances here shown. Police officers in cities have certain powers under statutes applicable to cities of the various classes, but 'peace officers, in the absence of an empowering statute, have no authority to arrest an individual for a misdemeanor without process, except on view--that is, when they witness the perpetration of the offense.' * * * * *

Also, in the case of State v. Peters, 242 S. W. 894, par. 1, the court said:

"Section 11640, R. S. 1919, provides that sheriffs are conservators of the peace, and section 11638, R. S. 1919, clothes the deputy sheriff with the same power as that possessed by the sheriff. The sheriff and his deputies, as peace officers, have the right to make arrests, without warrant, in misdemeanors committed in their presence flagrante delicto. * * * * *

In view of the authorities above set out under your fourth question it is the opinion of this department that the members of the State Highway Patrol can arrest and apprehend, with or without a warrant, persons who have committed a felony and if they have no warrant, any person whom they have good reason to believe has committed a felony.

It is further the opinion of this department that the members of the State Highway Patrol may arrest persons who have committed a misdemeanor in their presence.

It is further the opinion of this department that the members of the State Highway Patrol may arrest one who has committed a felony and are empowered in the same manner as an individual who has the same authority to arrest a person who has committed a felony, either under the Hue and Cry section, supra, or upon reasonable grounds that the person has committed a felony.

It is further the opinion of this department that members of the State Highway Patrol cannot arrest a misdemeanor, either on or off of the highway who has not been detected in the commission of the crime by the member of the Patrol.

V.

Your fifth question reads as follows:

"5. Shall the Patrol arrest on a warrant persons charged with crimes on the highway or against the highway?"

In giving our opinion on your fifth question, we are assuming that the crime described in this question is a crime concerning the laws of motor vehicles or traffic regulations. If the crime pertains to any of the crimes set out in Section 8358, supra, which section sets out the powers and duties of the State Highway Patrol, then the State Highway Patrolmen may arrest, on a warrant, persons charged with crimes set out in said Section 8358, supra, which includes crimes against the highway.

VI.

Your sixth question is as follows:

"6. Shall the Patrol pursue drivers of cars from the highway to make arrests?"

In answering the above question we are assuming that the member of the Patrol detected the driver of the car in a commission of either a felony or a misdemeanor. Under Section 8359, supra, it specifically provides "he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

In view of this partial section it is the opinion of this department that if a member of the State Highway Patrol should detect a person committing either a felony or misde-

meanor he may pursue the driver of such car to any place in the state to make an arrest.

VII.

Your seventh question reads as follows:

"7. Shall the Patrol assist sheriffs in investigations which they have not the facilities for handling?"

In answer to this question we do not find that the State Highway Patrol is empowered or authorized under Section 8358, supra, to assist sheriffs in investigations in any manner other than the violation of the motor vehicle laws and traffic regulations. The fact that the sheriff has not the facilities for handling investigations other than that of the violation of the motor vehicle laws and traffic regulations does not alter the case in any manner. If the State Highway Patrol should assist sheriffs in such investigations, they would be giving aid to investigations which should not be given at the expense of the State Road Fund.

VIII.

Your eighth question reads as follows:

"8. Shall the Patrol assist any organization in any way whatsoever to investigate any crime or condition not confined to misuse of the highways or a violation of motor laws?"

Since Section 44a, Article IV of the Constitution of Missouri specifically states, "and enforcing any state motor vehicle law or traffic regulation," it would be a violation for the State Highway Patrol to investigate any crime or condition not confined to misuse of the highways or a violation of motor laws for the reason that the expense of investigation would be borne by the State Highway Patrol Appropriation Act which would be invalid.

IX.

Your ninth question reads as follows:

"9. Shall the Patrol leave the highway to investigate persons suspected of damaging the highway or markers?"

Under Section 8358, Chapter 44, R. S. Missouri 1939, it specifically provides that the State Highway Patrol is empowered and authorized "to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible * * . For that reason the State Highway Patrol is authorized to leave the highways to investigate persons suspected of damaging the highway or markers.

X.

Your tenth question reads as follows:

"10. Shall the Patrol collect on 'no account' or 'insufficient funds' checks received at office of Secretary of State for fees?"

Section 8358, supra, specifically states:

"* * * It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

This authority granted in Section 8358, supra, does not empower the Patrol to collect checks marked "no account" or "insufficient funds." If the secretary of state accepts noncertified checks he does so at his own risk for the reason that he is not authorized to receive checks for any fees. Also, the secretary of state may cancel any instrument, license or certificate that he has granted which has not been

paid for.

XI.

Your eleventh question reads as follows:

"11. Shall the Patrol assist in traffic direction around fairs, picnics, funerals and other special gatherings?"

Section 8358, supra, specifically states:

"It shall be the duty of the Patrol to police the highways constructed and maintained by the Commission * * * * *

and further states, "to regulate the movement of traffic thereon."

In the above partial section it is very noticeable that the Legislature, in empowering the State Highway Patrol to regulate the movement of traffic, specifically stated that it applied to highways constructed and maintained by the commission.

Statutes have been construed to the effect that when a certain procedure or thing is mentioned it excludes all other procedure and things. It was so held in State ex rel. Kansas City Power and Light Company v. Smith, 111 S. W. (2d) 513, and also in Chilton v. Drainage District No. 8 v. Pemiscot County, 63 S. W. (2d) 421. It was so held also in Crevisour v. Hendrix, 136 S. W. (2d) 404.

As to traffic directions at the State Fair, the Legislature, under Section 14159, R. S. Missouri 1939, provided for the appointment of special police for the purpose of keeping peace and directing traffic.

In view of the above authorities it is the opinion of this department that the State Highway Patrol shall not assist in traffic directions around fairs, picnics, funerals and other special gatherings unless as set out in Section 8358, supra, the highways upon which they are directing the traffic is constructed and maintained by the commission.

XII.

Your twelfth question reads as follows:

"12. Shall the Patrol conduct investigations concerning stolen cars and 'hot car rings'?"

The powers and duties of the State Highway Patrol are set out in Chapter 44, Section 8358, supra. The question of the theft of motor vehicles is set out in Chapter 45, R. S. Missouri 1939. The framers of Section 44a, Article IV of the Constitution of Missouri saw fit to include as an incident to that section, which was a provision for the State Highway System, the phrase "cost of administering and enforcing any state motor vehicle law or traffic regulation." It is very noticeable under this section of the Constitution that the five words "any state motor vehicle law" by the Legislature, in setting out the duties of the Highway Patrol, under Section 8358, supra, only mentioned the following part in reference to the motor vehicle laws, that is, "to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission." Previous to this clause in Section 8358, supra, this sentence is specifically set out, "It shall be the duty of the patrol to police the highways constructed and maintained by the commission; * * . The word "thereon" used in reference to the enforcement of the motor vehicle laws is plain and unambiguous and this power granted to the State Highway Patrol means the vehicle laws thereon the highways constructed and maintained by the commission.

The Legislature, by the enactment of Section 8358, supra, has construed the enforcement of the motor vehicle laws to mean in reference to the highways and not to the reference of the theft of automobiles. Under Chapter 44, which contains Section 8358, supra, another section has been enacted by the Legislature to show that it was the intention of the Legislature that the power of the State Highway Patrol is confined solely under Section 8358. This section is 8363, R. S. Missouri 1939, which reads as fol-

lows:

"Neither the governor, the commission, nor the superintendent shall have any power, right or authority to command, order or direct any member of the patrol to perform any duty or service not authorized by this chapter."

This section specifically states that the governor, the commission nor the superintendent can order or command any member of the Patrol to perform any duty or service not authorized by this chapter. In other words, under this section the State Highway Patrol is not permitted to investigate stolen cars and people who commit such acts which you describe as "hot car rings."

XIII.

Your thirteenth question reads as follows:

"13. Shall the Patrol conduct safety campaigns and engage in traffic and safety education?"

In view of the authorities set out in the above twelve questions and more especially the duties as described in Section 8358, supra, we are of the opinion that the State Highway Patrol cannot conduct safety campaigns and engage in traffic and safety education for the reason that they are not so authorized.

It is further our opinion to that effect for the reason that the money paid into the State Road Fund under Section 44a, Article IV of the Constitution of Missouri does not permit the spending of the money of that sacred fund for anything except matters concerning the maintaining and the construction of the State Highway System.

XIV.

Your fourteenth question reads as follows:

"14. Shall the Patrol fingerprint persons killed in accidents to establish identity?"

We find no authority for the State Highway Patrol to fingerprint persons killed in accidents to establish identity. That is a matter for other officials, such as coroners and for other peace officers who are empowered to perform such acts.

XV.

Your fifteenth question reads as follows:

"15. Shall the Patrol attempt to contact persons traveling through the state for the delivery of emergency measures?"

After a careful research and under all of the authorities hereinbefore set out it is our opinion that the State Highway Patrol is not empowered to attempt to contact persons traveling through the state for the delivery of emergency messages unless it is a matter incident to or connected with the maintaining and construction of the state highway system or concerning the violation of the laws set out in Section 8358, supra, regarding motor vehicles and traffic regulations.

XVI.

Your sixteenth question reads as follows:

"16. Shall the Patrol relay radio messages for out-of-state departments or other state and federal agencies?"

In view of our holding under your fifteenth question and unless the radio message relayed for out-of-state departments or for other state and federal agencies concerned the violations of the motor vehicle laws as set out in Section 8358, supra, or is not incident to the maintaining and construction of the state highway system, it is our opinion that the State Highway Patrol cannot relay such messages.

XIX.

Your nineteenth question reads as follows:

"19. Shall the Patrol investigate suspicious characters along the highways?"

It is the opinion of this department that the State Highway Patrol is not empowered to investigate suspicious characters along the highways unless they have reasonable cause to believe that the persons under suspicion may have or intend to commit a violation of the laws as set out under Section 8358, supra. Of course, if a member of the State Highway Patrol has just grounds and believes that the suspicious character is a fugitive from justice or a patrolman, under the Hue and Cry section, believes that the suspicious character has committed a felony he may, by investigation, arrest the suspicious character the same as if he was a private citizen and not a member of the State Highway Patrol. The State Highway Patrol is not empowered to promiscuously investigate any person on the highway unless he has just and reasonable grounds for the investigation. A State Highway Patrolman, under Section 44a, Article IV of the Constitution of Missouri, and under Section 8358, supra, is confined as a member of the State Highway Patrol and not as a private citizen to laws involving the protection and maintenance of the State Highway System.

XX.

Your twentieth question reads as follows:

"20. Shall the Patrol accept for filing fingerprints and other data on criminals from members and other officers?"

In answer to your twentieth question and in view of authorities hereinbefore set out, it is the opinion of this department that the Patrol has no authority to accept for filing fingerprints and other data on criminals from members and other officers unless the data concerns the violation or would aid in a conviction of persons guilty of the violation of crimes set out in Section 8358, supra, in regard to the laws concerning motor vehicles in that section and traffic regulations.

XXI.

Your twenty-first question reads as follows:

"21. Shall the Patrol accept for examination in the laboratory material submitted by other officers or departments concerning crimes investigated by those officers, which were not committed on the highways?"

This question concerns a matter which is not incident to and is in no way connected with the maintenance or construction of the State Highway System and under the facts stated therein does not concern crimes coming within the authority of the State Highway Patrol as set out in Section 8358, supra.

It is, therefore, the opinion of this department that the State Highway Patrol, which has been created by reason of Section 44a, Article IV of the Constitution, cannot use the money out of the State Road Fund for the examination in the laboratory any material submitted by other officers or departments concerning crimes investigated by those officers which have no connection with the violation of laws as set out in Section 8358, supra, or concerning the maintenance and construction of the State Highway System.

XXII.

Your twenty-second question reads as follows:

"22. Shall the Patrol furnish information concerning the previous records of criminals to other departments?"

Under the above question you ask if the State Highway Patrol can furnish information concerning the previous records of criminals to other departments and if you mean criminals other than those who have been convicted or are subject to arrest for a violation of the laws regarding the State Highway System as set out in Section 8358, supra, then the State Highway Patrol is not authorized to furnish that information for the reason that under our previous opinion the State Highway Patrol is limited to crimes concerning motor vehicle laws as applicable

to the State Highway System under Section 8358, supra, and traffic regulations.

Under Section 8456, R. S. Missouri 1939, it is the duty of the Commissioner of Motor Vehicles to receive and file all violations of motor vehicle laws pertaining to traffic, etc., and under other sections of the statutes it is the duty of certain officers to report such violations to the Commissioner of Motor Vehicles, and we find no authority under Section 8358, supra, for the State Highway Patrol to furnish information to other departments.

XXIII.

Your twenty-third question reads as follows:

"23. Shall the Patrol assist in the fingerprinting of school children, applicants and citizens for personal checkup and identification?"

Under the above question we are assuming that the school children consented to the fingerprinting, but we do not understand what you mean when you say applicants and citizens for personal checkup and identification. Even if you mean that the school children, the applicants and citizens for personal checkup and identification agree to the fingerprinting, we find no authority which permits the State Highway Patrol to use the funds set apart in the State Road Fund for the maintenance and construction of the State Highway System to be used for the fingerprinting of anyone with or without their consent.

In this state Section 23, Article II of the Constitution of Missouri provides that no person shall be compelled to testify against himself in a criminal cause. Under that section of the Constitution where a person objects to being fingerprinted, the Legislature saw fit to enact Section 4184, R. S. Missouri 1939, which reads as follows:

"Any person convicted of a felony, which shall not be set aside or reversed, may be subjected by or under the direction of those in whose custody he is to the measurements,

processes and operations practiced under the system for the identification of criminals, commonly known as the Bertillon signaletic system. Such force may be used as necessary to the effectual carrying out and application of such measurements, processes and operations; and the signaletic card and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law."

This section was not passed upon in this state directly, but in the case of State v. Baldwin, 297 S. W. 10, 1. c. 18, par. 10, the court said:

"If it be conceded (a matter we do not now pass upon) that Baker's testimony as to taking the picture, and that it was the picture of the defendant, was competent, there was no excuse for the latter portion of his evidence, as to where the picture was kept. What issue in the case did that tend to prove? To what issue in the case was proof of where the picture was kept relevant? Absolutely none. Baker had said he took the picture, and that it was the picture of defendant, and that facts had not been questioned up to the date of the general objection to proof as to where the picture was kept. Such evidence of Baker was not relevant to any issue in the case, and, under the rules we have discussed supra, the general objection of irrelevancy was good. It is clear what the real purpose was in its introduction. And the court seems to have been in thorough sympathy, for we read in the record: 'The Court: Did I hear you say Bertillon room?'

"The law fixes the character of pictures

to be found in Bertillon rooms. R. S. 1919, sections 4140 to 4143, both inclusive. In section 4140 it is provided that any person convicted of a felony, whose sentence has not been reversed, shall be subject to all the things (by way of identification) allowed by the Bertillon system. See, also, sections 8955 and 8964, R. S. 1919, wherein is authority for the establishment of a Bertillon system of identifying convicted criminals in cities of 500,000 or over. So, under the law (presumably known by all citizens) the defendant's picture was in the Bertillon room of the city of St. Louis, wherein it had no place, unless, under section 4041, he had been convicted of a felony and his conviction had not been reversed. This made this evidence highly prejudicial. The place where the picture was kept was utterly immaterial upon the question as to whether or not it was the picture of defendant. Nor did it tend to prove defendant committed the crime. It could be relevant to no issue in the case, and the court should have promptly sustained the objection that the evidence was irrelevant and immaterial. Its failure to do so was prejudicial and reversible error."

Many of the circuit judges of this state have declared that if persons have been convicted of a felony and their cases have been finally adjudicated they can be fingerprinted without their consent, but if the persons have not been convicted of a felony they have, by injunction, restrained police officers and other officers from fingerprinting such persons. These cases, so far, have not been appealed or passed upon by the Supreme Court of this state other than in the case of *State v. Baldwin*, supra. But even if the defendant had been finally convicted of a felony and the fingerprinting was not made for the purpose of enforcing the laws and under the duties of the State Highway Patrol as set out in Section 8358, supra, it would be a violation of Section 8363, supra, for the reason it would be exceeding the duties of the State Highway Patrol and the use of the State Road Fund for purposes other than the

maintenance and construction of the State Highway System.

XXIV.

Your twenty-fourth question reads as follows:

"24. Shall the Patrol issue bulletins listing stolen cars, crimes committed, driver's licenses suspended or revoked, stolen property, etc?"

The above question refers to listing stolen cars, crimes committed and stolen property. If the bulletin regarding the above matter is incident to the powers and duties of the prevention of crime as set out in Section 8358, supra, such a bulletin would be proper for the reason it is a question pertaining to enforcement of the motor vehicle laws and property of the State Highway Commission as set out in Section 8358, supra. You specifically mention the furnishing of bulletins concerning stolen cars. The answer to this question is contained in our opinion in reply to your question numbered 12. Of course, if the stolen cars are property of the State Highway Commission, it comes within the duties and powers of the State Highway Patrol, under Section 8358, supra, and a bulletin in such a case would be proper. You also mention in the above request whether it is proper for the State Highway Patrol to issue bulletins listing drivers' licenses suspended or revoked. Of course, this public notice is recorded in the office of the Commissioner of Motor Vehicles as set out in Sections 8456 and 8459, R. S. Missouri 1939. The issuing of bulletins listing drivers' licenses suspended or revoked would be proper for the reason that under Section 8358, supra, it specifically states, "It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes." Said Section 8358, supra, further states, "* * to regulate the movement of traffic thereon; (meaning highways constructed and maintained by the commission); to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; * * "

It is, therefore, the opinion of this department that under Section 8358, supra, the State Patrol is empowered to issue bulletins listing stolen cars if the cars are the property of the State Highway Commission but not as to stolen cars that are not the property of the State Highway Commission and are not connected in any way with the maintaining of the state highways.

It is further the opinion of this department that the State Highway Patrol may issue bulletins concerning crimes committed in violation of the laws of the state highways as set out in Section 8358, supra.

It is further the opinion of this department that the State Highway Patrol may issue bulletins concerning drivers' licenses suspended or revoked.

It is further the opinion of this department that the State Highway Patrol may issue bulletins concerning stolen property which is the property of the State Highway Commission but not as to stolen property that is in no way connected with the maintenance and construction of the state highways.

XXV.

Your twenty-fifth question reads as follows:

"25. Shall the Patrol assign members of Patrol to schools of other departments as instructors in first aid, safety, and law enforcement?"

We find no authorization in Section 8358, supra, whereby the State Highway Patrol may expend money out of the State Road Fund for the purpose of the Patrol entering schools of other departments as instructors in first aid, safety and law enforcement. The State Road Fund, which was enacted under Section 44a, Article IV of the Constitution of Missouri, as we have said in further answers to your questions in this request, can only be used for the maintenance and construction of the state highways and payment of the bonds issued under said section.

We reiterate that if the State Highway Patrol was paid out of the general revenue it could do many things which are

not now limited under Section 44a, Article IV of the Constitution of Missouri and especially the clause used therein in violation of the motor vehicle laws and traffic regulations.

XXVI.

Your twenty-sixth question reads as follows:

"26. Shall the Patrol be active in any strike duty?"

In answer to the above question we call your attention to Section 4613, supra, which is a section in reference to the duty of peace officers in case of riots, etc. Under said section 4613 the proper officer may require bystanders or spectators to aid in stopping the riot and assist in making arrests of the people involved in the riot. In such a case if the State Highway Patrol is ordered by the mayor, board of aldermen or a member of the board of aldermen of any municipality or by the sheriff, coroner and marshal and their respective deputies of the county in which such town or city is situated to assist in making arrests, then the State Highway Patrolmen, under their duty as peace officers, are required to be active. If they are not summoned or if there is not a riot, "strike duty" is not a part of the maintenance and construction of state highways or an act which would be enforcing the motor vehicle laws or traffic regulations.

XXVII.

Your twenty-seventh question reads as follows:

"27. Shall the Patrol assist in the training of the Missouri defense forces?"

We find no authority in Section 8358, supra, which would authorize the State Highway Patrol in the training of the Missouri defense forces. Such action would in no way be incident or have any connection with the enforcement of the laws as set out in Section 44a, Article IV of the Constitution of Missouri or Section 8358, R. S. Missouri 1939.

XXVIII.

Your twenty-eighth question reads as follows:

"28. Shall the Patrol provide the department with emergency equipment for use in disasters?"

In answer to your above question if the disasters described are not incident or a part of the State Highway Commission, or would not aid in the maintenance and construction of the highways, or would not aid in the prosecution or regulation of the violation of the motor vehicle laws and traffic regulations, then the State Highway Patrol has no authority to furnish emergency equipment for use in disasters which equipment is purchased out of the funds provided for the State Road Fund.

XXIX.

Your twenty-ninth question reads as follows:

"29. Shall the Patrol examine documents or materials for other state departments?"

In answer to the above question it is the opinion of this department that the money paid into the State Road Fund is a sacred fund for the use of the maintenance and construction of state highways and should not be deviated for the purpose of furnishing aid to any of the other state departments except the departments under the State Highway Commission.

XXX.

Your thirtieth question reads as follows:

"30. Shall the Patrol assist in locating prisoners after escape from the state penitentiary and reformatories?"

In answer to your above question, which was answered in detail in questions 4 and 5 in this request, we further state that the locating of prisoners after escape from the

state penitentiary and reformatories is not included in the specific duties of the State Highway Patrol as set out in Section 8358, supra.

We again call your attention to Section 8363, supra, which specifically prohibits the governor, the commission and the superintendent of the State Highway Patrol from directing any member of the Patrol to perform any duty or service not authorized by Chapter 44 of the Revised Statutes of Missouri 1939.

XXXI.

Your thirty-first question reads as follows:

"31. Shall the Patrol use radio facilities in case of disaster which disrupts land communications for general emergency use?"

This department, in answering all of the forty-seven questions set out in this request, is merely giving our opinion on these questions according to the legal aspect and not the moral aspect and in further answer to this question it is our opinion that under Section 8358, supra, we find no authority for the State Highway Patrol to use the radio facilities purchased out of the sacred road fund for the purpose of carrying on communications which a disaster has disrupted so that land communications cannot be carried on for general emergency use.

XXXII.

Your thirty-second question reads as follows:

"32. Shall the Patrol continue off the highway investigations of cases arising on the highway?"

In answer to the above question if the cases under investigation are cases which come within the duty of the State Highway Patrol to prohibit and the law against such crimes to be enforced as set out in Section 8358, supra, then the State Highway Patrol is authorized under Chapter 44, Revised Statutes of Missouri 1939, to continue the

investigation of such cases. The investigation of such cases must be cases involved in the construction and maintenance of the state highways and regulation of the traffic thereon or the enforcing the laws of motor vehicles as set out in said Section 8358.

XXXIII.

Your thirty-third question reads as follows:

"33. Shall the Patrol arrest recognized fugitives if in civilian clothes and not on active duty, either off or on the highway?"

In answer to your thirty-third question we wish to state that this question was specifically answered in questions 4 and 5 in this request. In those answers we held that the State Highway Patrol, if having reasonable and just grounds to believe the person suspected was guilty of a felony, then they may arrest the person without a warrant or with a warrant either off or on the highway the same as any individual is authorized under the laws of Missouri. We also held in questions 4 and 5 that the State Highway Patrolmen could arrest a person on a misdemeanor if committed in their presence with or without a warrant.

XXXIV.

Your thirty-fourth question reads as follows:

"34. Shall the Patrol take part in activities of the Missouri Defense Council?"

After careful research we find no authority under Section 44a, Article IV of the Constitution of Missouri or Section 8358, R. S. Missouri 1939, which empowers the State Highway Patrol to take part in activities of the Missouri Defense Council.

XXXV.

Your thirty-fifth question reads as follows:

"35. Shall the Patrol protect wreckage of planes until Department of Commerce officials arrive?"

After careful research we find no authority under Section 44a, Article IV of the Constitution of Missouri or Section 8358, R. S. Missouri 1939, which empowers the State Highway Patrol to protect wreckage of planes until Department of Commerce officials arrive.

XXXVI.

Your thirty-sixth question reads as follows:

"36. Shall the Patrol cooperate with the railroads in investigation of sabotage?"

After careful research we find no authority under Section 44a, Article IV of the Constitution of Missouri or Section 8358, R. S. Missouri 1939, which empowers the State Highway Patrol to cooperate with the railroads in the investigation of sabotage.

XXXVII.

Your thirty-seventh question reads as follows:

"37. Shall the Patrol search for any kind of supportive evidence at the time and place of arrest of an individual?"

In answer to the above question it is the opinion of this department that if a lawful arrest was made of an individual for a crime, the prosecution of which comes within the duties of the Highway Patrol as set out in Section 8358, supra, then the Patrol has authority to make a search for any kind of supportive evidence at the time and place of arrest the same as a sheriff or constable.

XXXVIII.

Your thirty-eighth question reads as follows:

"38. Shall the Patrol arrest for violations of game laws observed off the highway?"

We find no authority under Section 44a, Article IV of the Constitution of Missouri or Section 8358, R. S. Missouri 1939, which empowers the State Highway Patrol to arrest for violation of game laws except the power that is granted an individual as we have defined in questions 4 and 5 of this request. It is not the duty of the State Highway Patrol to arrest for violations of the game laws observed off the highway but they may, of their own volition, arrest under the same powers that are granted an individual.

XXXIX.

Your thirty-ninth question reads as follows:

"39. Shall the Patrol arrest fugitives when not first observed on the highways, such as convicts known to be in woods, cornfields, etc., and no other help available?"

This question was answered by our opinion on questions 4 and 5 as set out in this request. Under those questions we gave our opinion that the State Highway Patrol has the same authority to arrest fugitives as is granted individuals. Under those questions 4 and 5 we gave the authorities upon which we base our opinion.

XL.

Your fortieth question reads as follows:

"40. Shall the Patrol take part in civic programs and parades?"

After a careful research of Section 44a, Article IV of the Constitution of Missouri or Section 8358, R. S. Missouri 1939, we find no authority that empowers the State Highway Patrol to take part in civic programs and parades. Of course, as we said before, we are only giving our opinion on the legal question. The State Highway Patrol has been taking

part in civic programs and parades, but under Section 44a, Article IV of the Constitution of Missouri, money should not be taken from the sacred State Road Fund for the purpose of paying expenses of the State Highway Patrol for any other actions except those set out in Section 8358, supra.

XLI.

Your forty-first question reads as follows:

"41. Shall the Patrol patrol any city street or county road?"

In answer to your above question, we again refer to Section 8358, R. S. Missouri 1939, which specifically states, "It shall be the duty of the patrol to police the highways constructed and maintained by the commission; * * * * *

In our opinion, in answer to questions heretofore answered, we stated and quoted the law upon which we base our opinion to the effect that the mention of one thing in statute implies exclusion of another thing. We also held that where special powers are conferred or special methods are prescribed for exercise of power, the exercise of such power is within the maxim that the expression of one thing is the exclusion of another and the doing of the thing specified, except in a particular way point out, is nugatory. *Kroger Grocery & Baking Company v. City of St. Louis*, 106 S. W. (2d) 435, 341 Mo. 62, 111 A. L. R. 589. Upon the same subject we have also previously cited the case of *State ex rel. Kansas City Power and Light Company v. Smith*, 111 S. W. (2d) 513, 342 Mo. 75.

In view of the above authorities and our opinion under previous questions in this request, it is the opinion of this department that the State Highway Patrol does not have the power to patrol any city street or county road that has not been constructed and maintained by the commission. We base this opinion on the fact that the Legislature, in Section 8358, supra, in setting out the duties of the Patrol to police the highways and setting out specifically the duties of the State Highway Patrol, specifically stated in each clause the word "thereon." This word "thereon" referred back to the phrase "It shall be the duty of the patrol

to police the highways constructed and maintained by the commission."

Again I refer to Section 8363, supra, which prohibits the governor, the commission and the superintendent from directing any member of the Patrol to perform any duty or service not authorized by this chapter which includes Section 8358, supra.

XLIII.

Your forty-third question reads as follows:

"43. Shall the Patrol escort military convoys upon request of the military authorities?"

In answer to this question it is our opinion that it is not the duty of the State Highway Patrol to escort military convoys upon request of the military authorities under Section 8358, supra. We qualify this opinion to the effect that if it is necessary for the State Highway Patrol to escort military convoys with or without the request of the military authorities in order to regulate the movement of traffic upon the highways constructed and maintained by the commission, then it would be proper, but if the convey is moving over city streets or county roads not constructed and maintained by the commission, then it would not be proper.

XLIV.

Your forty-fourth question reads as follows:

"44. Shall the Patrol take part in any honorary or guard duty in connection with any state occasion?"

After careful research of Section 44a, Article IV of the Constitution of Missouri and Section 8358, R. S. Missouri 1939, we find no authority for the State Highway Patrol to take part in any honorary or guard duty in connection with any state occasion, unless the same is incident or connected

in some way with the State Highway Commission.

XLV.

Your forty-fifth question reads as follows:

"45. Shall the Patrol escort good will tours and large organizations when such tours do not follow state highways?"

In answer to your forty-fifth question we refer you to our opinion in answer to questions 40 and 43 which were to the effect that the Patrol is authorized to escort organizations in order to regulate traffic upon highways constructed and maintained by the commission but not authorized to escort organizations over city streets or county roads.

XLVI.

Your forty-sixth question reads as follows:

"46. Shall the Patrol assist in returning or locating runaway children?"

After careful research of Section 44a, Article IV of the Constitution of Missouri and Section 8358, R. S. Missouri 1939, we find no authority for the State Highway Patrol to use money out of the State Road Fund for the purpose of returning or locating runaway children.

XLVII.

Your forty-seventh question reads as follows:

"47. Shall the Patrol arrest individuals for federal offenses?"

This question has been answered by our opinion under questions 4 and 5 which was to the effect that the State Highway Patrol may arrest felons with or without warrants if they have just reason to believe the person arrested has committed a felony, or may arrest misdemeanants if the offense is com-

mitted in their presence. We have also held that it is not their duty to make such an arrest but it is permissible.

XLVIII.

Your forty-eighth question reads as follows:

"48. Shall the Patrol arrest soldiers for desertion?"

After careful research of Section 44a, Article IV of the Constitution of Missouri and Section 8358, R. S. Missouri 1939, we do not find that it is the duty of the State Highway Patrol to arrest soldiers for desertion, but under an Act of Congress dated June 18, 1898c, 469, Section 6, 30 Stats. 484, Congress authorized any civil officer to arrest members of the army for desertion. Since under Section 8359, Chapter 44, R. S. Missouri 1939, the officers of the State Highway Patrol are vested, by law, with the powers of a peace officer, the State Highway Patrol may arrest soldiers for desertion, but under Section 8358, supra, it is not their duty to arrest soldiers for desertion.

XLIX.

Your forty-ninth question reads as follows:

"49. Shall the Patrol investigate emergency peace disturbances adjacent to the highway?"

In answer to the above question, we refer you to our opinion as to your questions 4 and 5 as set out in this request, which was to the effect that State Highway Patrolmen may arrest persons committing misdemeanors within their sight.

L.

Your fiftieth question reads as follows:

"50. Shall the Patrol engage in traffic duty around the stadium at the University of Missouri during football games, when requested by the University authorities?"

In answer to the above question we refer you to our opinion on your question numbered 41, which was to the effect that the State Highway Patrol can only enforce traffic regulations upon highways constructed and maintained by the commission as set out in Section 8358, supra. The fact that the State Highway Patrol is requested by the University authorities to engage in traffic duty around the stadium of the University of Missouri during football games does not alter the law as set out in Section 8363, supra, which specifically prohibits the governor, the commission and the superintendent from directing any member of the Patrol to perform any duty or service not authorized by Chapter 44, R. S. Missouri 1939.

CONCLUSION

It is not the desire of this department to curtail the activities of the State Highway Patrol, but since a request for an opinion on certain activities has been presented to this office it is our duty to give our opinion according to the laws governing the powers and duties of the State Highway Patrol.

In the past, the State Highway Patrol has been efficient in solving certain criminal cases which we now hold they are not empowered to do. Our former opinion given to you in reference to the powers and duties of the State Highway Patrol sets out most of the authorities upon which we base our opinion in this request of forty-seven questions. We do not hold that the State Highway Patrol cannot, under any circumstances, be considered as state-wide police officers, but as the law now stands and the fact that the State Highway Patrol is paid out of the State Road Fund, which is acquired under Section 44a, Article IV of the Constitution of Missouri, we are compelled to hold that they are not state-wide police officers.

The Legislature has enacted laws limiting the powers of sheriffs generally to their own counties. It has also enacted laws limiting constables generally to the district of the justice of the peace under whom they serve writs.

In the State Highway Patrol Act the Legislature, under Section 8358, R. S. Missouri 1939, limited the State Highway Patrol to police the highways constructed and maintained by the commission. They also, in the same section, set out other duties and powers which were limited to the enforcement of certain laws thereon. The word "thereon" refers to highways constructed and maintained by the commission. The Legislature also empowered the State Highway Patrol to determine and arrest persons for causing damages to state highway property within and on the state highways. It also empowered the State Highway Patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes. That it was the intention of the Legislature that the State Highway Patrol was limited to the duties set out in Section 8358, *supra*, is shown by the fact that it enacted Section 8363, *supra*, which prohibited the governor, the commission and the superintendent to command, order or direct any member of the Patrol to perform any duty or service not authorized by Chapter 44, Revised Statutes of Missouri 1939. If it was the intention of the Legislature to create a state-wide police department with full authority in all matters, it could have enacted such a statute and not limited them as to their powers, duties and authority as they have done under Section 8358, *supra*. Of course, if the Legislature should enact such a statute creating a state-wide police department with full authority to enforce any and all laws with the same power as that of sheriff and other peace officers, the State Highway Patrol could not use the funds earmarked for state highway purposes only as set out in Section 44a, Article IV of the Constitution of Missouri. In case of such an event it would be necessary that the appropriation for the benefit of the State Highway Patrol be appropriated out of the general revenue and not to the State Road Fund.

In all of the above questions upon which we have rendered our opinion the main test as to whether or not the State Highway Patrol is empowered to conduct any action is whether or not the action or laws sought to be enforced is connected incidentally or pertains in any manner to the enforcement of the law as set out in Section 8358, R. S. Missouri 1939.

The limitations of the State Highway Patrol, set out in Section 8358, *supra*, must be followed except where some other law makes it mandatory that they perform some other

Hon. Forrest C. Donnell

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September 19, 1941

duty such as arrests under the Hue and Cry section and laws such as the riot section which must be followed not only by the State Highway Patrol but in some cases by private individuals.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WJB:DA

GOVERNOR: Upon a vacancy he shall appoint State Administrator of the Social Security Commission for a term of four years and not for the unexpired term of his predecessor.

October 3, 1941

10-4

Honorable Forrest C. Donnell
Governor, State of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

In answer to your oral request of October 2, 1941, in reference to the appointment of the State Administrator under the Social Security Act, we are herein giving our opinion under the facts given to us as follows:

"On November 3, 1937, George I. Haworth was appointed Administrator of the Social Security Commission for a term ending July 1, 1941, and until his successor be duly appointed and qualified. Section 9400, R. S. Mo. 1939, provides that such appointment be made for four years. Mr. Haworth has tendered his resignation, and the question arises as to when the term of Mr. Haworth expires, and, in the event of an appointment, should it be for his unexpired term or for a period of four years?"

The Legislature saw fit in the enactment of the chapter upon social security in Section 9398, R. S. Missouri 1939, to put in the following clause, "* * Whenever any vacancy occurs, the Governor shall appoint a Commissioner for the remainder of such term. The Governor may at any time after notice and hearing remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance or nonfeasance in office. * * "

It is very noticeable in the above clause that it says "when any vacancy" which may mean resignation or death or any other vacancy which does not occur by reason of removal for cause. The language in the above clause is unambiguous, and since under this section it specifically sets out the term of each commissioner, ranging from one

to three years, in case of a vacancy the appointment must be for the unexpired term of each particular commission. The reason for such a procedure is so that the appointment of a commissioner, in case of a new appointment, would not change the entire commission at one time, and the reason for setting out that the appointment should be for the unexpired term is to keep the terms of the respective commissioners uniform.

In the case of Smith v. Pettis County, 136 S. W. (2d) 282, paragraphs 16-18, the court defined "term of office" as follows:

"* * * A 'term of office' uniformly designates a fixed and definite period of time. * * * * *

Section 9400, R. S. Missouri 1939, provides as follows:

"The Governor, by and with the advice and consent of the Senate, shall appoint a State Administrator at an annual salary of not to exceed \$6,000.00 who shall be a person qualified by education and experience to supervise the administration of the work of the State Social Security Commission, and shall have been a citizen and taxpayer of Missouri for not less than ten years and shall hold office for a term of four years. The State Administrator shall, with the consent of the State Commission, appoint such officers, employees, and others as may be required herein for the administration of any law imposing duties upon the State Commission or deemed necessary by the State Commission, and shall fix their duties, title, expenses and compensation within the limits of Appropriation laws. The State Administrator shall serve as executive and administrative officer of the State Commission. He shall prepare and submit to the State Commission, for its

approval, an annual budget of all funds necessary to be expended by the State Commission. He shall prepare annually a full report of the administration of this or any other law, together with such recommendations and suggestions as he may deem advisable, and submit such report to the Governor. Each officer or appointee may be removed at any time by the appointing power in the same manner by which the appointment is required by law to be made. Members of the State Commission, the State Administrator and all officers appointed by the State Commission shall, before entering upon the duties of their office, take and subscribe an oath or affirmation, as required by the Constitution of Missouri. The State Commission may require a good and sufficient bond to be given by any officer or employee as the State Commission may designate in an amount and with sureties satisfactory to the State Commission, and in a form of bond approved by the Attorney General, conditioned upon the faithful discharge of the duties of the respective office or employment, and to account for all property and funds coming into their hands by, through and from such office or employment."

In this section of the statute it will be noted, first, the following words are used: The Governor, by and with the advice and consent of the Senate, shall appoint a State Administrator * * * " The section then further states, "The State Administrator shall, with the consent of the State Commission, appoint such officers, employees, * * * " The section then states, "* * each officer or appointee may be removed at any time by the appointing power in the same manner by which the appointment is required by law to be made. * * " So it seems that since the second quotation which applies to the State Administrator, with the consent of the State Commission, appointing such "officers," and under the first quotation of this section which

states the Governor shall appoint a State Administrator, and the third quotation states "each officer or appointee," it can only be said that this clause, which permits the removal of each officer or appointee, refers to the State Administrator, as well as the officers and employees appointed by the State Administrator.

There is no question but that the Governor may remove at any time any appointee whom he has appointed and in the same manner by which the appointment is required by law to be made.

Section 12826, R. S. Missouri 1939, provides as follows:

"The Governor shall have power and he is hereby authorized to remove from office, without assigning any other reason therefor, any appointive state official required by law to be appointed by the Governor, whenever in his opinion such removal is necessary for the betterment of the public service, but the Governor may, at his discretion, in any order of removal which he may make under authority of this act, assign additional and more specific reasons for such removal."

This section has not been passed upon by any of the appellate courts of this state but the language used in the section is plain and unambiguous. In reading the statutes together, such as Section 12826, supra, and that clause of Section 9400, supra, in reference to the removal of each officer or appointee, there is no question but that the Governor has the authority to remove at any time in the same manner by which the appointment is required by law to be made.

Under Section 12826, supra, the Governor may remove from office without assigning any other reason, any state official whom he has appointed, and all that is necessary is that in his own opinion such removal is necessary for the betterment of the public service. This section further permitted the Governor to give any other reason in addition to his own personal opinion in removing any officer whom he

has appointed. Section 12826, supra, was enacted to give the Governor the power as set out in Article V, Section 4 of the Constitution of Missouri, which provides as follows:

"The supreme executive power shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Missouri.'"

Under the above constitutional section the Supreme Court has held that it cannot interfere with the Governor's executive powers. State ex rel. v. Stone, 120 Mo. 428.

In construing Section 9400, supra, it is necessary to consider the intention of the Legislature. The Legislature, in Section 9400, Chapter 52 of the Social Security Act, did not place such a procedure in the appointment of the state administrator. There was nothing said or placed in this section which made it mandatory upon the Governor, in case of a vacancy, to appoint for the unexpired term. Also, they did not see fit to command the Governor to notify and have a hearing to remove the state administrator as was set out in the removal of the members of the commission of the Social Security Board. In fact, Section 9400, supra, specifically states, "* * Each officer or appointee may be removed at any time by the appointing power in the same manner by which the appointment is required by law to be made. * * " There is nothing in this section which requires or forbids the Governor to appoint for the unexpired term or for a period of four years as set out in said Section. There was no occasion for the term of office to be uniform as set out in Section 9398, supra, which refers to the appointment of the five commissioners.

Under Section 9400, supra, it is not necessary that the Governor give any reason for the removal of a state administrator at any time, and, after removal, this section provides that the Governor, with the advice and consent of the Senate, shall appoint the state administrator who shall be properly qualified for a term of four years. There is no question but that at this time the Governor may appoint a state administrator for a period of four years, and if he saw fit at the end of the term of office of George I. Haworth, he could remove his appointee and appoint another person for a term of four years.

In giving this opinion we have not overlooked the

case of *The State ex rel. Withers v. Stonestreet*, 99 Mo. 361, which was followed by the case of *State ex inf. v. Williams*, 222 Mo. 268. In both of these cases the section under construction provided that the Governor shall appoint and commission the successor for the remainder of the term of office as provided in the section. In the case of *The State ex rel. Withers v. Stonestreet*, 99 Mo. 361, l. c. 373, 374 and 375, the court said:

"This reasoning leads to this result: That the date of the appointment, first made by the governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. This conclusion is well sustained by authority. *Attorney General ex rel. v. Love*, 39 N. J. L. 476, is decisive of this point. And the general rule is elsewhere recognized that when no time is mentioned in the law, from which the term shall commence, it must begin to run from the date of election. *State ex rel. v. Constable*, 7 Ohio, 7; *Marshall v. Harwood*, 5 Md. 423; *Hughes v. Buckingham*, 5 S. & M. 632.

"These last, though election cases, furnish a strong analogous support to the view already expressed, showing as they do, the urgent necessity felt of having some determinate period at which and from which official terms shall begin. The law favors uniformity, but uniformity cannot be obtained except by the establishment of an inflexible rule. And the course in the office of the executive in regard to appointment of the first appointee, the language of his commission, and the language of all subsequent commissions, except that of relator, fixing the beginning of such official term at June 18, biennially, as the period from which to reckon the duration of such term, affords a contemporaneous,

as well as a continuous, exposition of the meaning of the law, and of the intention of its makers, that is not without value in the present investigation. Such contemporaneous and continuous construction, in the absence of anything of a countervailing character, should be sufficient per se to settle the controversy on the point in hand adversely to the relator.

"Under statutory provisions substantially identical with those under discussion, it has been held that the true rule was to construe the word 'term' as designating consecutive periods of six years, following each other in regular order, the one commencing where the other ends, and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. People ex rel. v. McClare, 99 N. Y. 83, 93. The statute there was like section 5838, providing that the appointee should hold for a certain number of years and until his successor should be appointed and qualified, and also like section 5832, providing that in case of vacancy, an appointment should occur for the residue of the term.

"The ruling just mentioned is in entire conformity to the authorities and views heretofore cited and expressed as to the date of the commencement and the uniform duration of the successive terms of office of the different and successive appointees under the law now being discussed. And, upon the very face of section 5838 aforesaid, there appears a legislative command that the terms of office of each appointee is to last two years 'from the date of his appointment;' but the legislature was cognizant that appointments might fail to be made at

the proper time; that deaths, resignations, failure to accept, qualify, etc., might occur, and so made provision in section 5838, that an appointee should hold office not only for his official term of two years, but until his successor should be duly appointed and qualified. And section 5852 exhibits the same marks of legislative solicitude that uniformity should prevail as to the duration of the official term of the inspector; for that section makes special provision, in case of vacancy, that the governor, upon being informed thereof, 'shall appoint and commission his successor for the remainder of the term of office as therein provided.' What term of office? Evidently the term of two years mentioned in section 5838, beginning at the date of the original appointee's appointment."

As set out in the cases of *The State ex rel. Withers v. Stonestreet*, 99 Mo. 361, and *State ex inf. v. Williams*, 222 Mo. 268, the main question involved was the beginning of the date of the term and the expiration of the term, and the court held that although the Legislature did not set out the date, the fact that the Governor made the appointment made the legal date of the beginning and since the Legislature designated the length of the term, the Governor, by setting the beginning of the date thereby also set the date of the expiration of the term.

We merely mention the above two cases for the reason that the sections being construed contain the same term as provided in Section 9398, *supra*, in regard to the appointment of the five commissioners and Section 9400, *supra*, does not contain the terms and clause as set out in the case of *The State ex rel. Withers v. Stonestreet*, 99 Mo. 361, and *State ex inf. v. Williams*, 222 Mo. 268, and as set out in Section 9398, *supra*.

If it had been the intention of the Legislature to have the appointment be for the unexpired term, they would have put the same clause in Section 9400, *supra*, which refers to the appointment and removal of the state administrator, as they have put in Section 9398, *supra*, which refers to the appointment and removal of the five members of the commission.

Hon. Forrest C. Donnell

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October 3, 1941

CONCLUSION

In view of the above authorities it is the opinion of this department that the State Administrator, under the State Social Security Act, when appointed, shall be for a term of four years, and in case of a vacancy, the appointment of a State Administrator should not be for the unexpired term of his predecessor.

It is further the opinion of this department that the Governor may remove at any time any officer or appointee appointed by him in the same manner by which the appointment is required by law to be made.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

WJB:DA

PENAL INSTITUTIONS:

Concerning leasing of property; use of convicts for service, and sale of articles manufactured in the various penal institutions.

October 17, 1941

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

This Department is in receipt of your request for an official opinion concerning certain legal questions contained in the Audit of the Department of Penal Institutions from January 1, 1939 to December 31, 1940, which was submitted to you by the Honorable Forrest Smith, State Auditor, in compliance with Section 13099, R. S. Missouri 1939. The questions contained therein are as follows:

- (1) May the Commission of the Department of Penal Institutions lease temporarily, property owned by the Department, and which, at the time of leasing, the Department has no use therefor?
- (2) Are all or any of the following entitled to the use of convicts or inmates as servants: the Commissioners; the Warden; the Deputy Warden; the Superintendent of the Intermediate Reformatory for Young Men at Alcoa; the Superintendent of the Missouri Reformatory at Boonville; and the Superintendent of the Auxiliary Prison?
- (3) If any of the above are entitled to the use of convicts or inmates as servants, then may fifty cents per day subsistence money for each convict so used be paid by the Commission to the person using the convict or inmate?
- (4) May private individuals purchase from various industries employing inmates of the State Penitentiary, furniture and clothing?

We shall take your questions up in the order in which they are stated.

At the outset we wish to call your attention to the statement in 6 Corpus Juris 811, which is as follows:

"It is the duty of the Attorney General to give his opinions on questions of law only, and not to decide disputed questions of fact, or matters of propriety involving executive judgment or discretion."

This reference is so made because some of the questions presented in the Audit deal with the propriety of the acts of the various penal officials and whether or not they abused their discretion, and also the adequacy of the price demanded by the officials has been questioned. With this phase of the Audit this Department is not concerned, but in this opinion restrict ourself entirely to the questions of law presented.

I.

A DEPARTMENT OF THE STATE HAVING
CONTROL OF PROPERTY CANNOT LEASE
SAME IN THE ABSENCE OF STATUTE.

The first question presented is whether the Commission of the Department of Penal Institutions may lease certain properties owned by the Department for which properties the Department at the present time has no use.

From the facts shown in the Audit the Department of Penal Institutions owns various properties upon which are situated houses. This land was bought for use in the expansion program of the penal institutions. However, this land is not needed at the present time for use as buildings of the Penitentiary, so the buildings have been leased to various individuals for use as living quarters.

Section 8987, R. S. Missouri 1939, provides as follows:

"The Commission of the Department of Penal Institutions shall, with the approval of the Governor, have authority

to lease or purchase lands for farming, rock quarries, grazing, or for any or all purposes deemed by the Commission necessary and proper to be used for the employment at useful work of the prisoners in the penitentiary, and for training the same so that they may on leaving the penitentiary be of good health and character and competent to earn an honest livelihood. The Commission is authorized to erect on such lands when leased or purchased such buildings for hospitals, dormitories, reformatories and other structures or improvements as it may with the approval of the Governor, deem necessary and proper for the welfare of the prisoners. Such lease or purchase of said lands by the Commission shall be on behalf of the State of Missouri at such terms as the Commission may deem fair and reasonable, and a lease or a deed taken therefor to the State of Missouri; * * * * *

A reading of this statute discloses that the right given to the Commission to lease lands is used in the same sense as "purchase," that is, by said section the Commission is given the power to acquire land. The statute in no way can be construed to give authority to the Commission to dispose of land by lease, and, therefore, Section 8987, supra, is no authority for the question submitted.

A thorough research of the cases in Missouri discloses no cases in which the right of the State to lease lands has been raised. However, in regard to counties and cities, the rule in this State is that in the absence of a statutory enactment empowering it so to do a county or municipal corporation has no power to rent to private persons municipal property which it holds for public use. *Matthews v. Alexandria*, 68 Mo. 115; *Shopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898; *Illinois and St. Louis Ry. & Canal Co., v. St. Louis*, 2 Dill. 70, Fed. Cas. No. 7,007. This is the majority rule in the other jurisdictions of this country, which cases are cited in 133 A. L. R. 1242 and 63 A. L. R. 614. The later cases of *Hagar v. St. Louis*, 323 Mo. 1031, 20 S. W. (2d) 666, and

Harris v. St. Louis, 233 Mo. App. 911, 111 S. W. (2d) 995, do not in any way change the rule above cited. In the Hagar case there was a specific charter provision giving authority to "lease or otherwise dispose of property." In the Harris case, supra, the court held that the power to lease was necessarily inferred from the statute authorizing the creation of the property.

We are unable to find any statutory provision that gives authority to the Department of Penal Institutions to lease the property held by them, and we believe the rule laid down by our Supreme Court in regard to the right of counties and cities to lease property, is equally applicable to the right of the State, and we therefore rule that the Department of Penal Institutions has no authority to lease property held by it in its governmental capacity.

II.

THE DIRECTOR OF THE DEPARTMENT OF
PENAL INSTITUTIONS, THE WARDEN AND
THE DEPUTY WARDEN OF THE STATE PENI-
TENTIARY ONLY ARE ENTITLED TO THE
USE OF CONVICTS AS SERVANTS IN THEIR
HOMES.

Section 9042, R. S. Missouri 1939, provides in part as follows:

"* * *; but nothing in this article shall be construed as forbidding the warden and deputy warden from using convicts as servants in their own families, subject to such rules as may be prescribed by the commission."

Section 8984, R. S. Missouri 1939, provides:

"The director of penal institutions shall have and exercise all the rights, powers, and privileges with reference to the residence provided for the warden of the Missouri state penitentiary, and the employment of prisoners therein, heretofore by law granted to and

conferred upon said warden with reference thereto."

It will be seen that under the above statutory provisions that the Director, the Warden and the Deputy Warden are allowed to use convicts as servants in their homes. The number that may be used is something that is entirely within the discretion of the Board, and is a matter upon which we do not feel competent to pass.

As to the other persons listed in the Audit who had the use of convicts as servants, to-wit, the two remaining Commissioners, the Superintendent at Alcoa, the Superintendent at Boonville, and the Superintendent of the Auxiliary Prison, we find no authority for such allowance. Of course, the above statement applies to the use of convicts as servants in the home.

Section 8986, R. S. Missouri 1939, provides that the Department of Penal Institutions may provide any employee of the Institution or Institutions under its care with board and living quarters, except that this section does not apply to the State Penitentiary. Neither does it apply to the Intermediate Reformatory, with the exception of the guards and attendants at said institution. Therefore, if the Superintendent at the Reformatory at Boonville resides upon the premises we believe that the use of convicts as servants would be proper.

In this connection we wish to call your attention to an opinion rendered by this Department on March 31, 1934, to the Honorable Forrest Smith, State Auditor, which was an answer to a request from the then Director of Penal Institutions as to the use of convicts as servants. This Department held in that opinion that only the persons mentioned above, that is, the Director, Warden and Deputy Warden, were entitled to the use of convicts as servants in their homes; and that is the holding in this opinion.

III.

THE DIRECTOR, WARDEN AND DEPUTY WARDEN NOT ENTITLED TO CASH RE- IMBURSEMENT FOR SUBSISTENCE OF SERVANTS.

In view of the holding above, that only the Director,

the Warden and the Deputy Warden are entitled to the use of convicts as servants in their homes, the question next arises as to whether the allowance by the Commissioners of the Department of Penal Institutions of fifty cents a day to such persons as subsistence for each convict so used, was proper.

The general rule is stated in 9 Cyc. 876, as follows:

"A person convicted of a felony and sentenced to confinement in the State Penitentiary is in contemplation of law, in prison until he serves his term or is pardoned, although he may be hired out to work for a contractor for convict labor, for the State cannot surrender the police power of the State over the convicts."

Section 9040, R. S. Missouri 1939, provides in part as follows:

"Said commission shall prescribe the articles of food and the quantity and quality of each kind which shall be provided for said convicts. * * * * "

Section 9065, R. S. Missouri 1939, states in part:

"The convicts shall be clothed in the uniform prescribed by said commission, and shall receive the allowance of food prescribed by the rules, and no other; but the convicts under the care of the physician shall be allowed such diet as he may direct. * * * * * "

Therefore, it will be seen that the Commission is to prescribe the food that is to be given to the convicts and every convict must receive the same kind of food. That this was the intention of the Legislature is apparent because of the words "no other" in Section 9065, supra. The General Assembly was specific in its statement that all convicts were to receive a certain allowance of food, and that only. This view is further carried out by the clause following, in which it is provided that convicts under the care of the physician shall be allowed such diet as he directs, thereby by a specific statement excepting sick convicts from the scope of the statute.

It is further the rule, as stated in 50 Corpus Juris, 360, that:

"Express provision is usually made by a statute for the maintenance and care of prisoners and these statutes must be looked to primarily to determine the right of the sheriff or other officers to particular compensation for such maintenance and care, and the amount thereof, and for expenses incurred therein, and the liability of the state, county or municipality therefor."

Since our Legislature has with definite clearness declared how convicts should be fed, we believe that this method is exclusive and any attempt by the Commissioners of the Department of Penal Institutions to alter this method is illegal and cannot be countenanced.

Therefore, we rule that a payment of fifty cents per day for each convict used by the Director, Warden and Deputy Warden as servants, to be used to cover the cost of feeding said servants, is illegal and contrary to the statutes of Missouri.

IV.

FURNITURE AND CLOTHING MADE BY CONVICTS IN THE PRISON INDUSTRIES MAY BE SOLD TO PRIVATE PERSONS.

The last question presented is whether private persons may purchase furniture and clothing from the prison industries.

Section 8988, R. S. Missouri 1939, provides in part as follows:

"* *, said board may purchase or lease upon reasonable terms such machinery as may be necessary for the manufacture and production of any other articles or products that may be disposed of upon the open market at a profit to the state, including shoes, clothing, floor mats,

October 17, 1941

mops, rugs, carpets and other articles
of furniture, such as beds and bedding
of all kinds; also desks, chairs, tables,
farm implements, fertilizer, brick or any
other articles agreed upon by the board.
* * * * *

In view of the above section, we are of the opinion that the Department of Penal Institutions may sell to private persons articles made by the convicts in the prison industries so long as said articles are sold at a profit. As stated at the outset, we do not in this opinion pass upon the adequacy of the prices obtained for the articles listed in the Audit but content ourself with citing to you the law upon the matter.

Section 8990, R. S. Missouri 1939, which provides that in case of any excess production from any of the industries before mentioned that it shall be the duty of said Commission to sell the same at the market price, does not apply to the instant facts. That statute applies to the situation when the various state departments and institutions make requisitions for articles to be made or manufactured in the prison industries. If said departments and institutions do not take the entire number of the articles so requisitioned, then the excess can be sold upon the open market at the then market price.

We believe that the above conclusions answer all the questions presented in the audit and, therefore, respectfully submit this opinion.

Yours truly

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

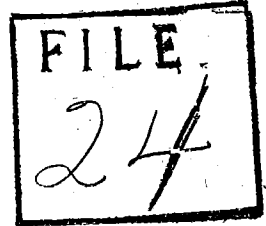
W. J. BURKE
Assistant Attorney General

AO'K:EG

OFFICERS: Public Administrator does not forfeit his office by moving from the county to another county within this State.

October 22, 1941

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

We are in receipt of your request for an opinion under date of October 16, 1941, which reads as follows:

"(a) Does the person who was elected to the office of Circuit Clerk and Recorder of Deeds in Texas County in 1938, for a term beginning January 1, 1939 to December 31, 1942, surrender one of the offices, and if so which of said offices does he surrender?

"(b) If the Public Administrator of Texas County is no longer a resident of the county; what legal determination, if any, would be required as to his change of residence to justify the appointment of a man to fill the vacancy?"

Answering paragraph (a) in your above request, will state that this Department gave an opinion upon the same question and in reference to the same office in the same county. We are enclosing a copy of this opinion, which was given on August 23, 1941, at the request of Mr. Homer H. Martin, Circuit Clerk, and Recorder, Texas County, Houston, Missouri. This opinion held that although the population of Texas County exceeds 19,000 at this time there is no vacancy in the office of Recorder of Deeds or Circuit Clerk and the offices should not be separated until the expiration of the term of the present holder of both offices, which will occur in 1942.

In answering paragraph (b) in your request, we wish to state that the office of public administrator is not an office created or set out in the Constitution of Missouri, but derives his authority solely from the laws enacted by the legislature.

In an early case in Missouri, State ex rel. Attorney General v. Woodson, 41 Mo. 227, 1. c. 230, the court said:

"The power of the state to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office is as clear and unquestioned as is the power to fix the qualifications of voters."

The state may fix the qualifications of those who shall hold state offices, and subject to such limitations as may be imposed by the State Constitution, such power may be exercised by the state legislature. 46 Corpus Juris, page 936. And at page 938, Section 35 of the same text, it is said:

"In the absence of a constitutional or statutory provision residents within the district of which the jurisdiction of the officer extends is unnecessary to eligibility."

In Mechem on public officers, Section 438, page 280, it is said:

"Where the law thus requires the officer to reside within the district which he represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result."

And, conversely, where the law does not require one to reside in a district, a removal of an officer does not create a vacancy in the office.

The legislature in creating the office of public administrator enacted Section 295, R. S. Mo. 1939, which reads as follows:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the Constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and the court may from time to time, as occasion shall require, demand additional security of such administrator, and, in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

It is very noticeable under the above section that the eligibility or qualification of a public administrator is not designated as to his being a resident of the county, neither is there a proviso which provides for a forfeiture of the office by an administrator if he should remove from the county.

Section 298, R. S. Mo. 1939, provides that the public administrator may be removed from office in the same manner and for the same causes as judges of the county court. In checking the section which authorizes the election of judges of the county court, which is Section 2475, R. S. Mo. 1939, we further find that said section does not set out any qualifications, neither does it define the eligibility of the judges to be elected as to residence under that section.

Under Section 295, supra, the only provision as to removal of the public administrator is to the effect that he may be removed by the probate judge if he does not put up sufficient security as a bond for the performance of his duties. And, it further provides that in case of such removal the probate judge may appoint another public administrator.

After a careful research we find no provision that a public administrator, or any other administrator, forfeits his office on account of removal from the county in which he has been elected or appointed. Under Section 6, R. S. Mo. 1939, it provides that no judge or clerk of any probate court, in his own county, or his deputy, and no male or female person under twenty-one years of age, or of unsound mind, shall be executor or administrator. Under this disqualification no mention is made that the public administrator forfeits his office if he should remove from the county. Also under Section 10, R. S. Mo. 1939, it specifically prohibits the appointment of an administrator who is a non-resident of this State and makes no mention of a non-resident of the county. Also under Section 209, R. S. Mo. 1939, if an executor or administrator should be temporarily absent from the State he shall appoint an agent to act for him in the handling of the estate. This limitation specifically says "absent himself from this State" and does not say "absent himself from his county."

In preparing this opinion we have not overlooked the case of *In Re Estate of Isaac Walker*, dec'd., 1 Mo. App. 404, which ruling was made that to disqualify an administrator he must be out of the State.

Also in the case of *Vosler v. Brock*, 84 Mo. 574, an executor disqualified himself by removal from the State.

Also in the case of *Chouteau's Executor v. Burlando, et al.*, 20 Mo. 305, it was held that letters of administration

could be revoked by reason of the administrator becoming a non-resident of the State.

In the three cases above, the administrator or executor had moved from the State and not from one county to another county within the State.

Since non-residence of the county is not a forfeiture of the office by a public administrator, the question then arises as to whether or not a public administrator can be ousted from office for failure to personally devote his time to the performance of the duties of such office.

Article II, Section 18, Constitution of Missouri provides as follows:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

By reason of the above section of the Constitution the legislature saw fit to enact Section 12828, R. S. Mo. 1939, which reads as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his

duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Under the above section if the public administrator shall fail personally to devote his time to the performance of his duties as public administrator, he forfeits his office and may be removed by the prosecuting attorney of the county, under the provisions set out in Section 12829, R. S. Mo. 1939. Section 12829 reads as follows:

"When any person has knowledge that any official mentioned in section 12828 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain

and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

Under the above section if the public administrator who now resides in another county does not personally perform the duties of the public administrator he may be removed by proper action of the prosecuting attorney.

If the public administrator is removed and his office forfeited by the action of the prosecuting attorney as above set out in Section 12829, supra, a vacancy would exist which should be filled by the Governor under Article V, Section 11 of the Constitution of Missouri, which reads as follows:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

Of course, under Section 10, Article VIII of the Constitution of Missouri, no person shall be elected or appointed to any office in this State who is not a citizen of the United States and who shall not have resided in this State one year next preceding his election or appointment. This section does not mention that the residence of any electee or appointee should be in the county for any specified time.

CONCLUSION.

In view of the above authorities it is the opinion of this Department that the public administrator of Texas County continues in office as public administrator until the expiration of his term for which he was elected, even though he has moved permanently from Texas County, to any other County,

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and if the public administrator is not personally devoting his time to the performance of the duties of such office he may be removed by proper action brought by the prosecuting attorney of Texas County as set out in the above opinion.

It is further the opinion of this Department that if the public administrator should move out of the State of Missouri he would forfeit his office for the reason that he would not be qualified as an administrator as set out by the statutes on administration.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:CP

LEGISLATORS HOLDING OFFICE OF RECORDER OF DEEDS: A member of the General Assembly may not be appointed to office of Recorder of Deeds during the term for which he is elected to the General Assembly.

October 23, 1941

Hon. Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

This is in reply to your letter of recent date in which you request an opinion from this department on the question of whether or not a member of the General Assembly may be appointed to the office of Recorder of Deeds during the term for which such person is elected to the General Assembly.

Section 12 of Article 4 of the Constitution, pertaining to this question, provides as follows:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

By this section it will be seen that a member of the General Assembly may not be appointed to an office under this State during the term for which he is elected. If the office of the Recorder of Deeds is an office under this State, a member of the General Assembly could not be appointed to that office during the term for which he is elected.

Article 1, Chapter 89, Sections 13147 to 13160, contains the statutory provisions relating to the Recorder of Deeds. It will be noted that this Article provides for the election of a Recorder of Deeds; it fixes his term of office, his qualifications, and requires him to give a bond for the faithful performance of his duties, and that his position is referred to as an office. Other sections of the

statutes pertaining to the Recorder of Deeds provide that such office shall have a seal, has authority to administer oaths, is required to record certain instruments for which a fee may be charged, and is required to make settlement with the County Court, and in case there is a surplus of fees, the Recorder is then required to turn these fees into the County Treasury.

In the case of *Hastings v. Jasper County*, 314 Mo. 144, 149, the court said:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be by him exercised for the benefit of the public.' (*Mechem, Public Officers*, 1; *State ex rel Walker v. Bus*, 135 Mo. 325.) * * The authorities all agree, substantially, that if an officer receives his authority from the law and discharges some of the functions of government, he will be a public officer."

In the case just quoted from the court held a probation officer to be a public officer of his county, though not a State officer, saying on page 150:

"The right, authority and duty are created by statute; he is invested with some portion of the sovereign function of the government to be exercised for the benefit of the public and is consequently a public officer within the definition given by this court."

The term "office under this State" is also in Section 12 of Article 6 of the Constitution of Missouri, pertaining to the jurisdiction of the Supreme Court in certain cases. The meaning of this term has been construed by courts in a number of cases in which the jurisdiction of the Supreme Court was questioned. In *State ex inf. Barrett v. Parrish, et al*, 307 Mo. 455, 457, the Court in discussing this term, said:

"Section 12 of Article VI of our Constitution provides that the Supreme Court shall have jurisdiction on appeal in all cases involving 'the title to any office under

this State.' See also the following authorities: State ex inf. Thompson v. Bright, 298 Mo. l. c. 345, 250 Mo. 599 and cases cited; State ex inf. West v. Consolidated School District, 290 Mo. l. c. 138-9, 234 S. W. 54; State ex inf. Barker v. Smith, 271 Mo. 168, 196 S. W. 17; State ex inf. Wright v. Morgan, 268 Mo. 265, 187 S. W. 54; Ramsey v. Huck, 267 Mo. l. c. 336, 184 S. W. l. c. 968; State ex inf. Sutton v. Fasse, 189 Mo. 532."

And, in State ex rel Davidson v. Caldwell, 310 Mo. 397, 406, the Court said:

"I. The construction of this constitutional provision, so far as concerns the character of the office involved, has been comprehensive as well as liberal. It has been held to apply to a State Board of Equalization (State ex rel. Gardner v. Hall, 282 Mo. 425); to a clerk of a circuit court (State ex rel. Blakemore v. Rombauer, 101 Mo. 499); to members of a school board (State ex rel Macklin v. Rombauer, 104 Mo. 619); to school directors (State ex inf. Sutton v. Fasse, 189 Mo. 532); to a county collector (Sanders v. Lacks, 142 Mo. 255); to a township trustee and collector (Macrae v. Coles, 183 S. W. (Mo.) 578); to a justice of the peace (Ramsey v. Huck, 267 Mo. 333); to a grain inspector (State ex rel. v. Knott, 207 Mo. 167); to a member of a county highway board (State ex rel. v. Morehead, 256 Mo. 683.) These rulings are determinative of the question of jurisdiction. So far as the character of the office is concerned, if it is one to which the officer has been elected or appointed under the authority of the law and requires the performance of duties prescribed by law, it is such an office as is meant by the Constitution. (State ex rel. Zevely v. Hackmann, 300 Mo. 59, 254 S. W. 53; State ex rel. v. Bus, 135 Mo. 331.)"

It will be noted that the Blakemore case cited above that the Clerk of the Circuit Court is an officer under this State and that the Supreme Court has jurisdiction over such office.

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Our statutes provide that in certain counties the Clerk of the Circuit Court may be Ex-officio Recorder of Deeds.

In view of the authorities hereinbefore referred to, we do not think that there is any doubt that the office of Recorder of Deeds is an "office under this State."

CONCLUSION

From the foregoing, it is the opinion of this department that a member of the General Assembly, during the term for which he has been elected, may not be appointed to the office of Recorder of Deeds, or any other county office.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

OFFICERS: Present incumbent of the office of Grain Warehouse Commissioner is entitled to remain in office until April 15, 1943.

October 28, 1941

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

We are in receipt of your request for an opinion, under date of October 25th, 1941, which reads as follows:

"On May 16, 1939, a Warehouse Commissioner was appointed for a term ending April 15, 1943, and until his successor is appointed and qualified. On October 10, 1941, House Bill No. 191 became law. (Laws of Missouri for 1941, page 373). Section 4 of said law, page 375, provides that it shall be the duty of the Governor to appoint a suitable person, to be confirmed by the Senate, who shall be known as the Grain Warehouse Commissioner for the State of Missouri, whose term of service as such shall continue for four years from the date of his appointment unless removed for cause.

"I respectfully request an opinion from your office on the following question: Should the Governor now appoint a Commissioner under the provisions of Section 4, page 375, of the Laws of Missouri for 1941, or does the Commissioner appointed, as above stated on May 16, 1939, continue in office under such ap-

pointment until April 15, 1943 and until his successor is appointed and qualified?"

The two main and principal sections which are in issue in this opinion are Section 14622, R. S. Mo. 1939, and Section 4, Laws of 1941, page 373.

Section 14622, R. S. Mo. 1939, reads as follows:

"The governor shall, by and with the advice and consent of the senate, appoint the warehouse commissioner for a term of six years, such term to begin on the date of the taking effect of this article. Upon the expiration of said term, and thereafter, a commissioner shall be appointed for four years from the time of his appointment and qualification and shall serve until his successor is appointed and qualifies. Any vacancy occurring by removal, resignation or death, shall be filled by the governor for the unexpired term."

Section 4, Laws of Missouri 1941, page 373, reads as follows:

"It shall be the duty of the Governor to appoint a suitable person, to be confirmed by the Senate, who shall be known as the Grain Warehouse Commissioner for the State of Missouri, hereinafter referred to as 'the Commissioner', whose term of service as such shall continue for four years from the date of his appointment unless removed for cause. Said Commissioner shall not, directly or indirectly, be interested in buying or selling

grain either on his own account or for others, nor shall he be directly or indirectly interested in handling or storing grain as a public warehouseman or on private account during his term of office. Any vacancy occurring by removal, resignation or death shall by and with the consent of the Senate be filled by the Governor for the unexpired term."

It will be noticed in comparing the above two sections that they are similar in every respect as to the mode of appointment and tenure of office. Section 4, supra, slightly modifies the name of the Commissioner as set out in Section 14622, supra, the difference being that in Section 14622, the Commissioner is designated as the Warehouse Commissioner and in Section 4, supra, the Commissioner is designated the Grain Warehouse Commissioner.

Section 4 is one of the fifty-nine sections contained in the 1941 Act, which act, according to the title, repealed Article 1 of Chapter 109, Revised Statutes of Missouri 1939, we find that most of the sections from 14621 to 14685 inclusive, have been retained and only slightly modified in a few sections under the Act of 1941. It has been held that in this State where a statute has been repealed and re-enacted in the same session without a radical change in the contents it is considered the same as a continuation of the former law. In the case of *State v. Ward*, 40 S. W. (2d) 1074, para. 10-11, 328 Mo. 658, the court, in holding that a repeal and re-enactment of a section in the same session is but a continuation of the previous section, said:

"III. The point that the repeal by the Fifty-fifth General Assembly in 1929 of section 5596, R. S. 1919, and the enactment in lieu thereof of a new section to be known as section 5596 (Laws 1929 p. 217 (now Rev. St. 1929, Sec. 8246)), terminated the two year closed season voted by Harrison county in 1928, is without merit.

"In Brown v. Marshall, 241 Mo. 707, 145 S. W. 810, loc. cit. 815, this court ruled: 'A subsequent act of the Legislature repealing and re-enacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. State ex rel. v. Mason, 153 Mo. 23, loc. cit. 58-59, 54 S. W. 524; State ex rel. v. County Court, 53 Mo. 128, loc. cit. 129-130; Smith v. People, 47 N. Y. 330.'"

Also in the case of State v. Bradford, 285 S. W. 496, 1. c. 500, para. 8, 314 Mo. 1. c. 697, the Supreme Court of this State, even where a modification of a section repealed and re-enacted was held to be a continuing law of the former section, and said:

"While the act of 1921, page 206, purports to repeal section 3973 of Revised Statutes 1919, yet, as the same law was re-enacted with a modification, it is simply an amendment of the law of 1919, and is a continuation of the latter as amended. Brown v. Marshall, 241 Mo. loc. cit. 728, 145 S. W. 810, and cases cited; State ex rel. v. Jost, 269 Mo. loc. cit. 258, 191 S. W. 38, and cases cited."

Also in the case of Brown v. Marshall, 241 Mo. 707, 1. c. 727, 728, the court said:

"Not only was said order of July 28th fixing said terms valid when made, but it remained so during the entire period covering the administration of Lewis V. Bogy's estate. This is true because the Act of 1877 only purported

to repeal (quoting), 'all acts and parts of acts inconsistent with this act.' (See section 20 of that act.)

"Clearly there was nothing inconsistent between section 9 of the Act of 1855, and section 7 of the Act of 1877, both of which have been previously quoted. Each in express terms and almost in the same language authorize the various probate courts of the State, by order, to change the stated terms thereof, to such times as the judges thereof may deem best and most convenient for the transaction of the business therein.

"But independent of that, there is another sound rule of statutory construction which governs this case, and that is, a subsequent act of the Legislature repealing and reenacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. (State ex rel. v. Mason, 153 Mo. 23, 1. c. 58-59; State ex rel. v. County Court, 53 Mo. 128, 1. c. 129-130; Smith v. People, 47 N. Y. 330."

And, on page 739 the court in that case stated:

"The legal effect of the separation of the city and county was a division of the old county of St. Louis into two counties, the one, namely, the city of St. Louis, having within its borders the seat of government; while it may not have continued to be the

identical entity as the old county, and while the form of its government thereafter was different from what it was before, it was at least the continuation of and successor to, for legal purposes, the old county, and its government the successor, in so far as the same functions were provided to be performed, of the old government; the courts, except the county court, which was expressly abolished, remained the same and retained the same habitation and jurisdiction."

This case was followed in the case of State ex rel. v. Jost, 269 Mo. 248. In the case of State ex rel. v. Mason, 153 Mo. 23, the Supreme Court held that where one act specifically stated repealed a previous act and, at the same session the same act in the same form was readopted, it was an amendment and not a repeal of the previous act. The court in that case, at page 58, said:

"That the Act of 1899 continued the then system and was merely an amendment of that law is obvious notwithstanding the use of the formal words repealing the Act of 1860 and 1861 and amendments and re-adopting the same in the form of a new law.

"The new law must be construed as a continuing act as to all the provisions which were carried forward from the old to the new."

Also in the case of State ex rel. v. The County Court of Vernon County, 53 Mo. 128, l. c. 131, the court said:

"The act of 1873 is really nothing more than a revision of the act of 1872. Some of the provisions in the two acts are identical, and they all

relate to the same subject matter. The purpose of the later enactment was to remedy defects that were supposed to exist in the former. The subsequent law was not designed to interrupt the continuity of the first act, so as to avoid or annul proceedings commenced under it.

"By the first section of article 17, in the act of 1873, (Sess. Acts, 1873, p. 120,) it is provided, that the County Court in each county having adopted the township organization, at their first meeting after the adoption of the act shall proceed to district their respective counties, as directed in article fifteen, for the purpose of electing County Court judges, and shall appoint a day for the purpose of electing the same. Then after making various provisions, not necessary to be here noticed, the 6th section declares, that an act entitled, 'an act to provide for the organization of counties into municipal townships, and to further provide for the local government thereof,' approved March 18, 1872, is hereby repealed.

"This last section does, in terms, repeal the former law, but the effect is not to be ascribed to it of completely annulling all proceedings commenced when the former law was in force. The first section, which explains and prescribes the mode of executing the act, says, the County Court in each county having adopted the township organization of this State, at their first meeting after the passage of this act shall proceed, etc. As a law existed providing for township organization before, and the provision for putting it in force is essentially the same in both acts, the latter law must be construed

as a mere continuation of the former, and one vote of the people is sufficient. But after the passage of the act of 1873 all subsequent proceedings must conform to it."

46 Corpus Juris, Section 30, page 934, in stating the rule, said:

"And since every public office is the creation of some law it continues only so long as the law to which it owes its existence remains in force."

Under the facts in the present case Section 4 did not annul or repeal the method and the tenure of office of the Commissioner. 46 Corpus Juris at page 935, also in stating the rule, said:

"While a civil service law does not preclude the legislature from abolishing in good faith an office whose incumbent is under the protection of such a law, such a law cannot be avoided by abolishing the office and creating a new one with duties substantially the same, to which new officers are appointed."

In the State of Texas the Court of Civil Appeals in the case of Bennett v. City of Long View, 268 S. W. 1. c. 788, said:

"Every public office is the creation of some law, and continues only so long as the law to which it owes its existence remains in force."

22 R. C. L. page 581, Sec. 296, states the rule as follows:

"* * * Yet the better opinion is that while the legislature may abolish an office and thereby abrogate the rights and duties of the officer it cannot leave the office standing and abolish the officer. Not only is a statute which legislates an officer out of office in the middle of his term, and devolves his duties and emoluments on another, unconstitutional, but the legislature cannot take from a constitutional officer the substance of the office itself, and transfer it to another, who is to be appointed in a different manner and to hold the office by a different tenure from that which is provided for by the constitution. The powers, authority and jurisdiction of an office are inseparable from it. Hence while the legislature may diminish the aggregate amount of duties of a judge, by the division of his district, or otherwise, it must leave the authority and jurisdiction pertaining to the office intact. And where a state constitution provides for the election of sheriffs, fixes the term of office, etc., but does not define what powers, rights and duties shall attach or belong to the office, the legislature has no power to take from a sheriff a part of the duties and functions usually appertaining to the office, and transfer it to an officer appointed in a different manner and holding the office by a different tenure. A transfer within the meaning of a constitutional provision prohibiting it during the term of an incumbent, and not an abolition of the office of prison superintendent, is effected by a statute incorporating a prison, abolishing the office of superintendent, and placing the management under directors, where the prison and the duties of management are essentially the same after as before the passage of the statute. * *"

Under the facts in the present request it cannot be held that the legislature abolished the incumbent of the office of Commissioner. In the case of *Malone v. Williams*, 118 Tenn. 390, 103 S. W. 798, 121 A.S.R. 1002, the court, at page 476, said:

"In the case at bar, however, it will be noticed that, within a few days of the passage of the ordinance which appellants claim abolished the office, another one was passed providing for the same office, that both ordinances were published on the same day, and that on the day previous to the publication, another person was appointed to fill the office. This shows that before the ordinance which is claimed to have abolished the office could become operative, the same office was again created. . . . It is too clear for argument that the real purpose and design was, not to abolish the office, but to get rid of one incumbent to make room for another. The method pursued to effect the removal is not such as commends itself to a court of justice. An officer whose tenure is during good behavior, or who can only be removed for cause, cannot thus be legislated out of office. *People v. McAllister*, 10 Utah, 357, 37 Pac., 578; *Pratt v. Board*, 15 Utah, 1, 49 Pac., 747; *Heath v. Salt Lake City*, 16 Utah, 374, 52 Pac., 602; *Pratt v. Swann*, 16 Utah, 483, 52 Pac., 1092."

"The same rule is laid down in Kentucky. In *Adams v. Roberts* it is said:

"Though the legislature is given the power to abolish the office of commonwealth's attorney in this State, until it does so it cannot abolish the tenure of any rightful incumbent of the office."

He might be impeached, but not legislated out of office. Cooley's Const. Lim. (6th Ed.), 482; Black, Const. Prohib., p. 119, sec. 99.' 83 S. W., 1035, 1037, 119 Ky., 364.

"To the same effect is State v. Wiltz, 11 La. Ann., 439, wherein the court said:

"'It is inadmissible to say that a person holding an existing office under a fixed tenure can be removed, or that his regular term of office can be abridged, by an ordinary act of the legislature other than an act abolishing the office.'

"The same rule obtains in this State.
* * * *

The court further, at page 479, said:

"The court held that the foregoing act simply changed the name of the office, leaving its duties intact, and devolved those duties upon a person other than the incumbent at the time, and did not in fact abolish the office, but was an abortive attempt to legislate the incumbent out of office. It was held that this could not be done."

In construing the intention of the legislature one must investigate into the history and purpose of the act. Section 34, Article IV, of the Constitution, reads as follows:

"No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but

the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

Under the above section it would have been necessary in the drafting of the new act under the laws of 1941 to amend Article 1 of the old act in Chapter 109 of the Revised Statutes of Missouri, 1939, by stating specifically the designated words stricken out or the designated words inserted and the words to be inserted in lieu of the words stricken out. The act contained in Article 1, Chapter 109 of the Revised Statutes of Missouri, 1939, affected by the act of 1941 consists of sixty-four sections and in order to amend the act of Article 1, Chapter 109 Revised Statutes of Missouri 1939, the person who drafted the act of 1941 repealed and re-enacted all of the sections except a slight few. The purpose of the repealing and re-enacting, which, according to the above authorities was an amendment and a continuation of the old law, was to consolidate several of the sections within one section and to delete certain obsolete sections contained in the act of 1939. This repeal and re-enactment could be considered as a non-legislative revision of Article 1, Chapter 109, Revised Statutes of Missouri 1939. That the purpose of the act should be considered in a construing of the act was held in the case of Artophone Corporation v. Coale, 133 S. W. (2d) 343, para. 2-4, where the court said:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and 'the manifest purpose of the statute, considered historically,' is properly given consideration." Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S. W. 2d 920, 925 (7-10)."

The above case was followed by Betz v. Columbia Telephone Co., 24 S. W. (2d) 224.

In the case of the appointment of a Clerk of the County Court under a law in force in 1919, which was repealed and re-enacted by the Laws of 1921 in the State of Nebraska, the Supreme Court in that case, which was Ford v. Boyd County, 197 N. W. 953, 1. c. 954, said in paragraph 3 as follows:

"Defendant contends that plaintiff's appointment was valid only until the taking effect of section 2395, Comp. St. 1922, and that thereafter she was not authorized to act as clerk of the county court, because she was not reappointed and there was no approval of the appointment nor salary fixed by the county board after the new act took effect. We think this position is untenable. The law in force in 1919 authorized the appointment of an assistant to act as clerk of the county court, and further provided that such appointment should be approved and salary fixed by the county board. While the law of 1919 was repealed, yet these provisions, in effect, were carried forward and re-enacted into the law of 1921. The provisions of section 2395, relative to the appointment of a clerk of the county court and the fixing of salary, was but a continuation of the law previously in force. Under the circumstances, no new appointment was necessary. Gage County v. Wright, 86 Neb. 347, 125 N. W. 626, 36 Cyc. 1223."

In a Kentucky case, which was State Insurance Board of Kentucky v. Greene, 213 S. W. 218, the re-enactment of the section repealed read as follows:

"That section 762d, of Carroll's Edition of the Statutes of 1915, relating to the creation of state insurance

board, the creation of secretary of said board and the appointment of an attorney therefor, be and the same is hereby repealed and the office of the present incumbents are hereby terminated."

And the court in its opinion, in paragraphs 3, 4, 5, said:

"The manifest intention of the Legislature was to abolish the state insurance board, and the offices of secretary and attorney therefor. This has effectively been accomplished, and, obeying that canon of construction above stated, it is our duty to sustain the act in question. Though the court might be of the opinion that a statute is unjust, unwise, or oppressive, it is powerless to intervene and declare it invalid, if the law be within constitutional limits.

"Authorities from other jurisdictions are cited in support of the proposition that the Legislature cannot, by changing the name of the office, abolish the officer, and continue the same office in existence, without abolishing the act creating the office. Repeals by implication are not favored, and while the act in question does not expressly repeal the statute creating the state insurance board, and the secretary and attorney therefor, we think the language of the act sufficient to abolish said offices. An office is abolished by implication, where a statute transfers all its functions to another office. *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413."

Under the above case it held that the State Insurance Board was abolished and it was the intention of the Legislature to

so abolish by reason of the enactment of Section 762d, supra. Under the facts in the present case, if it had been the intention of the legislature to abolish the office of warehouse commissioner, as set out in Section 14622, supra, it could, in the re-enactment and setting out of the re-appointment of the grain warehouse commissioner, have so said that the office of the present incumbent of the warehouse commissioner is abolished.

In the case of Collins v. Twellman, 126 S. W. (2d) 231, the Supreme Court of this State, in paragraph 3, said:

"Appellant, however, insists that section 13757 was repealed by the legislature of 1917 and re-enacted with some new provisions, see Laws 1917, page 492; that this law was approved April 12, 1917, page 492; that this law was approved April 12, 1917, and became effective ninety days after the adjournment of the assembly. Appellant then points out that the act of 1909, now article 7 of chapter 93, was repealed by the same legislature and re-enacted adding new provisions, see Laws 1917, pages 300 to 307; that this act carried an emergency clause and became effective when approved on April 10, 1917. So appellant argues that section 13757 must control over the other sections because it is the last expression of the legislature on this subject matter. We are of the opinion that appellant's position cannot be sustained. The repealing and re-enacting of the acts, by the legislature of 1917, was evidently for the sole purpose of amending those acts. It will be noted that the provisions now under consideration were left substantially as they were before 1917. It would have been an easy matter for the legislature to have dropped sections 13096 and 13097 from the article, or to

have harmonized them with section 13757, when the laws were rewritten in 1917, but they did not do so."

Under the opinion in this case, which is a Missouri case, it would cover the same statement of facts as set out in the present request, showing that the purpose of the repealing and re-enacting of the acts were for the sole purpose of amending those acts and not the enactment of a new article.

In the case of Great Northern Ry. Co. v. United States, 155 Fed. Rep. 945, 1. c. 948, the Circuit Court of Appeals of the 8th Circuit, interpreted the facts such as set out in the present request as follows:

"Generally speaking, where a statute is amended 'so as to read as follows,' or is re-enacted with changes, or is in terms repealed and simultaneously re-enacted with changes, the amendatory or re-enacting act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation. In Sutherland on Statutory Construction (2d Ed.) Sec. 237, it is said of an amendment 'so as to read as follows':

"The amendment operates to repeal all of the section amended not embraced in

the amended form. The portions of the amended section which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule.'

"And in the succeeding section it is said of a simultaneous repeal and re-enactment:

"Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, nor pending proceedings or criminal charges affected by such repeal and re-enactment of the law on which they respectively depend.'

"The subject has been considered several times by the Supreme Court, and always with the same result. *Steamship v. Joliffe*, 2 Wall. 450, 458, 17 L. Ed. 805, involved the right of a port pilot to collect half pilotage fees for services proffered and declined, and during the pendency of the action the statute giving the right was in terms repealed and at the same time substantially re-enacted; the

new act allowing half pilotage fees in the same circumstances as the original. The court held that the new act did not impair the right to fees which had arisen under the original, saying:

"The new act took effect simultaneously with the repeal of the first act. Its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them."

"Murdock v. Memphis, 20 Wall. 590, 617, 22 L. Ed. 429, to which we will refer again, related to a revisory and substituted act, which, it was said, was a new law in so far as it differed from the original, and in so far as it embraced portions of the original was a preservation of them. Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 11, 17 Sup. Ct. 7, 9, 41 L. Ed. 327, related to an act which expressly repealed and at the same time substantially re-enacted a prior one, and of this it was said:

"Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in

the new act. This is the same principle that is recognized and asserted in *Steamship Co. v. Joliffe*.'

"*Holden v. Minnesota*, 137 U. S. 483, 490, 494, 11 Sup. Ct. 143, 146, 147, 34 L. Ed. 734, was a criminal case involving the infliction of the death penalty. After the commission of the offense and before the indictment of the offender a statute was adopted which substantially re-enacted or repeated the provisions of the previous law relating to the mode of inflicting that penalty and to the issuing of the governor's warrant therefor. It also contained new provisions imposing solitary confinement after the issuance of the warrant and regulating the details of the execution, and in terms repealed all acts and parts of acts inconsistent with it. Responding to the contention that the previous law was thereby repealed, and that the new act could not be applied to prior offenses, the court, in addition to holding that the new provision for solitary confinement, although not in terms so written, was applicable only to future offenses, held that the previous law was not repealed, and in that connection said:

"These provisions were not repealed by the act of April 24, 1889 (Gen. Laws Minn. 1889, p. 66, c. 20). In respect to the first and second sections of that act, it is clear that they contain nothing of substance that was not in sections 11 and 12 of chapter 118 of the General Statutes of 1878. And it is equally clear that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter re-enacts or repeats those provisions. As the act of 1889 repealed only such previous acts and parts of acts as were inconsistent

with its provisions, it is inaccurate to say that that statute contained no saving clause whatever. By necessary implication, previous statutes that were consistent with its provisions were unaffected.'

"And again:

"The provisions of the previous law, as to the nature of the sentence, the particular mode of inflicting death, and the issuing by the Governor of the warrant of execution before the convict was hung, were, therefore, not repealed, although some of them were re-enacted or repeated in the statute of 1889, and other provisions relating merely to the time and mode of executing the warrant, but not affecting the substantial rights of the convict, were added.'

"The rule announced in these cases was again recognized by the Supreme Court in *Campbell v. California*, 200 U. S. 87, 92, 26 Sup. Ct. 182, 50 L. Ed. 382, and was recently applied by us in *Lamb v. Powder River Live Stock Co.*, 65 C. C. A. 570, 132 Fed. 434, 67 L. R. A. 558. It has also been quite generally recognized and applied in the state courts."

It also immediately following the last citation set out approximately sixty leading cases where the above rule has been followed.

It is not within the power of the legislature to remove appointed officers by such subterfuge and thereby abrogate the powers of the appointing officer. In the case of *State ex rel. Birdsey v. Baldwin*, 45 Conn. 134, 1. c. 144, the court, in construing this rule of law, stated:

"We have then this condition of things--an act of the legislature repeals by its terms a certain section of the General

Statutes and abolishes a board of officers appointed under it, and the same act creates precisely the same board and clothes them with the same powers and duties enumerated in the section repealed. Can this be done? We think not. The act in question contains the elements of its own destruction. It attempts to kill and make alive at the same instant, an impossibility. There must be some appreciable space of time between the repealing act and the re-enactment of the same act. In this case not a second intervened, and there was never a moment when the relators were out of office, or when the office of county commissioners for New Haven County was abolished."

In all of the above cases they are to the effect that the repeal of the statutes by the re-enactment of other statutes which are substantially to the same effect should be considered as an amendment and not as the enactment of a new law.

Another matter which has been brought to our attention, although not requested in the original request, is: "In case of any vacancy by removal, resignation or death, shall it be filled by the governor for the unexpired term or for a term of four years?"

Section 14622, R. S. Mo. 1939, reads as follows:

"The governor shall, by and with the advice and consent of the senate, appoint the warehouse commissioner for a term of six years, such term to begin on the date of the taking effect of this article. Upon the ex-

piration of said term, and thereafter, a commissioner shall be appointed for four years from the time of his appointment and qualification and shall serve until his successor is appointed and qualifies. Any vacancy occurring by removal, resignation or death, shall be filled by the governor for the unexpired term."

It is very noticeable under this section that it carries the old obsolete partial section which reads as follows:

"The governor shall, by and with the advice and consent of the Senate, appoint the warehouse commissioner for a term of six years, such term to begin on the date of the taking effect of this article."

This part of the section was placed in what is now Section 14622 at the time that the grain inspection article was passed and the other part of the section provides that the term shall be for four years so that the term would expire each four years thereafter and not six years as provided in the original appointment by the governor with the advice and consent of the Senate. This section first appeared as Section 5994, R. S. Mo. 1919 by reason of the enactment of the law and appearing in the Session Laws of 1913, page 356. The section as set out in the Revised Statutes of Missouri for 1939 and the section as set out in the Session Laws of 1913, page 356 are identical. It is a matter of arithmetic to determine the term of office of the original appointee as warehouse commissioner, as the original section in the Laws of Missouri 1913, page 356, and the present Section 14622, R. S. Mo. 1939, specifically stated that the appointment for the term should begin on the taking effect of this article. By reason of an emergency clause to the whole act of 1913 the act came into effect on April 15, 1913. For your information we are

hereunder setting out the names, date of appointment and date of expiration of the appointment of each warehouse commissioner from the date that the article came into effect, April 15, 1913, to date.

James T. Bradshaw, appointed April 15, 1913, for a term expiring April 15, 1919.

This appointment was for a term of six years. His next appointment, which was for a term of four years as provided in the original act and as provided in Section 14622, R. S. Mo. 1939, was made April 22, 1919, as of April 15, 1919.

Under the laws of this State where the Legislature does not state the exact date of appointment of an appointee the Governor sets the exact date of the beginning of the term and thereby sets the exact date of the expiration of the term. In this appointment of James T. Bradshaw on April 15, 1919, the Governor has set the term to begin on April 15, 1919 and to expire four years thereafter or until his successor is appointed and qualifies. In other words, it is the duty of the Governor on April 15th every four years from April 15th, 1919, to make an appointment. This rule of law is stated, and has not been repealed, in the case of *The State ex rel. Withers v. Stonestreet*, 99 Mo. 361, 1. c. 373, 374 and 375, where the court said:

"This reasoning leads to this result: That the date of the appointment, first made by the governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. This conclusion is well sustained by authority. *Attorney General ex rel. v. Love*, 39 N. J. L. 476, is decisive of this point. And the general rule is elsewhere recognized that when no time

is mentioned in the law, from which the term shall commence, it must begin to run from the date of election. State ex rel. v. Constable, 7 Ohio, 7; Marshall v. Harwood, 5 Md. 423; Hughes v. Buckingham, 5 S. & M. 632.

"These last, though election cases, furnish a strong analogous support to the view already expressed, showing as they do, the urgent necessity felt of having some determinate period at which and from which official terms shall begin. The law favors uniformity, but uniformity cannot be obtained except by the establishment of an inflexible rule. And the course in the office of the executive in regard to appointment of the first appointee, the language of his commission, and the language of all subsequent commissions, except that of relator, fixing the beginning of such official term at June 18, biennially, as the period from which to reckon the duration of such term, affords a contemporaneous, as well as a continuous, exposition of the meaning of the law, and of the intention of its makers, that is not without value in the present investigation. Such contemporaneous and continuous construction, in the absence of anything of a countervailing character, should be sufficient per se to settle the controversy on the point in hand adversely to the relator.

"Under statutory provisions substantially identical with those under discussion, it has been held that the true rule was to construe the word 'term' as designating consecutive periods of six years, following

each other in regular order, the one commencing where the other ends, and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. People ex rel. v. McClare, 99 N. Y. 83, 93. The statute there was like section 5838, providing that the appointee should hold for a certain number of years and until his successor should be appointed and qualified, and also like section 5832, providing that in case of vacancy, an appointment should occur for the residue of the term.

"The ruling just mentioned is in entire conformity to the authorities and views heretofore cited and expressed as to the date of the commencement and the uniform duration of the successive terms of office of the different and successive appointees under the law now being discussed. And, upon the very face of section 5838 aforesaid, there appears a legislative command that the terms of office of each appointee is to last two years 'from the date of his appointment;' but the legislature was cognizant that appointments might fail to be made at the proper time; that deaths, resignations, failure to accept, qualify, etc., might occur, and so made provision in section 5838, that an appointee should hold office not only for his official term of two years, but until his successor should be duly appointed and qualified. And section 5852 exhibits the same marks of legislative solicitude that uniformity should prevail as to the duration of the official

term of the inspector; for that section makes special provision, in case of vacancy, that the governor, upon being informed thereof, 'shall appoint and commission his successor for the remainder of the term of office as therein provided.' What term of office? Evidently the term of two years mentioned in section 5938, beginning at the date of the original appointee's appointment."

James T. Bradshaw was originally appointed on April 15, 1913, for a term of six years and then was re-appointed on April 15, 1919 for the term of four years, which would have expired April 15, 1923.

Section 4, of the grain and warehouse act in the Laws of Missouri 1941, page 373, when amended and re-enacted has deleted the first part of Section 14622 of the Revised Statutes of Missouri 1939, which refers to the original appointment for a term of six years.

We are hereafter referring to further appointments made on the office of warehouse commissioner as shown by the records in the office of the Secretary of State:

	Appointment	Expiration
T. J. Hedrick	June 13, 1931	April 15, 1923
W. O. Atkeson	June 25, 1923	April 15, 1927
Charles P. Anderson	Jan. 9, 1925	April 15, 1927
Roy H. Monier	Feb. 3, 1925	April 15, 1927
" " "	April 15, 1927	April 15, 1931
Ralph Drissenden	April 11, 1929	April 15, 1931
" " "	April 15, 1931	April 15, 1935
J. B. Hopper	June 22, 1933	April 15, 1935
" " "	April 15, 1935	April 15, 1939
James T. Bradshaw	June 29, 1937	April 15, 1939
C. E. Yancey	Dec. 31, 1937	April 15, 1939
James Buffington	May 16, 1939	April 15, 1943

In reading the above appointments it will be noticed that James Buffington, the present incumbent, was appointed on May 16, 1939, for a term expiring April 15, 1943. The question then is: "In case of a vacancy at the present time, should the appointment be made for the unexpired term or for a term of four years?" The statutes on this question are unambiguous. The original act, Laws of 1913, page 356, Section 14622, R. S. Mo. 1939 and Section 4 of the grain and warehouse act, Laws of Missouri, 1941, page 373, specifically provide: "Any vacancy occurring by removal, resignation or death, shall, by and with the consent of the Senate be filled by the governor for the unexpired term."

CONCLUSION.

In view of the above authorities it is the opinion of this department that the Governor of the State of Missouri at this time should not appoint a Commissioner under the provisions of Section 4, page 375 of the Laws of Missouri for 1941, and it is further the opinion of this department that the Commissioner duly appointed under Section 14622, R. S. Mo. 1939, and who was appointed on May 16th, 1939, shall continue in office under such appointment until April 15th, 1943.

It is further the opinion of this department that if any vacancy occurs by removal, resignation or death it shall be filled for the unexpired term with the consent of the Senate by the Governor.

Respectfully submitted,

W. J. BURKE

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorneys-General

ROY McKITTRICK
Attorney-General

WJB:CP

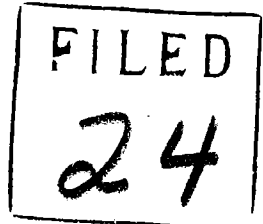
GOVERNOR: Writs directing election to fill vacancies in House of Representatives in Jackson County, Missouri, under Sections 12860, and 12861, R. S. Missouri, 1939, should be directed to the Board of Election Commissioners instead of the sheriff.

October 29, 1941

Filed 24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:



The Attorney General acknowledges receipt of your letter of October 28, 1941, wherein you request an opinion on the procedure to be followed in filling certain vacancies in the Sixty-first General Assembly from Jackson County, Missouri. Your letter is as follows:

"The resignation of Honorable Samuel C. Hayden as a member of the House of Representatives of the 61st General Assembly from the Ninth Legislative District, Jackson County, and the resignation of Honorable Samuel T. Cross as a member of the House of Representatives of the 61st General Assembly from the Sixth Legislative District of Jackson County, have been received by me.

"Section 12859 of the 1939 Revised Statutes of Missouri provides that whenever the governor shall receive any resignation he shall, without delay, issue a writ of election to supply such vacancy. Section 12861 of the 1939 Revised Statutes of Missouri refers to 'The sheriff to whom any writ of election shall be delivered . . .'" (My emphasis). Section 12097 of the 1939 Revised Statutes of Missouri, which pertains to the Board of Election Commissioners in all cities

of this state now having or which hereafter may have three hundred thousand inhabitants and not over seven thousand inhabitants, provides that said board of election commissioners shall 'have charge of and make provisions for all elections, general, special, local, municipal, state, county, all primaries, and of all other of every description, to be held in such city or any part thereof, at any time.'

"An opinion from your office is requested on the following question: Should the writs of election to supply the vacancies in the Sixth and Ninth Legislative Districts, Jackson County, be directed to the Sheriff of Jackson County, Missouri, or should said writs be directed to the Board of Election Commissioners of Kansas City?"

Sections 12858 to 12862, R. S. Missouri, 1939, have never received any judicial construction by any of our courts. They appear to be statutes dealing only with a particular object relating to vacancies in the House of Representatives and the Senate.

In determining the apparent conflict between the two statutes which you point out, we are herewith quoting the pertinent sections. Section 12860, R. S. Missouri, 1939, is as follows:

"When any vacancy shall happen in the senate, for a district composed of more than one county, the writ of election shall be directed to the sheriff of the county first named in the law establishing the district; and when such vacancy shall happen in a senatorial district, which shall have been divided or altered

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after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the county first named in such old district; and when any vacancy shall happen in either house, for any county which shall have been divided after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the old county."

Section 12861, R. S. Missouri, 1939, is as follows:

"The sheriff to whom any writ of election shall be delivered shall cause the election to supply such vacancy to be held within the limits composing the county or district at the time of the next preceding general election, and shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies of such notice to be put up, and the election to be held accordingly, in such parts of their respective counties as composed a part of the old county or district for which the election is to be held, at the last preceding general election; and the returns shall be made and the certificate of election granted in all things as if no division had taken place."

The statute relating to the Board of Election Commissioners in cities of three hundred thousand to seven hundred thousand inhabitants, being Section 12097, R. S.

Missouri, 1939, is voluminous and contains many matters which are not pertinent to your question. We herewith quote the portion which we deem relevant:

"* * * Upon the appointment of such commissioners, the county clerk of the county in which such city is situated, and the board of election commissioners or other custodians of said property shall, upon demand, turn over to such board of election commissioners all registry books, poll books, tally sheets and ballot boxes, heretofore used, and all other books, forms, blanks, stationery and property of every description in any way relating to registration or election, or the holding of elections, within said city. Said board of election commissioners shall make all necessary rules and regulations, not inconsistent with this article, with reference to the registration of voters and the conduct of elections; and shall have charge of and make provisions for all elections, general, special, local, municipal, state, county, all primaries, and of all other of every description, to be held in such city or any part thereof, at any time. The board, in addition to the other powers expressed in this article, shall have full power and authority to direct judges and clerks as to their duties in relation to election and the laws relating thereto and to compel compliance therewith; and two of the commissioners of opposite political parties shall have the power on any day of election, to remove any judge or clerk, who, in their opinion, is failing to perform his duty; and in the event of such removal, the commissioner or commissioners of the political party represented by the removed

person shall replace him with a
judge or clerk or deputy commission-
er belonging to such party. * * * *

Chapter 76 of Article 23, R. S. Missouri, 1939, which deals with the registration and holding of elections in cities of three hundred thousand to seven hundred thousand inhabitants, was passed by the Legislature in 1937, page 294. The sections heretofore referred to, dealing with vacancies in the General Assembly, have been live statutes in our State for more than thirty years.

We approach your question from the standpoint of the rule that a later statute operates as a repeal by implication of an earlier one when there is a total repugnancy between the statutes. *Graves v. Little Tarkio Drainage District*, 134 S. W. (2d) 70.

We think the rule as given in the decision of *Young v. Greene County*, 119 S. W. (2d) 369, is applicable to the effect that when two statutes deal with the same subject matter inconsistent with each other so they both become operative, the later act will be regarded as a substitute for the earlier one and will operate as a repeal thereof, although it contains no express repealing clause.

We deem the two statutes in question wholly inconsistent with each other insofar as holding an election to fill vacancies in Jackson County in the General Assembly. A review of certain statutes in Article 23, Chapter 76, will suffice as proof of this statement.

By the terms of Section 12096, R. S. Missouri, 1939, we glean a clear intention on the part of the Legislature, that Chapter 76 of Article 23 shall prevail in the holding of every election in cities of three hundred thousand to seven hundred thousand inhabitants because said section contains the statement, "and the registration of voters and the conduct of elections held in such cities shall be governed by the provisions of this article and be subject to the general election laws of this state, so far as the same are not inconsistent or in conflict herewith."

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Section 12110, R. S. Missouri, 1939, refers to the duty of the board of election commissioners to give ten days' notice, in two daily newspapers of the city, of the time and place of the election in each precinct of the city. In addition, Section 12194 of the same article and chapter, provides specifically that all laws and parts of laws in so far as they are inconsistent with the provisions of this article are hereby repealed. Referring to Section 12097, a portion of which is quoted supra, it is provided that the county clerk of the county shall turn over to the board of election commissioners all registry books, poll books, tally sheets and ballot boxes and all other forms and blanks in any way relating to registration and election, and the section further provides that the board of election commissioners shall have charge of and make provisions for all elections, general, special, local, municipal, state, county and all other of every description to be held in such city or any part thereof, at any time.

It has been held by the courts, and by the provisions of certain statutes, that all duties relating to elections formerly carried out by the county clerk, when statutes in the past referred to county clerk, are to be conducted by the board of election commissioners in cities and counties having registration.

CONCLUSION

We are of the opinion that, in construing your duties under Sections 12860 and 12861, R. S. Missouri, 1939, in so far as issuing writs for the filling of vacancies in the House of Representatives of the Sixty-first General Assembly, you should issue said writ or writs to the board

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of election commissioners of Kansas City, directing them to conduct the election in all matters instead of the sheriff of Jackson County, Missouri.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OFFICERS: -Notary Public - An employee of the Marine Hospital of Kirkwood, Mo., may be a notary public; (2) the powers of a notary public terminate at the expiration date of his commission; (3) a person may only be commissioned for the county in which he resides and he shall have power to transact his official business in such county and all adjoining counties thereto.

November 10, 1941

Hon. Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

We are in receipt of your letter of November 4, 1941, which reads as follows:

"Enclosed herewith is a copy of letter of November 3, 1941 from G. M. Forbes, 525 Couch Ave., Kirkwood, Missouri. I hand said copy to you with the request that you provide me with your opinion on the questions raised by Mr. Forbes in said letter."

The copy of the letter to which you refer in your request reads as follows:

"I have held a Commission as a Notary Public in the City of St. Louis for the past 4 years. My commission will expire on the 13th day of December, 1941 and I anticipate renewing same.

"However, on the application for the commission, I note the phrase 'I am not holding an office of profit under the United States.' I am at present employed by the Marine Hospital in

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Kirkwood and am wondering if this position will interfere with my holding a Notary Commission for the coming four years, as I am an employee of the United States Government under Civil Service regulations. I have the consent of the Commanding officer to renew my commission, if I desire to do so.

"I would also like to inquire about the status of my residence and commission at this time. I now hold a commission for the City of St. Louis. Since my appointment as a Notary I have moved to St. Louis County and would like my Commission to be granted for the County instead of the City of St. Louis (it is my understanding I could also notarize signatures of residents of the City of St. Louis also.) Will it be necessary for me to file an application for the appointment in the County or will it be called a renewal of my application and be made to apply to St. Louis County."

Article XIV, Section 4, of the Missouri Constitution provides:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Section 13360 R. S. Mo., 1939, provides how notaries are appointed, their term of office and qualifications. Said Section reads as follows:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

Douer on John's American Notary, (4 ed.) page 1, paragraph 1, defines a "notary" in the following manner:

"A notary or notary public is an officer appointed by the executive or other appointing power under the laws of different states, having power generally to attest writings for the purpose of establishing their authenticity, to administer oaths, and to perform similar duties."

Page 3, paragraph 3, of the same work, has this to say of notaries in the United States:

"In the United States, notaries are state officers, usually appointed by the governor. * * * *"

What is an office of profit is well settled by reason and authority. Mechem on Public Officers, Section 13, Page 10, states:

"An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit. The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit."

In view of the above, we are of the opinion that a notary public holds an office of profit under this state. The question that must now be determined is, whether a stenographer in the employ of the Home Owners' Loan Corporation holds an office of profit under the United States. 22 Ruling Case Law, Section 12, Page 380, distinguishes between a public office and a public employment, as follows:

"It is sometimes said that an office is a public charge or employment, but it frequently becomes necessary to distinguish between a public office and a public employment. The term 'employment' is the more comprehensive, and while an office is an employment, it does not follow that an employment is an office. Thus, when an employment is a continuing one, which is defined by rules prescribed by law, and not by contract, such an employment is an office, and the person who performs it is an officer. * * * * *

" * * * But on the whole an officer is distinguished from the employee in the greater importance, dignity, and

independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the more enduring tenure, and in the fact that the duties of the position are prescribed by law. Furthermore, a mere employee does not have the duties or responsibilities of a public officer.

* * * *

"It may be stated as a general rule that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of these elements. * * * "

Section 18, page 384, of the same volume, makes the following distinction between an officer of the Federal Government and a mere employee:

"Under the constitution of the United States in order to constitute a person an officer of the Federal Government as distinguished from a mere employee, he must hold his place either by virtue of an appointment of the President, or of one of the court, or of a head of a department authorized by law to make such appointment. Thus, a clerk appointed by the Secretary of the Treasury,

who is a head of such a department, is a public officer, and the same is true of an engineer in the naval service appointed by the Secretary of the Navy. But the commissioner of pensions is not the head of a department such as is authorized to appoint officers, and therefore a surgeon appointed by him has been held not to be a public officer. And where there is no statute authorizing the Secretary of the Navy to appoint a paymaster's clerk, nor any act requiring his approval of such an appointment, and the regulations of the navy do not require any such appointment or approval, a paymaster's clerk is not an officer of the United States. Again, the merchant appraisers appointed as umpires in cases of dispute on the value of imported goods subject to customs duties cannot be considered as public officers, especially in view of the fact that the original appointment of one of them is made by the importer alone. * * * * *

In the case of Robertson v. Ellis County, 84 S. W. 1097, 38 Tex. Civ. App. 146, the court said:

"A 'public office' is the right, authority, and duty created and conferred by law by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public (quoting and adopting definition in Mechem on Public Officers, as approved in Kimbrough v. Barnett, 55 S. W. 120, 93 Tex. 301). 'As said by Chief Justice Marshall, 'although an office is an employment, it does not follow that every employment is an office,' Mr. Mechem, in his work on Public Officers, says: 'The most important characteristic

which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions or government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer."* *"

In *Fekete v. City of East St. Louis*, 145 N. E. 693, the court stated:

"* * * An officer of the United States is one who holds office by virtue of appointment by the President or by heads of departments authorized to make appointments, U. S. v. Mouat, 124 U. S. 303; 8 S. Ct. 505; 31 L. Ed. 463, citing U. S. v. Germaine 99 U. S. 508, 25 L. Ed. 482; 3 Cyc. 818. * * * * *"

The Supreme Court of Missouri in the case of *Hastings v. Jasper County*, 314 Mo. 1. c. 149, defines a public officer as follows:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' (Mecham, Public Officers, 1;

State ex rel. Walker v. Bus, 135 Mo.
325.) * * * * *

From the foregoing authorities it is the opinion of this department that an employee of the Marine Hospital in Kirkwood, Missouri, is not an officeholder for profit of the United States, but is merely an employee and therefore is not disqualified by reason of the provisions of Article XIV, Section 4 of the Constitution of Missouri from holding the office of notary public in this State. Now turning to the second question set forth in the opinion request namely: Will it be necessary for Mr. G. M. Forbes to file a new application for the appointment of notary public instead of a renewal of his present appointment; and, thirdly: Shall he be appointed for St. Louis County, his now present residence, instead of St. Louis City, as is provided in his present commission?

Now turning to your second question, the Court in the case of State Ex Inf. v. Williams, 222 Mo. 268, said, at l. c. 277:

"* * * Where the law creates an office and prescribes the length of the term, with no date fixed for the beginning or ending of such term, and designates the power which is vested to fill such office by appointment, it necessarily follows that the appointive power has the right to fix not only the commencement of the term, but as well the end thereof. * * * * *"

It will be noted from the reason of Section 13360, supra, that the said Section provides: "Each such notary shall hold office for four years." Therefore, it is our opinion that a notary public's commission must terminate immediately upon the expiration date fixed in said commission by the Governor, which, in any event will not be for a period longer than four years from the commencement thereof. Whereupon, if such application is satisfactory the Governor

shall appoint and commission him for a period of four years from the date of the issuance of the commission, and it will of course be necessary for Mr. Forbes to make the necessary oath and furnish satisfactory bond as is provided by Section 13364 R. S. Missouri, 1939, which Section we do not copy herein for the sake of brevity.

Now turning to the third question we call attention to the case of Silver v. K. C. St. L. & C. Ry., Co., 21 Mo. App. 5, 1. c. 9, wherein the Court said:

" * * * Under our statute a notary public can only transact his official business in the county for which he was appointed and in which he resides. Section 2123, Revised Statutes, authorizes depositions to be taken without this state by a notary public 'within the government where the witness may be found.' We are informed by defendant's counsel that in Illinois a notary public may execute the duties of his office in any part of the state, so long as his residence is in the county of his appointment. There was no evidence, however, of this at the trial. The statute of Illinois was not introduced. There is no presumption to be entertained as to what her statutes are. In those states formerly subject to the common law of England the presumption here would be that the common law is in force there. But as Illinois was a part of the Louisiana purchase and was never subject to the common law of England, such presumption would not obtain in matters where the common law was applicable. There being no proof of the Illinois statute, and there being no presumption as to what her law is, we hold our own statute as to the powers of the notary applicable. Crone v. Dawson (19 Mo. App. 214), and White v.

Chaney (20 Mo. App. 389). Our statute saying the deposition may be taken by any notary 'within the government where the witness may be found,' I think, means any notary within the government, who is qualified and entitled to act, at the place where the witness may be found. In this state, as before said, he would only be qualified to act in the county of his appointment."

Under this statute a notary public can only transact his official business in the county for which he was appointed and in which he resides. It will be noted from observing this case that this opinion was rendered February 15, 1886 and since that time Section 13360, supra, has been amended, through the repeal of the old Section and an re-enactment of the present Section (See Laws 1919, Page 607). The material difference between Section 10360, supra, and Section 2123 set forth in the Silver opinion, supra, is that the present Section provides: "A notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties." In other words, the law has been broadened to give a notary public the power to notarize instruments in adjoining counties to the one for which such notary is appointed by the Governor, and under the authority of the Silver case, such notary must reside in the county for which he is appointed and commissioned by the Governor.

Therefore, Mr. Forbes should make application for a notary commission for St. Louis County, that being the county in which he resides, and will have authority, when commissioned and duly qualified to transact his official business in such county and all adjoining counties thereto.

CONCLUSION.

We are of the opinion that an employee of the Marine Hospital in Kirkwood, Missouri, may be commissioned as a notary public and that such employment is not an office

Hon. Forrest C. Donnell

(11) November 10, 1941

of profit as prohibited by Article XIV, Section 4,
of the Missouri Constitution.

Secondly, we are of the opinion that on the expiration of a notary public's commission that all the powers and duties of the notary public cease and it is incumbent upon a person desiring to be a notary public to file a new application and receive a new commission and again make the oath and furnish the bond as is provided in Section 13364 R. S. Missouri, 1939.

Thirdly, we are of the opinion that a person applying for a notary public's commission may only be commissioned for the county in which he resides and after receiving such commission and having fully qualified may transact his official business in such county and all adjoining counties thereto or in this particular case the City of St. Louis, likewise.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

BRC:RW

STATE PURCHASING AGENT -
(Emergency Purchases)

State Purchasing Agent may permit emergency purchases to be made by a state department without soliciting competitive bids therefor. State Purchasing Agent by rule or regulation may determine what is an emergency within the meaning of the Act.

December 5, 1941

12-5

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

This is in response to your telephone conversation concerning a purchase of eggs by the Department of Penal Institutions, which department wishes to make this purchase without complying with the provisions of Section 14591 R. S. Mo., 1939. This statute requires such purchases to be made on competitive bids. The following are the facts which are submitted by the Department of Penal Institutions relating to this transaction:

"Relative to our conversation of this afternoon concerning eggs to be purchased from Armour and Company, Kansas City, Missouri.

"Shortly after noon, Mr. L. J. O'Brien, of the contract department of Armour & Company, called me to tell me he had available one hundred (100) cases eggs, candled, current receipts, at the same price as was paid on our last order placed with his company. This order was Purchase Order No. 75916-X, covered three hundred (300) cases of eggs as specified, at a price of \$10.78 per case.

"On contacting Mr. Price of the State Purchasing Office I was informed it would be impossible to proceed with the purchase of these eggs, even though Mr. Price informed me he had just contracted for eggs at a price in excess of \$11.00 per case."

Honorable Forrest C. Donnell (2) December 5, 1941

Under Section 14593 R. S. Mo., 1939, the Purchasing Agent may authorize "emergency purchases" direct by any department. This Section is as follows:

"The purchasing agent shall have power to authorize any department to purchase direct any supplies of a technical nature which in his judgment can best be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the purchasing agent together with all bids received and prices paid."

By this Section we think that the necessity for the soliciting of bids is dispensed with in case of an emergency purchase, because the purpose for which this provision was written into this Act is to make a purchase on short notice and without delay. It will be noted, however, that this Section requires the department to report immediately to the Purchasing Agent all bids received and the price paid. Under the foregoing Section we think that the Purchasing Agent by a rule or regulation may prescribe when an emergency exists and also how such purchases shall be made. In support of this statement we are enclosing a copy of an opinion directed to Hon. George C. Johnson, State Purchasing Agent, dated August 28, 1933.

On the question of what is an emergency we submit that that would be a question of fact. However, we find that the Kansas City Court of Appeals in the case of *Mallon v. Water Commissioners*, 144 Mo. App. 104, 1. c. 110, defined this term as follows:

" * * * That word signifies some sudden or unexpected necessity requiring immediate, or, at least, quick action, whereas the meter supplies were obtained without the presence of such a situation. They were known to be in constant demand and were needed, with approximately correct knowledge in advance in what quantity. * * * " (Under-scoring ours.)

And, in *Bigham v. Lee County*, 185 So. 818, the Supreme Court of Mississippi quoted the following definitions of the words "emergency" and "exigency", l. c. 820:

" * * * In 2 Words and Phrases, Second Series, p. 255, emergency is defined as, 'An event or occasional combination of circumstances calling for immediate action, pressing necessity, a sudden or unexpected happening, exigency.' Citing cases. 'The word "emergency" is defined in Cent. Dict. as follows: "A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. A sudden or unexpected occasion for action; exigency; pressing necessity."' Citing cases. 'The word "emergency" signifies some sudden or unexpected necessity, requiring immediate or at least quick action.' * * * "

Also, in the case of *Good Roads Machinery Co. of New England v. United States*, 19 F. Supp. 652, the

Honorable Forrest C. Donnell (4) December 5, 1941

Federal District Court of the District of Massachusetts,
at l. c. 654, in discussing the term "public exigency"
said:

"A 'public exigency' demanding immediate delivery, as referred to in the statute, is a sudden and unexpected happening; an unforeseen occurrence or condition; a perplexing contingency or complication of circumstances; or a sudden or unexpected occasion for action. (cases cited) * *"

In the case of West Virginia Coal Co. of Missouri v. City of St. Louis, 25 S. W. (2d) 466, the Supreme Court of this State had before it the question of the authority of the City of St. Louis to make coal purchases without complying with the charter requiring the solicitation of competitive bids. In this case, at l. c. 469, it would seem that the Board of Standardization was authorized to determine whether or not there was an emergency. The Court said:

" * * * Under the provision of the charter, the determination of an emergency by the board of standardization was a prerequisite to the right to purchase in the amount here in question, without advertising for proposals. * * * "

We think that the statute authorizing the Purchasing Agent to make rules and regulations pertaining to emergency purchases would be analogous to the charter authorizing the Board of Standardization to determine whether or not an emergency existed.

Honorable Forrest C. Donnell (5) December 5, 1941

CONCLUSION

It is the opinion of this Department that, where an emergency exists, and the Purchasing Agent so finds, he may authorize a state department to purchase direct under such rules and regulations as he may prescribe without advertising for bids and without posting a notice of the proposed purchase on a bulletin board in his office, as is required by Section 14591 R. S. Mo., 1939.

It is further the opinion of this Department that the question of the existence of an emergency is one of fact in each particular case, which should be determined by the State Purchasing Agent.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

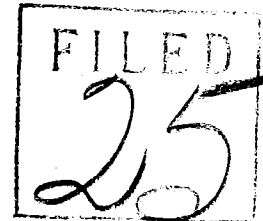
VANE C. THURLO
(Acting) Attorney General

TWB:RW

OFFICERS: Assistant Prosecuting Attorney must
QUALIFICATIONS: have same qualifications as Prosecuting
DEPUTIES: Attorney.

January 21, 1941

Mr. Arthur Duvall
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you request an official opinion on the following statement of facts:

"Would you please advise me as Prosecuting Attorney of Bates County, Missouri as to whether I have the right to appoint as my assistant a young man who has not lived in Bates County a year.

"The statutes seem to contemplate that the assistant shall have the same qualifications as the Prosecuting Attorney, but whether this refers to the legal qualifications alone or the residential as well I am unable to ascertain."

Qualifications of a prosecuting attorney are set out in Section 11309, R. S. Mo. 1929, in the following language:

"At the general election to be held in this state in the year A. D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney,

who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified."

It will be noted that one of the qualifications required under this section is that the Prosecuting Attorney must have been a resident of the county in which he seeks election for twelve months preceding the date of the election.

Section 11336, R. S. Mo. 1929, permits the Prosecuting Attorney to appoint an assistant. This section provides as follows:

"Each prosecuting attorney in this state may appoint one assistant prosecuting attorney, who shall possess all the qualifications of a prosecuting attorney, and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are now or may hereafter be made liable."

This section provides that the assistant shall possess all the qualifications required of the prosecuting attorney. It will be noted that this clause says all of the qualifications. Said Section 11309, supra, lists the different qualifications.

In 41 Mo. 153, State ex rel. Wingate, Attorney-General, v. Woodson, l. c. 154, the court, in speaking of the power of the State to fix qualifications of officials said:

"The power of the State to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as is the power to fix the qualifications of voters; * * * * *."

It would, therefore, seem that the qualifications as to residence must be met by the assistant prosecuting attorney the same as by the prosecuting attorney.

CONCLUSION.

It is, therefore, the opinion of this department that an assistant prosecuting attorney must have the same qualifications as to residence as does the prosecuting attorney.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

NEPOTISM: It is a violation of Section 13 of Article XIV of the Constitution of Missouri to appoint a road overseer who is the son of one judge and first cousin of another judge's wife.

February 18, 1941

Mr. H. M. Dye
Clerk of County Court
Waynesville, Missouri



Dear Sir:

This department is in receipt of your letter of February 6th, wherein you make the following inquiry:

"In regard to the phone call that Judge Wilson had with you this afternoon, the court would like to know about the employment of a man as county road overseer who is a son of one of the judges and a half first cousin to the presiding judge's wife and no relation to the other member of the court."

We assume that you have in mind the question of nepotism entering the appointment of the road overseer. The duty of appointing road overseers is placed on the county court by Section 8516 R. S. Mo. 1939:

"All road overseers shall be appointed by the county court of the county at the February term of said court. * * "

Section 13 of Article XIV of the Constitution of Missouri is as follows:

"Any public officer or employee

of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

There are two methods of determining the prohibited degree which is designated in the constitutional section as the fourth degree, one is by the canon law and the other by the civil law. The determination by each law is as follows:

"We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related." By the civil law the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

In our interpretation we have accepted the civil rules which, by computing relationships under the constitutional section herein referred to, we find that any relationship below first cousins is not prohibited. Therefore, if a road overseer is the son of one of the judges and a half first cousin to the presiding judge's

Mr. H. M. Dye

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February 18, 1941

wife, relationship being considered both by affinity and consanguinity, we are of the opinion that it would be a violation of the nepotism act for such appointment to be made by the court. The decisions referring to the nepotism act for determining violations in the past are State ex rel v. Hall and Ellis 325 Mo. 154, State ex inf. vs. Whittle 333 Mo. 705. In the decision of State ex inf. vs. Ferguson 333 Mo. 1177, the court held that a mayor forfeited his office by appointing his first cousin as pumper for the city water system.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

TAXATION AND REVENUE:
COLLECTOR:
AUTHORITY TO PROPORTION
TAXES:

The tax collector is not authorized to accept proportion of taxes where lands subject to the tax are sold to the federal government during the year for which the taxes are assessed and levied.

April 2, 1941

Honorable David A. Dyer
Prosecuting Attorney
St. Charles County
St. Charles, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

"A land owner owning land located in St. Charles County lost title to the same by virtue of a condemnation proceedings brought by the United States of America on June 15, 1938, that being the date on which the Federal Government paid to the registry of the Federal Court the amount of an award set by commissioners as the value of the land and obtained the court's order of possession. The land owner filed exceptions and only recently has the amount of the final award been determined. Being obligated to present to the Federal Government evidence that all state and county taxes due and payable are paid before he can take down his award, this landowner recently presented himself to Mr. Bruns to pay the taxes on the land for the year 1937 in full and tendered an amount on the total tax for the year 1938 equal to the proportion that the period from January 1, 1938 to June 15, 1938, bears to the full twelve months period. In other words, he tendered 13/24ths of the amount of tax that would have become payable on October 1, 1938 for the year 1938. Mr. Bruns,

April 2, 1941

feeling that he had no right to so prorate these real estate taxes, refused this tender. In fact, he said that he had some thought that the man would have to pay the 1939 taxes which, according to commonly accepted thinking, became a lien on June 1, 1938. However, that question does not enter into this problem that I am presenting to you."

Your question involves the authority of the county collector to proportion real estate taxes, in cases where the lands upon which the taxes are imposed have been, during the year for which such taxes are imposed, conveyed to the federal government. The authority of the collector to accept or prorate such taxes will depend upon the provisions of the statutes. We think the case of *State of Missouri v. Federal Lead Co.*, 265 F. 305, is authority on this question. In that case the collector had compromised the taxes due, and in speaking of whether or not this officer had the authority to so compromise the tax, the court said:

"* * I think there can be scant doubt that Croke had no authority to compromise with defendant by accepting a less amount as taxes due from the defendant than the actual sum shown by the tax books in his hands as collector. The duties of Croke as collector are defined and prescribed by the statutes of Missouri, which create the office of collector of revenue of the several counties in the state of Missouri (section 11432, R. S. Mo. 1909; *State v. Herring*, 208 Mo. 708), 106 S. W. 984, and which prescribe the duties of such collectors (sections 11429, 11434, 11440, 11445, 11448, 11450, 11456, 11459, 11460, 11461, 11464, 11465, 11466, 11467, 11468, 11469, 11473, 11474, 11475, 11477, 11478, 11479, and 11480, R. S. of Mo. 1909). Since, therefore, the office is of statutory origin (*State v. Herring*, supra),

neither the common-law rules, nor the decisions of other states, touching the powers, duties, and authority of collectors of state and county revenue in such states, are decisive. Section 11429, R. S. Mo. 1909, cited supra, provides that upon the delivery of the tax books to the collector he is to be charged with the full amount of the taxes shown upon such books. He can be relieved from liability only (a) by collecting such taxes, or (b) by procuring credit from the county court of his county upon a return of a delinquent list pursuant to statute. Section 11464, R. S. Mo. 1909, supra. To the end that the collector may be relieved, upon the performance of either one or the other of the above contingencies, annual settlements with the county court are required. These settlements, to distinguish them, perhaps, from the 'monthly statements' and the monthly payments also required to be made by the collector (section 11473, supra) are called 'final settlements' in the statutes (section 11465, supra).

"The policy of the state of Missouri, as expressed in the decisions of the Supreme Court thereof, is clearly opposed to the view that any officer, such as a collector, can bind the county, save and except by such performance of incumbent duties as is prescribed by statute. *Lamar Township v. City of Lamar*, 261 Mo. 271, 169 S. W. 12, Ann. Cas. 1916D, 740; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193; *Ex parte Tartar (Mo.)* 213 S. W. 94. There seems to be no Missouri statute conferring power on the collector to take a less sum in payment of the taxes charged to him on the tax books than the amount

April 2, 1941

of such taxes as shown by such tax books. At least the diligence of counsel has disclosed none such, and after a diligent search, aided by some prior knowledge of the subject, I have been unable to find any such statute. Neither is there any statute in existence which expressly places authority on a county court of Missouri to compromise taxes as such, and which have been levied and assessed and made up into a tax book, in a case such as is here before me. County courts in Missouri are empowered to compromise back taxes, when the lands against which such taxes have been assessed are not worth the taxes assessed thereon (section 11496, R. S. Mo. 1909); to refund taxes collected on an illegal levy, provided the fact of such illegality has theretofore been judicially determined by the Supreme Court of the state (section 11523, R. S. Mo. 1909); to correct erroneous assessments, for that the lands were not subject to taxation, or were assessed twice for the same years, or assessed to two different persons (section 11522, R. S. Mo. 1909). None of the above statutes, it is obvious, applies to the situation here presented."

In your request you refer to the case of United States v. Certain Lands in the City of St. Louis, 29 Fed. Sup. 92. It appears from this case that the rule as to when the lien for taxes accrues and becomes a fixed encumbrance, is that the tax is determined by the annual assessment and the levy of the tax.

Section 10940, R. S. Missouri 1939, provides as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for

the ensuing year."

This section would seem to indicate that the person owning the property on the first of June is liable for the taxes for the ensuing year. Section 11086, R. S. Missouri 1939, provides in part as follows:

"The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: * * * * *

While the collector may bring proceedings for the taxes against the lands upon which they are a lien, still under said Section 11086, supra, he may proceed against the owner of the lands by what is termed a "distress warrant." In other words, the collector has two remedies provided by statute for collection of taxes against real estate. In the case of Land & Improvement Co. v. Kansas City, 295 Mo. 674, the court, in speaking of the procedure of the collector in collecting taxes against real estate, said:

"A tax, of the kind involved in this proceeding, is a contribution required of its citizens by the State. And while we speak of property as being subject to taxation, it is the individual who pays the tax, and not his property. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged; and when ascertained it is imposed upon the per-

son of the owner on account of his ownership of the property. And this is true even when a personal judgment cannot be rendered against him therefor. (State v. Snyder, 139 Mo. 549, 552; Gitchell v. Kreidler, 84 Mo. 472, 476.) * * * * *

In the Land and Improvement case, supra, the City of Kansas City had condemned certain lands in that city and the question of the payment of the taxes for the year in which the lands were taken over were before the court and the court said:

"When the city elected to take over the real estate and pay the compensation previously ascertained, the tax for the year 1918 was due and owing by respondent, and had by operation of law become a lien on the property in the city's favor. In these circumstances the city had the right to apply so much of the compensation--purchase price--in its hands as was necessary to satisfy the lien, and then pay the remainder to the respondent. * * * * *

We are referring to this case for the reason that even though the city came into possession of the lands during the year for which the tax was due and owing it held back an amount of the award sufficient to pay the tax for the entire year.

In our research through the statutes we fail to find where even the county court would be authorized to permit this tax to be settled by payment of a proportion of it. In the case of United States v. Certain Lands in the City of St. Louis, supra, the court, while proceeding in equity, directed that the tax be proportioned based upon the time during which it was owned privately, still the court in that case did not say that the private owner was released from his personal liability for the payment of the tax which was created by the assessment and levy. Even

Hon. David A. Dyer

-7-

April 2, 1941

though the lien on the real estate is destroyed when it is taken over by the federal government, the tax bill still has some value because of the owner's personal liability thereon and this is a sufficient reason for the lawmakers to have failed to permit the collector to proportion taxes when the real estate comes into possession of a tax exempt agency during the year for which the tax is assessed and levied.

CONCLUSION.

From the foregoing it is the opinion of this department that the tax collector is not authorized to accept a proportionate part of the taxes on lands which have been sold to the federal government during the year for which such taxes are assessed and levied.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:DA

COUNTY OFFICERS: County court is only liable for premiums
BONDS: on a surety bond furnished by the circuit
CIRCUIT CLERKS: clerk when it consents and approves the
payment of the premiums. The bond may
extend past the term of the county judge.

September 11, 1941

2/1/2
Honorable Arthur Duvall
Prosecuting Attorney
Bates County
Suite 200
First National Bank Building
Butler, Missouri

10-2
FILE

Dear Sir:

We are in receipt of your request for an opinion from this department under date of September 5, 1941, which reads as follows:

"Our Bates County Court has been presented a proposition with respect to which I would appreciate advice.

"The situation is this: The Circuit Clerk of Bates County has elected to and furnished Surety Company Bond for the sum of \$5,000.00, upon which bond the Clerk paid the premiums for the years 1935 to 1941 inclusive.

"The Circuit Clerk has presented the County Court bill asking to be reimbursed for the premiums paid by him to the Surety Company for the years 1935 to 1941 inclusive. The Court stands ready to pay the premium for the current year but raises a question as to whether or not the County is liable for or should make an order directing payment or reimbursement to the Clerk for the years 1935 to 1940 inclusive, which is prior to the tenure of office of two of the members of the present County Court.

"I should greatly appreciate your advice as to whether or not the court

should order payment of the back premiums, or whether the proper method should be that the Clerk institute suit against Bates County to recover the premiums so paid."

Under Section 13285, R. S. Missouri 1939, the circuit clerk of a county is compelled to furnish a bond to protect persons interested in money received by him.

Section 3238, R. S. Missouri 1939, provides in part as follows:

"Whenever any officer * * * * of any county of this state, * * * * shall be required by law of this state, * * * to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such * * * * county, * * enter into a surety bond, * * with a surety company * * authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

Under the above partial section it is very noticeable that before the county is liable for the premiums paid on a surety bond by a county officer, it is first necessary that the officer elect to furnish a surety bond and the county to consent and approve to the giving of a surety bond at the cost of the county.

In your request you do not state whether or not the previous county courts have consented to and approved of a circuit clerk furnishing a surety bond in lieu of a personal bond. You also state that the circuit clerk has presented the county court a bill asking for reimbursement for the premiums paid in the years 1935 to 1941, inclusive. The above section 3238, supra, was first enacted and appears in the Session Laws of 1937, page 190, Section 1. For that reason the county court cannot pay the premiums on the bond for any other years previous to 1937.

You also ask in your request if the county is liable

for the premiums when at the time the bond was given the present judges of the county were not then members of the present county court. I am assuming from your request that Section 3238, supra, has not been followed and for that reason the county court is not liable for the premiums on the circuit clerk's bond.

If the previous county courts from the years 1937 to 1941, inclusive, had consented to the circuit clerk giving a surety bond in lieu of personal bonds and agreed to pay the premiums by authority of Section 3238, supra, the fact that members of the present county court were not in office would not alter the situation and the county would be bound. It was held that contracts made by previous county courts which would be in effect for a short time after the county judges had left office were valid. It was so held in the case of *Aslin v. Stoddard County*, 106 S. W. (2d) 472, 1. c. 476, where the court said:

"In *Walker v. Linn County*, 72 Mo. 650, the county court, through an appointed agent, insured county property for a period of five years. Point was made, on demurrer, that the court had no power to make the contract. This court held that the county court, under its statutory authority to 'have the control and management' of the county's property and its statutory duty to 'take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage,' had the implied authority to insure the buildings belonging to the county. The contract was held valid. The question of the time of performance as extending beyond the terms of office of the then members of the court was not raised and was not discussed in the opinion, and that case therefore can hardly be considered authority one way or the other on the point we now have under consideration. But, if thought of at all, the time factor must have been regarded by the court as not affecting the validity of

September 11, 1941

the contract. And, whether considered or not in that case, can it be doubted that the county court, empowered to insure the county property, could lawfully make a contract for insurance extending beyond the terms of office of its then members, if such contract was made in good faith and was (perhaps because of a lower annual premium than for a short period) advantageous to the county? We think not. Other illustrations might be given. In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold."

CONCLUSION

By reason of the above authorities, it is the opinion of this department that if the circuit clerk did not elect to give a surety bond in lieu of a personal bond and the county court did not consent and approve the giving of such a bond, then the county court, or the public body protected by the bond, would not be liable for the premiums on the bond.

It is further the opinion of this department that since Section 3238, R. S. Missouri 1939, was not in effect previous to 1937, the premiums previous to 1937 must be paid by the circuit clerk and not the county court.

It is further the opinion of this department that the county court can consent and approve the giving of a surety bond in lieu of a personal bond and the county would be liable even if the bond extended to the full term of the officer and to a time after members of the county court had left office.

Respectfully submitted

APPROVED:

VANE C. THURLO
(Acting) Attorney General

W. J. BURKE
Assistant Attorney General

WJB:DA

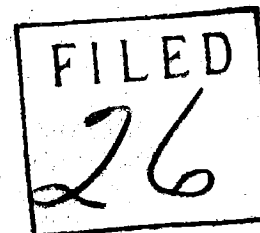
APPROPRIATIONS:
DEPARTMENT OF
AGRICULTURE:

Salaries of employees under the Commissioner of Agriculture must be paid from the specific appropriation for each department under the Commission.

July 28, 1941

7/29

Honorable John W. Ellis, Commissioner
Department of Agriculture
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of July 28, 1941, which reads as follows:

"Under the provisions of House Bill No. 581, Section 25, there is appropriated to the State Department of Agriculture for its use in paying the salaries and expenses connected with the work of the State Entomologist as set out in Article 3, Chapter 102, and designated as the Missouri Plant Law, the respective sums of:

"A. Personal Service..	\$30,000.00
B. Additions.....	500.00
C. Repairs & Replacements.....	500.00
D. Operation.....	19,000.00
Total.....	<u>\$50,000.00</u>

"Under Section 26, House Bill No. 581, there is appropriated for the Department of Agriculture:

"A. Personal Service..	\$150,500.00
B. Additions.....	1,500.00
C. Repairs & Replacements.....	1,500.00
D. Operation.....	82,050.00
Total.....	<u>\$235,550.00</u>

"It is my desire as Commissioner of Agriculture, to operate my Department

as efficiently and economically as possible.

"It is my opinion that the fees which will be paid into the Agricultural Fees Fund will provide ample moneys with which to operate.

"Due to the present economic outlook, the Governor has requested that all expenditures from the General Revenue Fund be kept at a minimum.

"In compliance with this request and the policy of this Administration, it is my desire to reduce to an actual needs basis the appropriation out of General Revenue. In order to do this, it is my thought that if some of the Personal Service and Operation classified in the division of Entomology, under Section 25, could be legally paid from the appropriation under 26, the appropriation under 25 could be reduced without fear of the payment for such services being denied from Section 26.

"Will you kindly give me an opinion as to whether or not I, as Commissioner of Agriculture, have the authority to certify as expenditures from the appropriation under Section 26 certain of the Personal Service and Operation costs of the Division of Entomology.

"I have in mind classifying the Assistant Entomologists as Inspectors and paying their salaries and expenses from the appropriation under Section 26. Also, of paying the clerical and stenographic employees connected with the work of the State Entomologist from Section 26.

"I respectfully ask your opinion as

to whether or not I can legally certify such items to the State Auditor and whether or not the State Auditor would be required to honor my requisition.

"Also, under the provision of Section 19, the State Veterinarian receives an appropriation for payment of certain employees including clerks and stenographers. Under section 14191, R. S. 1939, which reads in part, 'The Commissioner of Agriculture shall have charge of all clerical work pertaining to the Veterinary Service', it would appear that the office expenses such as clerks and stenographers could be paid from the appropriation as set out in Section 26 of House Bill No. 581.

"Will you kindly advise me if this could be done. Would appreciate a reply to this letter as soon as possible as the Budget Officer is at this time awaiting an opinion on these matters, before finally setting up the funds for this Department."

Article X, Section 19 of the Constitution of Missouri provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be

July 28, 1941

applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The above section was construed in *Nacy v. Le Page*, 111 S. W. (2d) 25, 1. c. 26, where the court said:

"* * * * The state treasurer, in his official capacity and in the funds of the state treasury, has no goods, moneys, or effects of any private citizen in his custody, nor does he owe a debt from the treasury to any one. He is a custodian of public funds, raised by taxation, which belong to the state. His duty is to pay out these funds only 'in pursuance of an appropriation by law' which 'shall distinctly specify the sum appropriated, and the object to which it is to be applied.' Section 19, article 10, Constitution.

* * * * *

Under the above holding it specifically states that the appropriation "shall distinctly specify the sum appropriated, and the object to which it is to be applied." Under the above holding and in accordance with your request in which you state that certain appropriations are made under Section 25, House Bill No. 581, and that you intend to pay employees as set out in the State entomology or Missouri Plant Law from appropriation under Section 26 of House Bill No. 581, it is our opinion that you cannot follow this procedure. The employees under what is known as the Plant Law in Article 3, chapter 102, must be paid out of the appropriation of House Bill No. 581, Section 25.

Also, in the case of *State ex rel. v. Gordon*, 236 Mo. 142, 1. c. 157, the Supreme Court of this state, in passing upon Section 19, Article X of the Constitution of Missouri, said:

July 28, 1941

"We cannot agree to that contention. It is provided by section 43, article 4 of the Constitution of this State that: 'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit any money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' And by section 19, article 10, that: 'No moneys shall ever be paid out of the treasury of this State, or of any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object.' ***** "

In all of the appropriations which you described in your request, namely, Sections 25, 26 and 19 of House Bill No. 581, an appropriation was made for stenographers and clerks, but in some of the above sections it only included certain officers which are not mentioned in the other sections.

CONCLUSION

In view of the above authorities it is the opinion of this department that you, as Commissioner of Agriculture, cannot classify entomologist, associate state entomologist and assistant entomologist under Article 3, chapter 102, of the Missouri Plant Law as inspectors under the Department of Agriculture and pay them from the general revenue under the Department of Agriculture, Section 26, for the

July 28, 1941

reason that the specific appropriation under House Bill No. 581, Section 25 was made for the purpose of only paying said employees and officers under Article 3, chapter 102 known as the Missouri Plant Law.

It is further the opinion of this department that you cannot legally certify an entomologist, associate state entomologist or assistant entomologist under Article 3, chapter 102 known as the Missouri Plant Law to receive payment under the agriculture appropriation which is set out in House Bill No. 581, Section 26.

It is further our opinion that since in all of the sections above set out in the appropriation bill No. 581, it specifically states clerks and stenographers and for that reason the clerks and stenographers can be paid, or transferred, to either the department known as the plant law, veterinary service or general agriculture service and for that reason the clerks and stenographers can be paid out of either appropriation.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WJB:DA

EGGS:

COMMISSIONER OF AGRICULTURE: Authority of the Commissioner of Agriculture over persons or firms who handle eggs.

October 15, 1941

Mr. John W. Ellis
Commissioner of Agriculture
Jefferson City, Missouri



Dear Mr. Ellis:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts:

"This Department needs a ruling upon the following questions, in relation to the Egg Law in Article 4, Chapter 58, R. S., 1939, which law is administered by the Commissioner of Agriculture, under Article 1, Chapter 102, R. S., 1939:

1. Can the Commissioner require a license under Section 9908 from a hatchery that sells its off-size-grade fresh eggs and incubator reject eggs?
2. Can the Commissioner license a dealer who traffics mainly in incubator and candlingroom reject eggs?
3. Attached hereto are the Egg Law Regulations, adopted March 1, 1940, calling your attention especially to Regulations 6 and 7. Also see herewith copies of letters from two large hatcheries, protesting the requirements of Regulations 6 and 7. The question raised by these and other related protests is: 'What legal Regulation, if any, can be promulgated that would permit a licensed hatchery to sell and ship undenatured reject shell eggs to a licensed dealer (if licensable) in correctly labeled and sealed cases, showing that such eggs are unfit for human food and are shipped for processing into tanner's stock?'

4. Since the foregoing questions 1, 2 and 3 were written, we now have additional reason to ask for an interpretation of the concluding sentence in Section 9912, as to shipping shell eggs 'to tanners' under seal. Does this mean that such undenatured shell eggs can be shipped under seal to tanners only, and not to dealers?"

Article 4 of Chapter 53, R. S. Mo. 1939, contains the laws relating to eggs. From an examination of this article it will be seen that two acts of the General Assembly make up the provisions of this article. Sections 9905 to 9911 inclusive are from House Bill 677, Laws of Mo. 1919, p. 364, entitled:

"AN ACT to provide for the regulation of traffic in eggs; to provide for the licensing of dealers in eggs; to prevent fraud and misrepresentation in dealing in eggs and to prevent the sale of eggs unfit for human food; and fixing penalties for violations; with an emergency clause."

This act also contained an emergency clause which is as follows: (Sec. 9, p. 366, Laws of Mo. 1919)

"There being no adequate law in this state regulating the traffic in eggs, and the sale of unwholesome eggs constituting a menace to the public health and endangering human life, creates an emergency within the meaning of the Constitution, therefore this act shall take effect and be in force from and after its approval by the governor."

This act was approved on May 26, 1919. It will be noted that the emergency clause of this act stated that "there being no adequate law regulating the traffic in eggs, and the sale of unwholesome eggs constituting a menace to the public health," so it would seem that one of the primary purposes of this act was to license all dealers in eggs and prevent fraud and misrepresentation in dealing with them.

Section 9912 to Section 9915, inclusive, are taken from C. S. H. B. 833, Laws of Mo. 1919, p. 356, entitled:

"AN ACT providing for the shipment, handling and sale of eggs, for food or manufacturing purposes, the inspection of egg breaking establishments, and regulating same by the state food and drug commissioner, prohibiting the retaining of unwholesome eggs, unless the same are case.

thereof, ...

This act was passed with the following emergency clause (Sec. 6, p. 358):

"There being no adequate law in this state regulating the egg breaking establishments which in many instances are conducted in such a way as to constitute a menace to the public health, an emergency is hereby declared to exist within the meaning of the Constitution, therefore, this act shall be in force and effect from and after its approval by the governor."

This act was also approved on May 26, 1919. The emergency clause in this act refers particularly to egg breaking establishments. The provisions of these two acts may overlap some but we do not find a conflict therein. Since both acts were passed at the same session and approved on the same day, we must assume that the Legislature and the Governor did not consider them to be conflicting.

Referring to your first question as to whether or not the Commissioner of Agriculture can require a license under Section 9908, R. S. No. 1939, from a hatchery that sells its "off-size-grade and incubator reject" eggs, this section reads as follows:

"That for the purpose of enforcing the provisions of this article it is hereby required that ten days after this article takes effect, any person, firm or corporation that shall engage in the business of buying, selling, dealing in or trading in eggs, including those retailers who buy direct from the producer and who sell in lots of one case or more, shall procure a license from the state food

and drug commissioner to conduct such business. Such officer upon receipt of proper application upon forms such as he may prescribe, accompanied by an annual license fee of two dollars (\$2.00) for a person, firm or corporation that shall engage in the business of buying, selling, dealing in or trading in eggs in lots of less than one carload shall thereupon issue to such person, firm or corporation an annual license to engage in such business; and such person upon receipt of a proper application upon forms such as he may prescribe accompanied by a license fee of ten dollars (\$10.00) for a person, firm or corporation that shall engage in the business of buying, selling, dealing in or trading in eggs in lots of one carload or more, shall thereupon issue to such person, firm or corporation an annual license to engage in such business."

It will be noted that the first sentence in this section states that "for the purpose of enforcing the provisions of this article", etc. The word "article" used in this section might not be construed to include those sections of the article which are taken from C. S. H. B. 333, Laws of Mo. 1919, p. 356, which are included in Sections 9912 to 9916, R. S. Mo. 1939, but, without doubt it does include Sections 9905 to Section 9911 of Article 4, Section 9905 reads as follows:

"That no person, firm or corporation shall sell, or have in his possession with intent to sell, offer or expose for sale, or traffic in, any egg unfit for human food, unless the same is broken in shell and then denatured so that it cannot be used for human food. For the purposes of this article, an egg shall be deemed unfit for human food if it be addled or mouldy, a black rot, a white rot, or a blood ring; or if it has an adherent yolk, or a bloody or green white; or if it be incubated beyond the blood ring state; or if it consist in whole or in part of a filthy, decomposed or putrid substance."

Section 9906 reads as follows:

"That no person, firm or corporation shall, in buying or selling eggs, take or give a

greater or less dockage for eggs unit for food as defined in section 9905 than the actual dockage which has been determined by the careful candling of the eggs so purchased or sold, and he shall keep such candling records as may be required by the rules and regulations of the state food and drug commission. All such records shall be open at all reasonable times for examination by the state food and drug commissioner or inspectors of the state food and drug department. The term 'candling' as used herein shall be construed to mean the careful examination, in a partially dark room or place, of the whole egg by means of a strong light, the apparatus and method employed to be such as shall be approved by the state food and drug commissioner. Every person, firm or corporation engaged in the business of buying eggs in this state for resale or consignment shall provide and maintain an adequate place for the accurate candling of eggs and a suitable place for the proper handling of eggs which are intended to be used for human food."

Since this law provides a penalty for its violation, it should then receive a strict construction.

Section 9905 prohibits any traffic in eggs unfit for human food unless the same are broken in shell and denatured. Section 9912 seems to have made an exception to Section 9905 by permitting eggs known as "yolks stuck to the shell, heavy blood rings, partially hatched, moldy eggs, black spots, black rots, or any other egg of an unwholesome nature to be cased and labeled" may be shipped to tanners under seal for manufacturing purposes only.

In reading this entire article, it will be seen that eggs unfit for human food may be sold on only two occasions, -- be broken in the shell and then denatured as provided in Section 9905 and under Section 9912 they may be cased and labeled and sold, or they may be broken in the shells and then denatured so as to be rendered unfit for human food and sold, or they may be sold within the shell or broken and dried and shipped to tanner under seal for manufacturing purposes only.

Section 9913 provides as follows:

"Eggs, exclusive of the above named varieties, which are not intended for sale to the trade in shell form, are hereby declared to be 'breaking stock.' 'Breaking stock' when packed in cases, sealed with proper identifying strips that have been approved by the state food and drug commissioner, may be shipped to licensed egg-breaking establishments. Brokers and commission men or ordinary receivers of eggs, who have eggs shipped to them in these breaking stock identified cases, may break the seal and examine the stock, but they must reseal the identifying strip where it is cut with another identifying strip which carried their name and address, and the date upon which they inspected the eggs. They will be held responsible for any tampering with the contents of the identified cases. It shall be unlawful for any person, firm or corporation to have in his or its possession, with intent to place them on the market for food purposes, eggs known as yolks stuck to the shell, heavy blood rings, partially hatched, mouldy eggs, black spots, black rots or any unwholesome eggs, unless the same be cased and labeled or broken in the shell and then denatured so as to render them unfit for human food."

This section prohibits the possession of eggs such as those described as unfit for human food in Sections 9905 and 9912 where the possession of same is with the intention of placing them on the market for food purposes, unless the same are cased and labeled, or broken in the shell and then denatured so as to render them unfit for human food.

So, it will be seen that the primary purpose of all these sections is to prohibit eggs unfit for human food from being placed on the market, and they only permit possession of such eggs when the same are cased and labeled or broken in the shell and denatured so as to render them unfit for human food.

The first sentence of Section 9906, supra, requires the person who buys or sells eggs unfit for food to keep records such

as may be prescribed by the Commissioner of Agriculture. It also prohibits such person from taking or giving a greater or less dockage for such eggs than the actual dockage as has been determined by the careful candling of the eggs so purchased or sold. This section indicates that the lawmakers intended to give the commissioner supervision of such dealers and they therefore provided, by Section 9908, for the licensing of them.

In our research on these questions, we did not find that these acts have been before our courts for construction. Under the general rules of construction, however, the officers administering such statutes are bound by their provisions only.

CONCLUSION

From the foregoing, it is the opinion of this department that:

1. The Commissioner may require a license from a hatchery which sells its off-size-grade fresh eggs and incubator reject eggs in order that he may enforce the provisions of Section 9908.
2. That the Commissioner, for the purpose of enforcing the provisions of Sections 9905 to 9911, inclusive, would be authorized to require a license of a dealer who traffics mainly in incubator and candlingroom reject eggs. The reason for requiring such a license would be to compel such dealers to comply with the first sentence of Section 9908, supra.
3. In answer to your third question, it is our opinion that the Commissioner of Agriculture may promulgate a rule providing for the casing and labeling of eggs known as "yolks stuck to the shell, heavy blood rings, partially hatched, mouldy eggs, black spots, black rots, or any other eggs of an unwholesome nature which are to be shipped or disposed of for manufacturing purposes or for food.
4. In view of our ruling in Section 3, supra, we are of the opinion that the eggs described therein may be shipped to persons other than tanners, if the Commissioner, by rule and regulation has provided for the proper casing and labeling of same.

Mr. John W. Ellis

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October 15, 1941

We are further of the opinion that the casing and labeling of such eggs; or if they are broken and then denatured so as to be rendered unfit for human food, complies with the statute on disposing of such eggs.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

TAXATION:

STREET RAILWAYS:

Motor busses operated in connection with street railroad or street railway for the transportation of passengers should be assessed by the State Tax Commission and not by a local assessor.

January 10, 1941

State Tax Commission
Jefferson City, Missouri

Attention: Mr. Clarence Evans, Chairman



Gentlemen:

We are in receipt of your request for an opinion dated November 26, 1940, which is as follows:

"Will you please furnish this department with an official opinion on the following statement of facts:

"The St. Louis Public Service Company is incorporated under the provisions of Article 5, Chapter 90, R. S. No. 1919 and also under the provisions of an Act of the Legislature approved April 12, 1921, (Laws, 1921, page 661), and, is by its Articles of Association authorized to engage in the business of transporting passengers for hire by street railway and motor busses.

"Prior to the reorganization of that company, it operated a number of motor busses and also owned all of the capital stock of a motor coach corporation, known as Peoples Motor Bus Company of St. Louis, the busses of which were separately operated.

"The St. Louis Public Service Company was reorganized in November, 1939, under the provisions of the Reorganization Bankruptcy Federal Statute; the physical property of the Peoples Motor Bus Company of St. Louis was amalgamated with the physical property of the parent company.

"During the time that the Peoples Motor Bus Company was engaged in operating its busses, its busses and other property were assessed by the Assessor of the City of St. Louis. The motor busses of the St. Louis Public Service Company, together with its railroad properties, were assessed by the State Board of Equalization upon the recommendation of this body.

"The question now arises, in view of the fact that the motor bus operations of the St. Louis Public Service Company are authorized by a provision of its Articles of Association under the Manufacturers and Business Companies Act, whether the motor busses and other physical property, ancillary to the bus operation, should be taken cognizance of by this body for assessment purposes or whether the assessment should be made locally?"

From this statement we find that the St. Louis Public Service Company is now authorized under its charter as amended to carry on the business of operating a street railway by the use of both street cars and motor busses, under the Street Railroad Act.

Under Section 10018, R. S. Mo. 1929, street railways are required to make a statement of their properties for taxing purposes to the State Board of Equalization. This section should not be confused with the railroad section, being Section 10012, R. S. Mo. 1929. The street railway section, Section 10018, R. S. Mo. 1929, reads as follows:

"On or before the first day of January in each year, the president or other chief officer of every street railroad company in every city of this state whose line is now or shall hereafter become so far completed and in operation as to run horse cars, electric cars, cable cars or cars propelled by any other device for the transportation of passengers, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief

officer, before some officer authorized to administer oaths, setting out in detail the full length of the line, so far as completed, including branch or leased lines, the entire length in this state, the length of double or sidetracks, the length of such line located upon real estate to which such company may have title as right of way, the length of such line located upon the public streets or thoroughfares of any city, together with all cars, motors, grip cars, live stock, electric trolley wires, cables, cable conduits, power houses, stables and all other property, real, personal or mixed, owned, used or leased on the first day of June, which may be used in or incident to the operation of such street railroad, the length of such line in each county, municipal township and city through or in which it is located, and the cash value of the several items embraced in the statement."

It will be noticed under the above section that the president or other chief officer of every street railroad company in every city of this state whose line is wholly or partially completed and in operation shall furnish a turn-in of the property of the company to the State Auditor, which officer has now been substituted by the State Tax Commission. It also specifically says "electric cars, cable cars or cars propelled by any other device for the transportation of passengers * * *." Under this partial section, motor busses are a device for the transportation of passengers, and a return of their valuation should be made to the State Tax Commission and not to the local assessing authorities.

Under Section 10018, supra, no division has been made as to the turn-in of different properties of the street railway company, but it specifically states and describes all of the property of the street railway or street railroad company.

That all property of a street railway or street railroad company must be turned in to the State Tax Commission was held mandatory in the case of State ex rel. Union Elec. Light & Power Co. v. Baker, 293 S. W. 399, 1. c. 404, where the court said:

"Under the railroad act, as we have heretofore observed, only a part or class of railroad property could be assessed by the state

board of equalization, the remaining class or portion being subject to local assessment. By the street car act, all property of the street car companies was required to be returned to the state auditor for assessment by the state board of equalization. It may be conceded that the General Assembly might have provided for the assessment of the property of electric power and light companies, electric transmission lines, etc., by a separate act similar to the street car act, or some other act, but we are not concerned with such possibilities. Our only concern is rightly to determine the validity of this particular act as amended."

Section 10019, R. S. Mo. 1929, provides that the properties of a street railway shall be assessed and apportioned in the same manner in which other railroad property is assessed and apportioned. This section merely describes the method and not the question as to which specific property shall be turned in to the State Tax Commission.

Section 10022, R. S. Mo. 1929, provides for the apportionment of these taxes.

Since Section 10018, supra, specifically states that the chief officer shall turn in to the State Tax Commission all cars propelled by any other device for the transportation of passengers, any property connected with the transportation of passengers is not excluded and should not be taxed locally by the local assessor, and the chief officer is not compelled to make a return of property of that nature to the local assessor.

Also, in the case of Kansas City Public Service Co. v. Ranson, 41 S. W. (2d) 169, 1. c. 172, the court said:

"Construing the above Act of March 11, 1897, and passing upon the identical question now before us, this court in banc, speaking through Brace, J. (161 Mo. 198, 199, 200, 61 S. W. 603, 605), said:

"Prior to this enactment (Act of March 11, 1897), the whole property of a street railroad was subject to assessment for taxes by the local authorities. The effect of this act in that respect was simply to change the assessing authority from them to the state board of equalization, and we know of no reason why this might not have been done."

Under the holding in the above case, the court specifically held that Section 10018, supra, which was an enactment of March 11, 1897, simply changed the assessing authority from the local tax assessor of all state railroad property to the State Board of Equalization and the State Tax Commission.

In the case of State ex rel. School Dist. of Kansas City v. Waddill, 52 S. W. (2d) 476, 1. c. 477, the court in passing upon the construction of Section 10018, supra, said:

"The assessment and levy of taxes in this state is purely statutory.' State ex rel. Ziegenhein v. Thompson, 149 Mo. 441, 445, 51 S. W. 98. 'The assessors have no jurisdiction to assess property otherwise than as the statute prescribes.' Abbott v. Lindbower, 42 Mo. 162, 168. 'Under our system of taxation * * * there can be no lawful assessment except in the manner prescribed by law.' State ex rel. v. Lesser, 237 Mo. 310, 318, 141 S. W. 888, 889. The answers to the questions propounded in the preceding paragraph must therefore be found in applicable tax statutes. In referring to those statutes, the section numbering employed in the revision of 1929 will be used."

Also, at 1. c. 478, the court said:

"Under the provisions of the three sections just referred to and quoted in part, it is too plain to admit of controversy that all the property of a street railroad company, used in or incident to the operation of its street railroad, is to be assessed, apportioned, certified, and the taxes thereon levied, in the manner pro-

vided by law for the assessment and taxation of other railroad property. The provisions for the assessment and taxation of 'other railroad property' are outlined in sections 10012, 10017, 10022, 10024, 10025, 10028, and 10029, R. S. 1929 (Mo. St. Ann. Secs. 10012, 10017, 10022, 10024, 10025, 10028, 10029). According to these, the property of a railroad company is divided into two classes. The first consists of the railroad, side tracks, depots, water tanks, turntables, rolling stock, etc., all of which have been denominated by this court in construing the statutes as the distributable property of a railroad company. The second class consists of all property not included in the first, such as roundhouses, workshops, etc., referred to in section 10025 as 'local property.' This latter class is required to be assessed by local assessing officer, and need not be further considered at this time."

The holding in this case was to the effect that Section 10018, supra, applied to street railroad companies only, while Section 10012 and other sections set out in the above paragraph applied as to the method of assessing, apportioning and certifying the taxes levied and not as to the specific property that should be turned in to the State Tax Commission.

In reading the three above cited cases it is clearly shown that the Street Railway Section 10018 requires the chief officer to make a return of all the property used in or incident to the transportation of passengers to the State Tax Commission, while under the Railroad Act, Section 10012 and Section 10025, R. S. Mo. 1929, there are two different kinds of property. Under the Railroad Act the first consists of the railroad itself and certain described property, which should be taxed by the State Tax Commission, and the second class consists of all other property not included in the first, such as roundhouses, workshops, etc., consisting of local property, which is required under Section 10025, R. S. Mo. 1929, to be assessed by the local assessing officer.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the chief officer of the St. Louis Public Service Company should, for taxation purposes, make a return of all motor busses and other property incidental to the transportation of passengers and used in connection with the regular and permanent street railway to the State Tax Commission and not the local assessor.

It is further the opinion of this department that Section 10018, R. S. Mo. 1929, when it mentions "propelled by any other device for the transportation of passengers," includes motor busses.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TAXATION: Only properties of bus
STATE TAX COMMISSION: and truck lines used in
INTERSTATE BUS AND TRUCK LINES: interstate business may
be assessed by State Tax
Commission.

----- January 21, 1941 -----

Mr. Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:



This is in reply to your request of recent date,
wherein you submit the following statement of facts:

"The General Assembly of 1939 amended
Section 10066 by adding thereto inter-
state bus and truck lines as a class
of public utility property to be
assessed by the State Tax Commission,
found on page 872 Laws of 1939.

"A contention exists among owners of
this class of property concerning what
portion of their equipment is subject
to assessment by the Tax Commission
and what portion by the local assessor.

"Various companies do both kinds of
business; for instance, a household
goods mover, whose principal operation
is in Missouri, intra-state, also holds
inter-state authority and makes one or
two trips a month out of the State.
Should all the equipment owned by said
company be assessed by the Tax Commis-
sion or only that portion of the equip-
ment for which he holds public service
commission permits to operate inter-
state business?"

The provisions of the taxing statutes pertinent to
your question are as follows: Laws of Missouri 1939,

page 872, Section 10,066. This section, in so far as it applies to your question, provides as follows:

"* * * * * and all property, real and personal, including the franchises owned by * * * interstate bus and truck lines, * * * shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such * * * interstate bus and truck lines, * * * is hereby required to render statements of the property of such * * * interstate bus and truck lines, * * * in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

Prior to the amendment of said Section 10,066 so that it included interstate bus and truck lines such lines were taxable, if they were taxable, under the provisions of

Section 9764, R. S. Mo. 1929, which provides as follows:

"All personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the 1st day of June of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owning personal property on the 1st day of June in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county where situated, in the same manner as other personal property is required by law to be returned. This section shall not apply to railroad or banking corporations."

By this section the property is assessed by the local county officials.

By the 1939 Amendment, apparently it was the intention of the lawmakers to place the duty of assessing interstate bus and truck lines in the State Board.

In Volume 61 C. J. at page 190, Sec. 154, the following rule is announced as to taxation of personal property:

"Personal property unless exempt, is subject to taxation, whether it be tangible or whether it be intangible. But in order to be taxable, personal property must come within the descriptive terms or application of the statute imposing the tax, * * * * *"

(Italics ours.)

Applying this rule to the question here, in order for properties of the interstate bus and truck lines to be tax-

able by the State Board such properties must come within the descriptive terms or application of the statute imposing the tax. In other words, such property must be property used in the interstate bus and truck line business. Otherwise, it would be taxable under said Section 9764, *supra*.

In the case of *State ex rel. Halferty, v. Kansas City Power & Light Co.*, 145 S. W. (2d) 116, 1. c. 120, at paragraph 4, the court, in speaking of the requirements of the law before we can have a lawful assessment, said:

"It is conceded that under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose. See *State ex rel. Union Electric Light & Power Co. v. Baker et al.*, 316 Mo. 853, 293 S. W. 399, (cited by both sides.) This principle is well settled and needs no further citation of authorities. * *"

Apparently when the General Assembly was amending Section 10,066, *supra*, so that it included interstate bus and truck lines, it did not have in mind to change the mode of assessing and taxing of bus and truck lines which were not interstate.

In the case of *State ex rel. School District of Plattsburg v. Bowman*, 178 Mo. 654, at 1. c. 660, the court, in discussing the intention of the General Assembly to include certain properties for taxation and to exclude others, said:

"It seems reasonably clear, however, that the Legislature did not have in mind partnership property when it enacted section 9121, and that that section is properly referable only to property owned by an individual. And

this being true, the statute must be deemed to be silent as to the assessment and taxation of partnership property; and, therefore, the general rules of law pointed out must be held to obtain."

So here, in the question involved, the General Assembly having only included properties of interstate bus and truck lines for taxation under Section 10,066, which is silent as to the assessment of intrastate bus and truck lines, the general statute for assessment of bus and truck lines would still be in full force and effect as to bus and truck lines which do intrastate business and they would, therefore, be assessed by the local authorities.

CONCLUSION.

From the foregoing, it is the opinion of this department that the State Tax Commission should assess only that portion of the equipment of interstate bus and truck lines for which they hold a public service commission permit to operate interstate business.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TAXATION: Taxation of Interstate Bus and Truck lines on irregular routes.

January 30, 1941

Mr. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you submit the following statement of facts and request:

"On page 872, Laws of 1939, you will find Section 10066 was amended by the addition of the words 'interstate bus and truck lines'.

"We find a great many companies doing interstate business which traverse irregular routes. The assessment of this property should be allocated according to the railroad law.

"We wish to inquire what the basis for allocation should be in such cases. In many instances, the carrier never makes but one trip through a certain taxing subdivision. Is it to be presumed that this carrier keep a minute record and that the assessment be divided in as many parts and parcels as he traverses during the year or is this law applicable only to regular routes?"

By the Act of 1939 the General Assembly has provided that interstate bus and truck lines shall be assessed and taxed in the same manner that railroad property is taxed. Section 10066, Laws of Missouri 1939, page 872. Said section, in so far as it applies to interstate bus and truck lines, provides as follows:

"* * * * and all property, real and personal, including the franchises owned by * * * interstate bus and truck lines, * * * shall be subject to taxation for state county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such * * * interstate bus and truck lines, * * * is hereby required to render statements of the property of such * * * interstate bus and truck lines, * * * in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

It will also be noted that this section provides that such property shall be subject to taxation for state, county,

municipal and other local purposes to the same extent as the property of private persons. So it cannot be questioned but that the property of the interstate bus and truck lines is taxable in some manner in this State.

The property of the railroad companies, commonly known as the distributable property, is assessed and taxed under Section 10012 R. S. Mo. 1929. The taxes from this distributable property is then allocated to the various subdivisions of the State by virtue of the provisions of Section 10022 R. S. Mo. 1929, on a mileage basis. That is, each subdivision of the State through which such railroad passes receives taxes in the proportion that the amount of mileage through such subdivision bears to the mileage of the entire railroad.

From your request it appears that since the carrier on the irregular route does not have any way of determining the miles of highway over which it passes through the various subdivisions, then it would be impossible to tax the property of these carriers as distributable property.

The term "irregular route" is defined in Laws of Missouri 1931 at page 305 in the following language:

"The term 'irregular route,' when used in this act, means that portion of the public highways over which a regular route has not been established."

If no regular route has been established then it would be almost impossible for the interstate bus and truck operator on the irregular route to comply with the railroad act in so far as it requires the carrier to furnish to the taxing authorities its mileage through the various political subdivisions of the State named in said Section 10022 R. S. Mo. 1929.

To construe said section 10066, supra, so that it required an interstate bus and truck operator on an irregular route to comply with the railroad act in so far as it

Jan. 30, 1941

requires the operator to furnish the taxing officials with the information as to the number of miles of roads it passes over through the various political subdivisions of the State, would almost require an impossible task, and we think it would be an absurdity to so construe this act. We think the rule of construction announced in *Hanna v. Aetna Life Ins. Co.*, 217 Mo. App. 261, 1. c. 272, would be applicable here. This rule is as follows:

"* * * The rule is that statutes will not be construed so as to require impossibilities or to lead to absurd results, if they are at all capable of any other reasonable interpretation. (25 R. C. L. 1018-1020; *Potter v. Douglas County*, 87 Mo. 239; *State ex rel. v. Koeln*, 211 S. W. 31; *Corrigan v. Kansas City*, 211 Mo. 608, 650. * * * *

We think this statute would receive the proper interpretation and construction by holding that the properties of the interstate bus and truck operators who have permits to operate on an irregular route should be assessed as local property as is required by Section 10025 R. S. Mo. 1929, which provides as follows:

"All property, real, personal or mixed, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state

and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

As stated above, our reason for this view is that it would be impossible to assess this property as distributable property of the carrier. We are therefore of the opinion that the provisions of said Section 10066, at page 872, Laws of Missouri, 1939, in so far as they require the distributable property of interstate bus and truck lines to be taxed, do not apply to lines which operate on an irregular route, but that such lines should be taxed as local property as is required by said Section 10025 of the railroad act.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

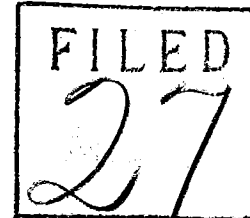
COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

INTOXICATING LIQUOR: Liquor sold on licensed premises may be legally opened and consumed on other, separate adjacent premises owned by the licensee, and not described in license.

April 11, 1941 4/15

Honorable Sam T. Evans
Prosecuting Attorney
Daviness County
Gallatin, Missouri



Dear Sir:

This is in reply to your request for our opinion in your letter which is in the following terms:

"Charles Harrington of near Altamont, Mo., has license to sell intoxicating liquor by retail in original package in his filling station. He owns and operates a dance hall under a separate roof a few feet away. He permits his customers to open and consume the intoxicating liquor in dance hall which they buy at the filling station and tobacco store.

"Two or three weeks ago the Liquor Department agreed to secure an opinion from your office as to whether or not this is legal. It is my opinion that to permit his customers to consume the liquor in dance hall is unlawful, being in violation of law which prevents the consumption of intoxicating liquor on premises where purchased.

"I should like to have copy of opinion whenever it is prepared.

April 11, 1941

"If for any reason your office has not been requested for an opinion, I should like to have an opinion from your office based upon the facts hereto attached. These facts are identical with the agreed statement of facts that the Liquor Department agreed to submit for an Attorney General's opinion."

The statement of facts attached thereto is as follows:

"That Charles I. Harrington was issued a liquor permit by the State of Missouri to sell whiskey and beer by the package on the following described premises:

"In the two story stucco building, with basement, the second story used for living quarters, the above building is 22 feet by 24 feet located on the Highway at the junction of Highways 69 and 6 one mile west of Altamont, Daviess County, Missouri; said Harrington also operates a dance hall just west of the above described two story building and ten feet west thereof; said dance hall is a separate building and is not connected in any manner with the two story building above described. He sells liquor from the two story building and permits it to be consumed in the dance hall.

"Is this a violation of the letter or the spirit of the liquor laws of Missouri, or is Harrington complying with the law?"

April 11, 1941

Section 4901, R. S. Mo. 1939 (a part of the Liquor Control Act) in part provides:

"Intoxicating liquor shall be sold at retail in the original package upon a license granted by the supervisor of liquor control, and said intoxicating liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor, except as otherwise provided in this act. * * *"

The provision above quoted, that ". . . liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor," (*italics ours*) means the premises described in the license - the premises upon which sales are licensed to be made. Section 4881, R. S. Mo. 1939, in part provides that "no person . . . shall sell intoxicating liquor in any other place than that designated in the license," In our opinion, the intent of the whole Liquor Control Act is that "premises" means "licensed premises". While the word "premises" has been variously defined, in use it generally refers to certain real property described in a legal instrument (Ballentine's Law Dictionary, page 1001). The instrument to which we look to ascertain what premises are involved in this matter is the liquor license, and application therefor. In practice the license describes the premises described in the application. In the case of In Re Henry, 142 N.Y.S. 485, 1. c. 486, where the question was whether the premises of an applicant for a liquor license were within a prohibited proximity to certain other buildings, the court said:

"It may be assumed that the term 'premises' as used in the statute is broad enough to include land and buildings or either, if specified in the application, but the immediate question here involved

is whether the specification of premises in the particular application was intended to be broader than the saloon building, and inclusive of the whole tract of land, and it is to be solved along the usual lines of interpretation of written instruments. By the statute (section 15, subd. 3) the specification of the premises is not required to be by metes and bounds, or by other exact description. It is enough to supply 'such apt description as will reasonably indicate the locality thereof.' In the present application there certainly is no reference to respondent's entire tract or description of it as being the premises intended to be specified, and, on the other hand, there can be no doubt but that the premises in mind as the place of the intended traffic was to be a building. The reference to a particular room makes this certain. It would be lawful to sell liquors on respondent's tract at any place or building or location specified, if consented to by the requisite proportion of neighboring owners, and, having specified such place, it cannot be assumed that he proposes now, or secretly proposed then, to sell it at some other point on his tract, where, by the statute, it would be, for lack of consents, unlawful to do so. Matter of Keene v. Toole, 1 Liq. Tax R. 79. * * * * *

Later, in Pierse v. Zimmerman, 5 N.Y.S. (2nd) 703, 704, 255 App. Div. 708, it was ruled that the term "premises" in a similar provision of the New York Liquor Law means "a store and not a building."

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The fact that the holder of the license also owns the other premises where the package was opened and consumed, in our opinion does not affect this question. The dance hall, as stated in your letter, is in a separate building not physically connected with the building described in the liquor license. Said dance hall is not used as a part of the business of selling intoxicating liquor in the original package for consumption on other premises. The premises meant in the liquor law are those used in conducting the business licensed. In Orke v. McManus, 115 N. W. 580, 1. c. 581, the Supreme Court of Iowa said:

"* * * The law prohibits the selling or drinking on the premises of the manufacturing establishment, not of the corporation owning or operating the plant, and, for this reason, the word 'premises' should be so limited in its meaning as to include no more than the buildings occupied by and the grounds used in connection with such establishment. As pointed out, the saloon was operated independently and apart from the brewery, and was not included within the premises of the manufacturing plant."

And, in State v. Almy, 79 Atl. 962, 1. c. 964, 32 Rhode Island 415, it was ruled:

"* * * Therefore the words, 'The finding of any liquors enumerated in this section upon the premises of any retail druggist or apothecary,' apply to the finding of the same in the shop or store or other portion of the business premises of those persons."

"* * * * And if he, as a druggist or apothecary, has a shop or store wherein a druggist's license could operate, if

April 11, 1941

he had one, those are his business premises; and, in case he has no such druggist's liquor license, those are the premises wherein he must not sell or keep for sale intoxicating liquor in prohibited quantities."

Since neither the liquor law nor a liquor license authorizes sales on all premises to which the licensee may have title or the right to possession, it necessarily follows that the limitations and prohibitions applicable to the licensed premises do not attach to other premises not licensed to which the licensee may have title.

Your letter states that the sales were made at and on the premises described in the license. Therefore, the sales are legal. Inasmuch as the opening and consumption of the package was done at a place other than the licensed premises, there is no violation in that respect either of the letter or the spirit of the liquor law.

CONCLUSION.

Intoxicating liquor sold on premises licensed for retail sale of such liquor in the original package for consumption on other premises, may legally be opened and consumed on other premises owned by such licensee, which other premises are not the premises described in the license, and consist of a separate building, though adjacent to said licensed premises. In the Liquor Control Act "premises" means premises described in the license.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General
EH:CP

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TAXATION AND REVENUE: I. Drainage district under county court organization may purchase realty sold for taxes due such district. After such date the land is not subject to taxes.

II. County court may purchase land in foreclosure of school fund mortgage for such fund and takes the title to the property free from all outstanding taxes.

October 29, 1941 general county and state taxes.

Honorable Sam T. Evans
Prosecuting Attorney
Daviness County
Gallatin, Missouri

Dear Mr. Evans:

We desire to acknowledge your request of October 25, 1941, for an opinion, which is as follows:

"The County Court of Daviness County, Missouri; desire your opinion on the following facts, namely:

1. A Drainage District acquired title to real estate through sale for delinquent drainage taxes; prior to sale state and county taxes had been assessed and levied against said real estate, which were unpaid and delinquent at time of sale for delinquent drainage taxes.

Is the Drainage District obligated to pay said State and County taxes which had been assessed and levied against said real estate prior to its acquiring title through sale for delinquent drainage taxes?

2. The County Court acquired title to real estate at sale of foreclosure of School Fund Mortgage; prior to the foreclosure state and county taxes had been assessed and levied against said real estate, which



Hon. Sam T. Evans.

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October 29, 1941

were delinquent at time of foreclosure sale.

Is the County Court obligated to pay these state and county delinquent taxes after acquiring title?

"I refer you to the case of State ex rel. City of St. Louis v. Baumann, 153 SW (2d) 31."

We presume that the county court bought the property involved under a tax sale in foreclosure of a lien for delinquent drainage taxes due a drainage district organized under the county court. Also that the court purchased land under a foreclosure of a school fund mortgage for and in behalf of such fund.

I.

In regard to the right of a county court to buy lands offered for sale in foreclosure of a lien for delinquent drainage taxes due a drainage district, organized under the county court, the Springfield Court of Appeals in the case of Drainage District No. 23 v. Hetlage, 102 S. W. (2d) 702, 710, held:

"Section 11020, vol. 2, R. S. Mo. 1929 (Mo. St. Ann. Sec. 11020, p. 3659), cited by appellant, reads in part as follows: 'Drainage or levee districts heretofore or hereafter incorporated under any of the drainage or levee laws of this state where lands are offered for sale for their own taxes (italics ours) or assessments due thereon, shall be and are hereby authorized to buy such lands at not to exceed the amount of such taxes, assessments, interest, penalties and costs.'

"It also further provides, among other things, for the sale of lands so purchased, but nowhere does it say anything whatever about the right to redeem from state and county taxes. Since this section confers power to bid at a sale for the district's own taxes, but is silent as to the right to bid at a sale for state and county taxes, the presumption is that the Legislature intended that the district should not have the power to bid as to state and county taxes. Dietrich v. Jones et al., 227 Mo. App. 365, 53 S. W. (2d) 1059; Chilton v. Drainage District No. 8, 228 Mo. App. 4, 63 S. W. (2d) 421.

"As insisted by respondent, the maxim, 'Expressio unius est exclusio alterius,' is applicable. Keane v. Strodtman, 323 Mo. 161, 18 S. W. (2d) 896. Applying the maxim to the facts in the case before us, the conclusion follows that the grant of the right to bid at sales for taxes due Drainage District No. 23, by implication, excludes the right of the district to bid at a sale for state and county taxes, or to redeem therefrom."

A drainage district is a "public corporation" and not a private one, and the county court administers its entire affairs, State ex rel. Applegate v. Taylor, 123 S. W. 892.

A drainage district is a public corporation, being a political subdivision of the state, which exercises prescribed governmental functions, Squaw Creek Drainage District v. Turney, 138 S. W. 12. Houck v. Little River Drainage District, 154 S. W. 739. Judgment affirmed in 36 Supreme Court 58, 239 U. S. 254. State ex Inf. McAllister, ex rel. Manion et al. v. Albany Drainage District 234 S. W. 339. Wilson v. King's Lake Drainage & Lovee District 158 S. W. 931. Max v.

Barnard-Bolckow Drainage District 32 S.W. (2nd) 583. Horney Creek Drainage District v. Farm City Inv. Co. 32 S.W. (2nd) 753. Graves v. Little Tarkio Drainage District, 134 S.W. (2d) 70.

In the case of State v. Baumann, 153 S.W. (2d) 31, 35, the Supreme Court, en banc, after holding that a certificate of purchase vested an equitable interest or title in and to the owner thereof, further ruled that a municipal corporation, owner of a certificate of purchase was not subject to taxes. The court in such case at page 35 said:

"The act permits the application of this rule in this case. Therefore, the City is now vested with the equitable title to the land and the land is not subject to taxes. * * *

"Furthermore, the provision making the payment of the outstanding taxes a prerequisite to obtaining a deed could not have been intended to apply to the City, acting in its governmental capacity, which is not liable for taxes. * * * 'Revenue is the object of taxation, and none would result from levying a tax upon the agencies of the state, through which it exercises the functions of government, or by virtue of which it protects and enforces its rights or those of its citizens. Taxation of these functions and agencies would, in effect, be merely taking out of one pocket and putting it into another. In the end, no net revenue would be derived.' See, also, State v. Locke, 29 N.M. 148, 219 P. 790, 30 A.L.R. 407."

While the exact point presented in this inquiry has not been decided by our Supreme Court, the reasoning and holding in the Baumann case supra, is controlling in the opinion of this department.

The ruling in this decision may be questioned by some but it stands until overruled. An application of the above decision to the facts stated by you, in the opinion of this department, results in the conclusion that a drainage district organized under and by virtue of the county court that acquires title to the land through a sale for its own taxes, takes title to the same without being subject to outstanding county and state taxes.

October 29, 1941

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II.

On determining the status of public school funds and the right of a county court, with reference to the investment, collection and reinvestment thereof, the court, in the case of Saline County v. Thorp S.W. (2d) 183, 186, said:

"It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations. Montgomery County v. Auchley, 103 Mo. 492, 15 S.W. 826.

"Sections 9243-9256, R.S. 1929 (Mo. St. Ann. Sections 9243 to 9256, pp. 7098-7104), say what a county court can do with reference to the investment, collection, and reinvestment of public school funds. These statutes require that county courts 'diligently collect, preserve and securely invest * * * on unincumbered real estate security, worth at all times at least double the sum loaned * * * the county school fund'; and that these funds 'shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools.'"

Hon. Sam T. Evans.

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October 29, 1941.

The application of general taxation to governmental subdivisions and municipal governments is discussed in the following excerpt from the case of State v. Baumann, supra, l. c. 35, in the following language:

" In Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct. 670, 682, 29 L. Ed. 845; the United States Supreme Court said: 'General tax acts of a state are never, without the clearest words, held to include its own property, or that of the municipal corporations, although not in terms exempted from taxation.' This is quoted in State v. Snohomish County, 71 Wash. 320, 128 P. 667 which held that public policy supports the conclusion that general tax laws are presumed to operate upon private, not public property in the absence of a clear intention to the contrary. The reason for such rule is aptly stated in Laurel v. Weems, 100 Miss. 335, 56 So. 451, 453, Ann. Cäs. 1914A, 159. 'Revenue is the object of taxation, and none would result from laying a tax upon the agencies of the state, through which it exercises the functions of government, or by virtue of which it protects and enforces its rights or those of its citizens. Taxation of these functions and agencies would, in effect, be merely taking out of one pocket and putting it into another. In the end, no net revenue would be derived.' See, also, State v. Locke, 29 N. M. 148, 219 P. 790, 30 A. L. R. 407."

Therefore, it is the opinion of this Department that a county court acquiring title to land under foreclosure of a school fund mortgage, for and in behalf of such fund, takes title to the property free from all outstanding general county and state taxes.

Respectfully submitted,

APPROVED:

S. V. MEDLING
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

SVM/mc

COUNTY BUDGET ACT: County court cannot return money transferred under Section 13829 to drainage districts after money has been taken into consideration for estimates for 1941. Can give drainage districts any surplus remaining in classes.

March 13, 1941



Mr. O. C. Ferguson
Treasurer, New Madrid County
New Madrid, Missouri

Dear Sir:

This department is in receipt of your letter of February 24th, wherein you make the following inquiry:

"A peculiar situation has developed in this county, on which I shall need an opinion. The Drainage Districts referred to in this letter have reference to districts organized by the county court.

On June 4th, 1940, three of the Drainage Districts, Nos. 10, 12 and 23, had some \$10,000.00 in surplus money after having paid all the bonds and other obligations of these districts. At this time a new district had been organized in which the lands in these three districts had been incorporated into a new district known as Drainage District No. 39, which issued some \$25,000.00 in bonds to reclean the ditches of this new district, which represented old districts Nos. 10, 12 and 23.

Naturally at the time of the issuance of the bonds, it was estimated that the bonds issued would be sufficient to do the work. At that time the county court made an order of record and issued

warrants on these districts to transfer such balances to the General Revenue Fund of the county (which, of course, means Classes 1 to 5, inclusive) and such transfer was purported to be done under Section 12167. At that time it was the full intention that this money should remain in the several classes to pay some outstanding warrants and to place the county on a cash basis. As treasurer, I issued the proper receipt and used the proceeds transferred to pay the outstanding warrants for the year 1940.

Now since that transaction, the Drainage Engineer finds that he underestimated the amount necessary to clean out the ditches, and requested the court for additional funds, and they in turn then requested the county clerk (orally) to issue warrants in favor of the above drainage districts in the sums heretofore transferred and against the General Revenue Fund. He refused to issue such warrants, stating that this money had been taken into consideration in making up the budget for the year 1941, and the several allowances had been made under the budget and that if this amount or amounts were transferred by him at this time, and by warrant, that it would just mean that much spent above the budget, and that he would be liable for the same, at least, to the extent of his bond.

Then the court purported to make an order of record wherein they ordered me, as county treasurer, to transfer such funds from the General Revenue Fund to the drainage districts from which they were originally

derived.

Would there be any liability on me, as treasurer, under the above circumstances, to transfer such amounts from the General Revenue Fund to the districts involved?"

You do not state in your letter whether the original transfer made by the county court was with the consent of the drainage districts. However, we assume there was no protest, or at least acquiescence, because you mention the fact the engineer of the drainage districts determined later that he had underestimated the amount necessary to clean the ditches.

Under the decision of Carthage Special Road District of Jasper County vs. J. C. Ross, 270 Mo. 76, Section 12167, now Section 13829, R. S. Mo. 1939, has always been a valid and live law. We have ruled several times that the County Budget Act, Sections 10910-10918, inclusive, R. S. Mo. 1939, applying to counties of less than 50,000, did not repeal Sections 12167 and 12168, Laws of Missouri, 1929, and, as a result, any funds remaining after the purpose for which they originally were levied were no longer needed, could be transferred by the county court. Therefore, the funds of the Drainage District which were transferred by the county court, if subject to transfer, were legally transferred to the General Revenue Fund, or as the statute mentioned, to such other fund as may in its judgment be in need of such balance.

Perhaps it is pertinent that we mention Section 12432, R. S. Mo. 1939, which is as follows:

"When the improvements of a district have been completed and paid for, and all costs and expenses of the district paid, if there remains on hands to the credit of such district any funds not needed, the county court may prorate back to the taxpayers all or any part of such funds not needed or may use the same for maintenance in lieu of the maintenance taxes."

March 13, 1941

Another pertinent section being 12422, the effect of which is that the treasurer of the county in which a drainage district is located shall act as treasurer of the district and shall be the custodian of the funds of this district except as otherwise provided in this article.

We assume that the county court and officers of the district were familiar with these sections at the time of the transferring of the funds in question.

There is no provision in the County Budget Act for any changes or alterations once the estimate is approved by the court and a copy filed with the State Auditor. We assume that the funds which were transferred were considered in the estimate under the budget made by the county court the first of February, 1941, and, as stated above, is now a part of the funds so budgeted.

Bearing in mind what we have heretofore said, we are of the opinion that if the county court desires to aid the drainage districts at the present time, it will be necessary to obtain the funds from a definite surplus in some of the classes under Section 10911, R. S. Mo. 1939. Class 5 contains the provision "county court may transfer any surplus funds from Classes 1, 2, 3 and 4 to Class 5 to be used as contingent and emergency expenses." Class 6 permits the use of funds for any lawful purpose provided no outstanding warrants for previous years are unpaid. If this method be used by the county court, we do not think that the county treasurer will incur liability on his bond under the last paragraph of Section 10917, R. S. Mo. 1939. If no available surplus in any of the classes now prevails, we suggest as the only advisable method to await the close of the fiscal year and determine whether any surplus results, and such surplus, if any, may be used in aid of the drainage districts.

Respectfully submitted,

OLLIVER W. NOLLEN
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General

OWN:RT

STATE PURCHASING AGENT: Authority to authorize emergency direct purchases by departments as result of uncertainty in the market created by National Defense Program.

August 19, 1941

Mr. Ted Ferguson
State Purchasing Agent
State Capitol Building
Jefferson City, Missouri



Dear Mr. Ferguson:

We are in receipt of your request for an opinion wherein you state as follows:

"At your earliest convenience, will you please issue this office an opinion as to whether or not, section 14594 of the Revised Statutes of Missouri, 1939, a part of which reads as follows - 'he shall also have power to authorize emergency purchases direct by any department', covers the prevailing condition of the market caused by the National Emergency. I have reference in particular to the conditions of the textile, piece goods, leather, steel and chemical market.

"We are continuously having more difficulty in obtaining quotations or bids, on many of these items as well as some others and find in many instances, our quotations are subject to immediate acceptance, both, as to delivery and price.

"The Superintendent of Industries, Missouri State Prison, in particular, has had great difficulty in securing merchandise and only after considerable

Aug. 19, 1941

correspondence have either he or I, been able to obtain any bids at all. In some cases, when we have received as few as one quotation, the vendor has refused to guarantee delivery or price - excepting, upon immediate acceptance. This situation leaves us with only two alternatives - either, we must accept his quotation immediately waiting no longer for other quotations, or, if, we wait for other quotations, we take the chance of not being able to get delivery or paying a higher price.

"If, in your opinion, purchases of a character as outlined above in this letter, are emergency purchases and may be purchased direct by the Department without bids, does the following apply - Section 14591 of the Revised Statutes of Missouri, 1939, part of which reads as follows: 'On any purchases where the estimated expenditure shall be two thousand dollars (\$2,000.00) or over, the purchasing agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchase are to be opened' - that is, if any purchase may be construed as an emergency purchase, is it necessary, regardless of the amount, to advertise for bids for same?"

Your first question is discussed in an opinion rendered by this Department to your predecessor in office, under date of August 28, 1933, a copy of which is enclosed. We held in said opinion that Under Section 5 of the State Purchasing Agent Act, Laws of Missouri, 1933, page 412, now Section 14593, R. S. Mo. 1939, the State Purchasing Agent had the power to authorize any department to make emergency purchases direct instead of through the State Purchasing Agent. It was pointed out, however, that before such authorization was extended, the State Purchasing

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Agent should satisfy himself that the purchase was an emergency purchase and that same must be made under and consistent with the rules and regulations promulgated by the State Purchasing Agent.

It was suggested in said opinion that the rules and regulations promulgated, covering direct purchases, require that the purchases be made only after the receiving of competitive bids. This is by reason of the requirement to be found in the last sentence of Section 14593, R. S. Mo. 1939. Said section provides as follows:

"The purchasing agent shall have power to authorize any department to purchase direct any supplies of a technical nature which in his judgment can best be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the purchasing agent together with all bids received and prices paid."

Your second question presents a more difficult problem. Section 14591, R. S. Mo. 1939, provides in part as follows:

"All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars (\$2,000.00) or over, the purchasing agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchase are to be opened. On purchases where the estimated expenditure is less than two thousand dollars (\$2,000.00) bids shall be secured without advertising. * * *"

Aug. 19, 1941

We are thus confronted with a section of the statute providing for advertisement for bids by the State Purchasing Agent on purchases of \$2,000.00 or more, and another section authorizing the State Purchasing Agent to allow departments to make emergency purchases direct.

In the case of Mallon v. Water Comrs., 144 Mo. App. 104, 1. s. 110, the court in passing upon the question of what was an emergency purchase, said:

"And the manner of these purchases shows they could not have been an emergency. That word signifies some sudden or unexpected necessity requiring immediate, or, at least, quick action, * * * * *

There are a number of well defined rules of statutory construction declaring (1) that the legislative intent in the enactment of a law must be sought and effectuated in statutory interpretation, O'Malley v. Continental Life Ins. Co., 335 Mo. 1115, 75 S. W. (2d) 837; (2) that a statute will not be given a construction which will make it unreasonable or which will result in absurdity, State ex rel. and to use of Drainage District No. 8 of Pemiscot County v. McKay, 227 Mo. App. 327, 52 S. W. (2d) 229; and (3) that all parts of an act should be made effective, if possible, Elsas v. Montgomery Elevator Co., 330 Mo. 596, 50 S. W. (2d) 130.

The Legislature undoubtedly recognized that situations might arise where an immediate purchase was necessary and sought to confer upon the State Purchasing Agent the authority to allow the various state departments permission to make such purchases when the occasion arose. To say that such a situation was recognized by the Legislature and then to contend that all purchases over \$2,000.00 must be made by advertisement, which necessarily would entail the loss of time, would be unreasonable, absurd and ineffective as it relates to authority to make emergency purchases.

We recognize that the National Defense Program which provides, among other things, for government priorities has resulted in a condition which makes it impossible for

Mr. Ted Ferguson

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Aug. 19, 1941

certain classes of manufacturers and dealers to guarantee either price or delivery, thus creating the need for emergency purchases by the various departments.

We are, therefore, of the opinion that the State Purchasing Agent has the power to authorize any department to make direct emergency purchases in excess of \$2,000.00 without advertising for bids. Such emergency purchases must be made under and consistent with the rules and regulations promulgated by the State Purchasing Agent, which rules and regulations must require that said emergency purchases be by competitive bids.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG
Enc.

STATE PURCHASING AGENT

When two or more bidders tie in amounts bid, the State Purchasing Agent may declare one the lowest and best bidder.

August 28, 1941



Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Ferguson:

This department is in receipt of your letter wherein you request an opinion based on the following question:

"At your earliest convenience, will you please render this office an opinion as to what procedure we should follow in the awarding of contracts when the lowest and best bid is a tie between two or more vendors."

"For your own information, this matter has been discussed with one of your Assistants, Mr. Creech."

The Purchasing Act was enacted in 1933 and is now Chapter 104, Sections 14589 to 14602, inclusive, R.S.Mo. 1939. Section 14591 relates to purchases on competitive bids. As two or more bidders have submitted bids for the same sum, or in other words, the bids are identical, the question arises as to the meaning of the sentence "The contract shall be let to the lowest and best bidder."

It was held in *State vs. Herman*, 59 N.E. 104, 63 Ohio State 440, that public officers had a certain discretion in awarding contracts and could not be mandamus-ed even though it was their duty to award the contracts to the lowest and best bidders. The phrase "lowest and best bidder" was under construction in the case of *Wilmott Coal Company vs. State Purchasing Commission*, 54 S.W. (2d) 634. It was held in that decision that the State Purchasing Commission of Kentucky should consider not only the amount of the bid, but also possible judgment, capability, skill and responsibility of the bidder and the quality of the good which was proposed to be furnished. In the decision of *Altshul vs. the City of*

Ted Ferguson

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August 28, 1941

Springfield, 193 N.E. 788, the words lowest and best bidder were construed not to be the lowest dollar bidder but that the city authorities had discretion in determining what was, under all the circumstances, the lowest and best bid for the work involved.

Therefore, taking into consideration the meaning of the expression lowest and best bidder, along with the other terms of the statute which give the purchasing agent the right to refuse any or all bids, and advertise for new bids, or, with the approval of the Governor, to purchase the required supplies in the open market, we are of the opinion that you have the authority to determine yourself who of the two or more persons submitting equal bids is the lowest and best bidder, taking into consideration the quality of the goods or merchandise, responsibility of the bidder, and other elements which the above authorities indicate should be taken into consideration. The other alternative is that you could refuse the bids if you decide that none of the lowest are the best bidders and readvertise for new bids, or purchase the required supplies on the open market with the approval of the Governor.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

SPECIAL ROAD
DISTRICT: -

Article 10, Chapter 46, makes no provision for the appointment of a trustee where such district is disorganized under Section 8706 R. S. Missouri, 1939. Therefore, must resort to circuit court for the appointment of trustee.

May 1, 1941

Hon. James A. Finch, Jr.
Assistant Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated April 21, 1941, which reads as follows:

"I hereby request your opinion upon the matters hereinafter set out.

"A Special Road District, organized under Article 10, Chapter 46, R. S. Mo. 1939, was recently dissolved by vote in accordance with Section 8706, R. S. Mo., 1939, and the following questions have arisen by the County Court of this County as a result of such dissolution. In the first place the said Article contains no provision with respect to the liquidation of the affairs of the District following such dissolution. We call your attention to the fact that Article 11 of Chapter 46, dealing with other types of Special Road Districts, contains a Section, namely Section 8733, providing for the appointment of a trustee for the Road District to liquidate its affairs, but Article 10 contains no such provision. Hence, the first question arising is as to how and by whom the affairs of the District shall be liquidated.

May 1, 1941

"Secondly, the District had rented certain machinery for the latter part of the year 1940, and under its contract was to issue a warrant dated December 31, 1940 for such rent. The warrant was never issued and the questions arising are, who shall issue the warrant, and whether said warrant is payable solely out of the tax receipts for the year 1940, which might be on hand or subsequently collected. In that connection the District had also issued its warrant on September 19, 1940 for repairs on machinery, and such warrant recited that it should be paid out of tax receipts for 1941. It would appear that under Section 8702 the District could not issue its warrant in anticipation of the income for the subsequent year. Would like for you to advise whether in your opinion that is correct, and whether such warrant would be payable out of the revenue for the year 1940, and whether any delinquent taxes collected for preceding years shall be applied to pay such obligation.

"I should like to also have your opinion on the question of whether any property, such as machinery and equipment, belonging to the District shall be used for the purpose of paying any outstanding warrants of the District, or what disposition should be made of such equipment.

"It is my understanding that Cape Girardeau County does not in anywise become liable for any outstanding obligations of the Special Road District. Would be glad if you would let me likewise have your opinion upon this question."

In reply to your first question: " * how and by whom the affairs of the District shall be liquidated." We wish to say that we have examined Article 10, Chapter 46, R. S. Missouri, 1939. We find under said Article that the legislature does not provide for the appointment of a trustee to liquidate the affairs of a district organized under this Article, as they have done under Article 11 and others. The only section which might be construed to have been meant to bring into the Article other sections of the statute is the last paragraph in Section 8706 R. S. Missouri, 1939, which reads in part as follows:

" * * * In all other respect said election, and the result thereof, shall be governed by the provisions of Article 10, Chapter 46, Revised Statutes of Missouri, 1939. (R. S. 1929, sec. 8057. Re-enacted, Laws 1935, p. 343.)"

However, as stated in the case of State v. Richman, 148 S. W. (2d) 796, the court said that they could not write into the law any provision, or make any interpretation that could not be drawn from a specific statute or statutes. This was a criminal case, but it correctly states the law in both criminal and civil cases. Therefore, the district about which you write, having been organized under Article 10, and in the enactment of the statutes contained in Article 10 the legislature, either through oversight or being of the thought that an occasion would not arise where a liquidation would be required, has failed to incorporate in Article 10 any Sections as will be found in Article 11, namely Sections 8733 and 8734 (R. S. Missouri, 1939), which Sections provide for the appointment of a trustee and set forth his duties. However, we are faced with the general proposition of law that no corporation can go into liquidation, either voluntary or involuntary, if there are assets on hand with which to pay them, in whole or in part, without liquidation procedure.

In the case of Graves v. Little Tarkio Drainage District Number 1, 134 S. W. (2d) 70, it was ruled that the drainage district law is a code unto itself and in proceedings involving drainage districts, courts must follow pro-

May 1, 1941

visions of statutes governing such districts. (Article 10 contains laws of the same nature, in that it is a code within itself.) All terms and provisions under the ruling of this case should be construed broadly and liberally.

In the instant case we do not see how it would be possible to have precluded the resident taxpayers from exercising their rights under Section 8706, but we think it logical that it must also be recognized that all creditors of the district must be paid in the dissolution subject, however, to other legal contingencies which will be taken up under question number two.

Therefore, in the enforcement of the liquidation and the carrying out of the same we think that the proper procedure would be for a petition to be filed in the circuit court of the county in which the district was organized, setting up the fact of incorporation and dissolution, and that there was no specific statute providing for the appointment of a trustee, and we cannot construe the several sections to be broad enough to include by inference the sections, supra, contained in Article 11. Therefore, we think the circuit court would have general power and jurisdiction and the circuit judge would be the proper judge and it would be fully within his rights to appoint a suitable person, or persons, to carry out the liquidation of the district about which you inquire.

In answer to your question number two, we are herewith enclosing an opinion which was written by this department on the 20th day of January, 1941, and rendered to Hon. Robert W. Smart, Prosecuting Attorney, Lawrence County, Mt. Vernon, Missouri, which covers the law as to expenditures made within and without the current and anticipated revenues to which you refer in your request.

CONCLUSION.

In conclusion, in answer to your question number one, it is our opinion that where the necessity requires a liquidation of assets of districts organized under Article 10

Hon. James A. Finch, Jr.

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May 1, 1941

of Chapter 46, Revised Statutes of Missouri, 1939, a trustee must be appointed by the circuit court of the county in which the district was organized there being no specific provision made by the legislature by statute for such appointment.

As stated above, your second question is answered by the enclosed opinion.

Respectfully submitted,

E. RICHARDS GREECH
Assistant Attorney General

APPROVED:

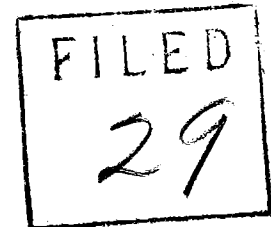
VANE C. THURLO
(Acting) Attorney General

BRC:RW

BONDS: County is authorized to hold an election for
AIRPORTS: bond issue for airport. Method of election
ELECTIONS: should follow bond election of county hospital.

July 16, 1941

Honorable James A. Finch, Jr.
Assistant Prosecuting Attorney
318 Broadway
Cape Girardeau, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of July 7, 1941, which reads as follows:

"At the request and for and on behalf of the County Court of Cape Girardeau County, I am requesting an opinion from you as to the authority of Cape Girardeau County to issue bonds for airport purposes under Section 15125, Revised Statutes, 1939.

"The County Court would like to know whether or not the statute authorizes the County to issue bonds and, if so, the character of election notice to be given and under what law the election would be held, and under what law the bonds would be issued.

"The County Court is ready to issue an order calling the election, but is awaiting an opinion from you as to its power and what law should govern before the order is entered. Therefore, in view of the pendency of the situation, would appreciate a prompt opinion from you.

"The proceeds from the bonds issued by the County would be used to match a WPA grant, and since the grant has

been authorized action by the County must be taken at once if the grant is made available."

Section 15125, R. S. Missouri 1939, reads as follows:

"Private property needed by a city, including cities under special charter, village, town, or county for an airport or landing field shall be acquired by purchase if such city, village, town or county is able to agree with the owners on the terms thereof and otherwise by condemnation, in the manner provided by the law under which such city, village, town or county is authorized to acquire real property for public purposes, other than street purposes, or, if there be no such law, in the manner provided for and subject to the provisions of the condemnation law. The purchase price or award for real property acquired for an airport or landing field may be paid for wholly or partly from the proceeds of the sale of bonds of such city, village, town, or county, as the local legislative body of such city, village, town or county shall determine, subject, however, to the adoption of a proposition therefor at an election to be held in such city, town, village or county for such purpose."

If it only required a consideration of the above provision to determine the legality of such a project, we would say the County could acquire an airport. Certainly, it cannot be contended but that such was the intention of the Legislature when said provision was enacted. There is no ambiguity, therefore, no room for construction.

The above provision was enacted by the 55th General Assembly and approved on May 24, 1929. No doubt, one of the reasons for the enactment of Section 15125, supra, was as a result of two cases decided by the Supreme Court of

July 16, 1941

this state in the latter part of 1928. *Ennis v. Kansas City et al.*, 11 S. W. (2d) 1054, and *Dysart v. City of St. Louis*, 11 S. W. (2d) 1045.

In each of the above cases the Supreme Court held the cities were entitled, under their charter, to acquire airports. As previously stated, there was no such provision as Section 15125, *supra*, at the time of these decisions.

Judge White, in *Dysart v. City of St. Louis*, *supra*, held that the acquisition, improvement or development of land by the City of St. Louis for an airport is a "public purpose" within Article X, Section 3 of the Constitution of this State authorizing a levy and collection of taxes for public purposes. In so holding, Judge White quoted approvingly from an opinion of Judge Ragland at which time had not been reported:

"Municipalities are studying local conditions and commercial organizations are pressing the importance of establishing terminal airports and of providing proper lighting for landing fields, and facilities such as hangars, garages, and repair shops. The possession of the airport by the modern city is essential if it desires opportunities for increased prosperity to be secured through air commerce. Lands susceptible of improvement, as parks, playgrounds, or general recreational purposes, may be utilized and developed around the modern airport so that the municipality may bring to itself not only the advantages of air commerce but afford its citizens those other inestimable advantages of improved beautification and health-giving opportunities. It is said that there were 3,800 landing fields in the United States at the close of 1926 of which 400 were municipal. See 1927 Aircraft year Book, p. 101, et seq. In a dozen cities of the Far West (California, Oregon, etc.)

projects for new airports or improvements of existing facilities are under way at an estimated cost of more than \$8,000,000. American City, July, 1927. In these rapidly changing times, even a wise man cannot discern the needs of the future. * * * Perhaps it may not be a 'great way' into what ordinarily would be termed the 'far distant future' when the human race will be flying with wings similar to those described by Bulwer Lytton in 'The Coming Race.'" City of Wichita v. Clapp, 125 Kan. 100, 104, 263 P. 12, 14, 15.

"There is small doubt but what this prophetic vision will speedily come to pass and that within a comparatively few years the use of the airplane will be as general as that of the railroad and motor vehicle.

* * * * *

"The question of whether the acquisition and control of a municipal airport is a public purpose within the purview of the constitutional principle heretofore adverted to is obviously a new one. The courts which have had occasion to consider it have, however, answered in the affirmative. City of Wichita v. Clapp, supra; State ex rel. City of Lincoln v. Johnson, State Auditor (Neb. 1928) 220 N. W. 273; State ex rel. Hile v. City of Cleveland et al. (Ohio Ct. App. 1927) 160 N. E. 241; and no court of last resort, so far as we are advised, has ever held the contrary. Not only that, but the governmental nature of the function involved is given tacit recognition in numerous recent statutory enactments, both state and federal: Laws of Georgia 1927, p. 779; R. S. Kansas 1923, 3-110;

Public Acts Conn., 1925, ch. 249;
Laws of Mass. 1922, ch. 534, 57;
Laws of Mont. 1927, ch. 20; General
Code of Ohio, par. 15, 3677; Pa.
Act No. 328 of 1925 (Pa St. Supp.
1928, 460C-1 to 460C-3); Act 254 of
the 69th Congress (the Federal Air
Act (49 USCA 171 et seq.)). We have
no doubt as to the soundness of the
view which obtains."

In *Ennis v. Kansas City et al.*, supra, Judge
Ragland, speaking for the Court, also held that the power
of Kansas City to acquire and maintain an airport was one
which falls within the category of both a public and
municipal purpose. In so holding, the Court said:

"A reading of the provisions quoted,
in connection with the charter as a
whole, indubitably shows that it was
the purpose of the people of Kansas
City to confer upon their municipality
all of the powers that could possibly
be delegated to a city, the limitations
imposed by statutes and constitutions
considered. The power to acquire and
maintain an airport, being one which
falls within the category of both a
public and municipal purpose, as was
held in *Dysart v. City of St. Louis*,
supra, is therefore embraced within
the general grant of power to Kansas
City. The specification of the power,
'to regulate and control the location
of aviation fields, hangars and air-
craft landing places; to regulate and
control the use of all aircraft within
or over the city,' does not under the
rule of construction which the charter
provides operate to limit the general
power. Besides, the power to regulate
and control the location of aviation
fields and the uses of aircraft with-
in and over the city can no doubt be
most effectively exercised through the

ownership and control of an airport. We accordingly hold that Kansas City is authorized by its charter to acquire and maintain an airport, and that being so authorized it can incur an indebtedness therefor through the issuance of bonds."

In the above case there was no specific provision in the charter granted the city of Kansas City to acquire airports, other than to acquire property for any public or municipal use. However, there was a provision in the charter to regulate and control locations of airfield hangars and landing places, and to regulate and control the use of all aircraft within and over the city.

While there are numerous decisions in other states holding to acquire an airport constitutes a public purpose, we deem it in view of the foregoing authorities, unnecessary to quote further authorities.

One very important thing must not be overlooked and that is Section 12, Article X of the Constitution of Missouri which prohibits an expenditure to exceed five per cent of the taxable property therein, including existing indebtedness, which provision must be strictly complied with in the particular question under consideration.

Section 12, Article X of the Constitution of Missouri partially reads as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount

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including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, * * * * *."

Therefore, it is the conclusion of this department that the County of Cape Girardeau may, under Section 15125, supra, acquire an airport. However, such expenditure must come within the confines of the Constitution of the State of Missouri, Article X, Section 12.

Article X, Section 12, supra, gives counties authority to issue bonds as set out in Section 15125, supra. Article X, Section 12, supra, was held to be self-enforcing in the case of State ex rel. Gilpin et al. v. Smith, 96 S. W. (2d) 40, 1. c. 42, par. 3, where the court said:

"We have already held in this opinion that section 12 of article 10 of our State Constitution is a self-enforcing grant of power permitting a county to incur an indebtedness for a county public purpose and an express statute is not necessary to give a county power to create such indebtedness."

Since this section is self-enforcing, the only procedure to follow is as set out in Section 12, Article X, supra, which provides for an election in which two-thirds of the voters must vote in favor of the increase of the debt. Section 15125, supra, appears in Article 3, chapter 123, R. S. Missouri 1939, and declares an election must be had but sets out no procedure for the election. The courts of this state have held that when special powers are conferred, or special methods are prescribed for exercise of power, the exercise of such procedure, method and power is within the maxim that the expression of one thing is the exclusion of another and the doing of a thing specified except in particular way pointed out is void. It was so held in Kroger Grocery and Baking Company v. City of St. Louis, 106 S. W. (2d) 435, 341 Mo. 62, 111 A. L. R. 589.

It has also been held by the courts of this state

that ordinarily a statute limiting a thing to be done in a particular form includes negative, that such thing shall be done in other manner. Chilton v. Drainage District No. 8, Pemiscot County, 63 S. W. (2d) 421.

In view of the holdings in the above case, and since no particular method of holding the election was prescribed by the Legislature in enacting the statute which authorized counties to issue bonds for an airport upon an election, there would be no special proceeding that the county should follow in holding the election. The procedure for a bond election to build a courthouse and county jail appears in chapter 16, Article 5, Section 3292, R. S. Missouri 1939. That procedure partially reads as follows:

"* * * * * it shall be lawful for any number not less than one hundred of the qualified voters of such county who are taxpayers therein to present to the county court of such county a petition in writing setting forth the object and purpose for which the indebtedness is desired to be incurred, and whether it is desired to issue bonds in evidence of such indebtedness, or to pay the same in a given number of years, to be stated in the petition, by the direct levy of taxes at a rate over and above the amount limited in section 11 of article 10 of the Constitution of the state of Missouri, and asking that an election be held to authorize the incurring of such indebtedness or the levying of such taxes. Upon the presentation of such petition it shall be the duty of the county court of such county at any term thereof to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state: * * * "

Also, in that chapter applying to a bond issue for a courthouse and jail building, or rebuilding or repairing same, Section 3294, R. S. Missouri 1939, which refers to the form of ballot, partially reads as follows:

"If the proposition submitted is to incur an indebtedness and issue bonds in evidence thereof, then such of the qualified electors as may favor incurring the indebtedness for the purpose aforesaid, and evidencing the same by the issuance of bonds, may cast a written or printed ballot at such election, in substantially the following form: 'For incurring indebtedness--Yes' and those opposed to incurring such indebtedness may cast a written or printed ballot in substantially the following form: 'For incurring indebtedness--No.' * * "

Article 1, chapter 126, R. S. Missouri 1939, provides the method and procedure of an election for a bond issue for the purpose of building county hospitals. Section 15160, R. S. Missouri 1939, which sets out the procedure for an election, follows about the same procedure as set out in Section 3292, supra, as to the form of notice and procedure. Section 15160, R. S. Missouri 1939, reads as follows:

"Whenever any number, not less than one hundred, of the qualified voters of any such county, who are taxpayers therein, shall present to the county court of such county a petition, in writing, praying the county court that an election be held to authorize the incurring of an indebtedness, and the levying of a direct tax, or the issuing of bonds therefor, for the purpose of purchasing land and building thereon a county hospital for the poor of such county, such county court, upon the presentation of such petition, may, if it so determine, at regular term thereof, and by order of record of

said court, adjudge it necessary for such county to incur an indebtedness and levy a direct tax or issue bonds therefor, for the purpose of purchasing the land and building such a hospital; such county court may, at the same term, order a special election in said county, for the purpose of providing for the incurring of such indebtedness and levying a direct tax or issuing bonds therefor. In said order for such election there shall be recited the amount and purpose of the indebtedness proposed to be incurred, and the number of years during which a direct tax shall be levied, and the amount of such direct tax on each one hundred dollars' valuation each year to pay said indebtedness; or in case of the issuance of bonds, the length of time for which bonds shall be issued, the rate of interest, the rate of increase of the tax levy to pay the interest, and provide a sinking fund to pay the bonds; and the date on which the election is to be held shall also be recited in said order of the county court."

Since no procedure for the form of the election is set out in the chapter applying to the bond issue for airports, we would suggest that you follow the procedure set out in the bond election for county hospitals. The procedure for the calling of the election is set out in Section 15163, R. S. Missouri 1939, which reads as follows:

"Said county court shall cause at least twenty days' notice of said election to be given by publication in at least two weekly newspapers, published in the county. And if there be a city in such county having election commissioners, such election commissioners shall cause at least twenty days' notice of said election to be given by publication in two daily newspapers, pub-

lished in such city. Such notice shall specify the amount of such indebtedness for which a direct tax is to be levied or bonds are to be issued, and the object and purposes thereof; and the number of years during which the direct tax shall be levied, and the amount of such direct tax on each one hundred dollars' valuation each year, to pay said indebtedness; or in case of the issuance of bonds, the length of time for which the bonds shall be issued, the rate of interest, the rate of increase of the tax levy; and such notice shall also specify the day on which the election is to be held, and the location of the polling places: Provided, that such election may be held at the same time of holding a general election for state and county officers, and in such case such election shall be conducted in all respects as state and county elections are conducted, so far as applicable."

The form of ballot is set out in Section 15164, R. S. Missouri 1939, which section reads as follows:

"The ballots to be prepared and printed for use at such election shall be in the following form:

"For incurring debt of _____ dollars for county hospital for the poor, ____ Yes.

"For incurring debt of _____ dollars, for county hospital for the poor, ____ No.

"The amount of the said indebtedness in each case shall be printed in the blank place provided therefor in the ballot aforesaid, and a ballot cast containing

"For incurring debt of _____ dollars, for county hospital for the poor, ____ Yes."

July 16, 1941

shall be taken as a vote assenting to incurring the debt and levying a direct tax or issuing bonds therefor, as the case may be, and if containing the latter ballot

"For incurring debt of _____ dollars,
for county hospital for the poor,
_____ No."

"the same shall be taken as a ballot dissenting from the incurring of said indebtedness."

Of course, the form of ballot would read so many dollars for an airport. This chapter on county hospitals provides that the election shall be conducted in the same manner as provided by law for state and county elections in force at the time so far as applicable and not contrary to or inconsistent with the provisions and scope of the article. This appears in Section 15165, R. S. Missouri 1939.

In a research of the cases in which bond elections have been contested or have been construed by the court, we find that in most cases the attack has been made on the form of notice of said election given by the court or the clerk of the county court as set out in the procedure under the specific bond issue elections for specific purposes such as county jails, courthouses, county hospitals, etc.

Since no procedure has been set out for the form of election of a bond issue for an airport as set out in Section 15125, supra, there is no restriction but that the county court should follow the procedure as set out for other bond issues as nearly as practicable, and that the election should be held in the same manner as provided for state and county elections.

CONCLUSION

It is, therefore, the conclusion of this department that if an election for a bond issue was held as authorized under Article X, Section 12 of the Constitution of Missouri,

Hon. James A. Finch, Jr.

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July 16, 1941

and as authorized under Section 15125, R. S. Missouri 1939, and the procedure followed was that as set out in a bond issue election for county hospitals, the bonds would not be subject to attack on account of an illegal election.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

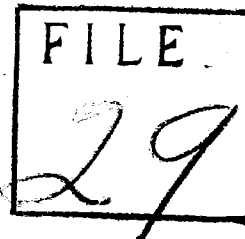
VANE C. THURLO
(Acting) Attorney General

WJB:DA

MOTOR VEHICLES: Automobile owned by a Maryland Corporation, when used in interstate business, is not required to have Missouri Registration Plates.

August 28, 1941

Honorable James P. Finnegan
Prosecuting Attorney
Municipal Courts Building
City of St. Louis
St. Louis, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of August 23, 1941, which reads as follows:

"I would like to have your opinion on the following matter which has been directed to our attention by several of the Police Officials of this City: Where an automobile owned by a foreign corporation and bearing State License Plates of that foreign jurisdiction, is used in this State by an employee of that corporation, which employee is a resident of this State, the problem has arisen of whether or not that car should bear Missouri State License Plates?

"To be concrete, the company manufacturing Cat's Paw Heels is a Maryland corporation, and their automobile bears Maryland State License Plates, and a resident of the City of St. Louis, Missouri, is an employee of that company, and uses that automobile in and out of the State. Is that person required to have Missouri State License Plates on that car?"

The statute of Missouri pertaining to reciprocity between states on the question of the registration of motor vehicles is set out in Section 8375, R. S. Missouri 1939, which reads as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

Under the above section it mentions that it is applicable to nonresident owners and applies to the operation of a motor vehicle by the owner or his permission to another to operate the vehicle within this state when properly registered in the state of the nonresident owner.

Section 8369, R. S. Missouri 1939, which is the main section for the registration of motor vehicles in the State of Missouri, specifically states "every owner of a motor vehicle or trailer." Section 8367, R. S. Missouri 1939, defines the word "owner" as follows:

"* * The term owner shall include any person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively.
'Person.' Includes firm, corporation, partnership or association. * * * *"

Under Section 8375, supra, it specifically sets out

this clause "* * when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner * *."

In your request you state that the motor vehicle in question is owned by the Cat's Paw Heels and is a Maryland Corporation and bears Maryland State license plates. You also state that the operator of the car is a resident of the City of St. Louis. The fact that the operator of the car is a resident of this state does not alter the law of reciprocity for the reason that Section 8369, supra, only provides that the owner shall register each and every automobile operated in this state which section does not apply where under Section 8375, supra, a nonresident owner is exempt under that reciprocity section.

The only question involved in this opinion is whether or not equal reciprocity has been granted by the State of Maryland as is granted nonresidents in the State of Missouri.

Article 56, Section 187, Annotated Code of Maryland, Volume 2 of 1939, partially provides as follows:

"Any person or operator not a resident of this State, who shall have complied with the laws of the State in which he resides, requiring the registration of motor vehicles and licensing of operators thereof, and the display of identification or registration numbers on such vehicles, and who shall cause the identification number of such State, in accordance with the laws thereof and none other, together with the initial letter or letters of said State to be displayed on his motor vehicle as in this subtitle provided, while used or operated upon the public highways of this State, may use the highways of this State without obtaining a registration certificate or operator's license from the Commissioner of Motor Vehicles as hereinbefore prescribed; provided the State of which he is a resident and the registration certificate which he displays shall extend the same privilege to residents

August 28, 1941

of this State; * * * * *

The above section has several provisos which are not set out in the above partial quotation, but these provisos do not apply under the facts set out in your request. An examination of the reciprocal law of Maryland, the state where the corporation, the Cat's Paw Heels is a resident, and also an examination of the Missouri reciprocal law in that respect on its face shows that they are very similar and import the same meaning.

CONCLUSION

It is, therefore, the opinion of this department that the motor vehicle owned by the Cat's Paw Heels, a Maryland Corporation, which motor vehicle bears Maryland state license plates, and the driver or operator of said motor vehicle is a resident of the City of St. Louis, Missouri, the corporation has complied with the motor vehicle laws of this state and the operator of said motor vehicle is not required to have Missouri State license plates on that car.

We base our opinion upon the comparison of the reciprocity laws of Missouri and Maryland and on the further fact as stated in your request that the operator of the car is a resident of this state and is used for interstate business.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO.
(Acting) Attorney General

WJB:DA

TAXATION: Township boards in counties under township
COUNTY COURTS: organization levy taxes in subordination
TOWNSHIP to the county court and the total levy
ORGANIZATION: made by the county court and township board
shall not exceed the constitutional limit.

June 2, 1941.

Honorable Arkley Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri



Dear Mr. Frieze:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

"The township collector of Washington Township of Dade County, and the ex-officio collector are experiencing trouble in the collection of taxes levied by the township board in Washington Township. The objection is made that the levy is excessive and illegal.

"The county court of Dade county levies the maximum of 40¢ allowed under the Constitution, retaining 32¢ thereof and paying 8¢ to the townships. For the 1940 tax year, the township board of Washington Township levied 20¢ for roads and 15¢ for township purposes. The rates, therefore, as extended on the tax books are, as follows:

<u>"State</u>	<u>County</u>	<u>Road</u>	<u>Township</u>
.12	.32	.20	.15

"Since there has always been a misunderstanding in the various townships of this county as to the maximum levy that may be made by the township boards, your opinion is respectfully requested for the future guidance of township officials."

The section of the statutes which authorizes levies to be made for township purposes is Section 11047, R. S. Mo. 1939. This section reads as follows:

"In all counties in this state which have now or may hereafter adopt township organization, if the amount of revenue desired and estimated by the county court for county purposes and the amount desired and estimated by any township board for township purposes shall together exceed the rate per cent on the one hundred dollars valuation allowed by section 11 of article X of the Constitution of Missouri 'for county purposes,' then it shall be the duty of the county court to apportion the tax 'for county purposes' between the county organization and the township organization in the following manner, to-wit: Eighty per cent of the taxes which may be legally levied 'for county purposes' shall be apportioned to the county organization for county purposes, and twenty per cent of such taxes shall be apportioned to the township organization for the purposes provided by section 13980 of the township organization law, as specified by the township board; but the combined rate for both the county and township organizations shall not exceed the maximum rate provided by the Constitution."

You state in your letter that the county of Dade levies the maximum of 40¢ allowed under the Constitution. We presume you refer to the maximum levy for county

purposes authorized by the Constitution. Article 10, Section 11.

Section 22 of the same article of the constitution authorizes an additional levy for road and bridge purposes by counties and township boards. Your request, however, does not appear to pertain to the levy made under this section. The Supreme Court in *State ex rel. v. Piper*, 214 Mo. 439, 1. c. 446, in explaining the provisions of what is now Section 11047, R. S. Mo. 1939, said:

"* * * The meaning of that section is that the county court shall apportion the tax, eighty per cent for general county purposes and twenty per cent for all such township purposes as the township has a right to exercise. This construction does not deprive the township of the right to levy a tax for road purposes, as relator thinks it would, but it limits the share that may be apportioned to the township for all its purposes out of the fund to be derived from the forty cents assessment to an amount which will leave sufficient of that fund to furnish the amount estimated by the county court as necessary for general county purposes, and if there is not enough for both the county must have eighty per cent and the township what is left."

Your request indicates that the total assessment made by the county and township, for county purposes, amounted to 40¢ on the \$100.00 valuation.

Referring to the constitutional limit of 40¢, it will be seen that the total amount of the levy is excessive by 7¢. Under said Section 11047, *supra*,

Hon. Arkley Frieze

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June 2, 1941.

and by the ruling announced in the Piper case, supra, the amount levied by the county court is valid, but the township levy is excessive in the amount of 7¢.

CONCLUSION

It is, therefore, the opinion of this department that the county court in a county, in which the maximum levy for county purposes is 40¢ on the \$100.00 assessed valuation and in which township organization is in effect, under the provisions of Section 11 of Article 10 of the Constitution, may levy 32¢ on the \$100.00 assessed valuation for county purposes and the township boards in such counties may levy 8¢ on the \$100.00 assessed valuation.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TWB:LB

COUNTY SUPERINTENDENT OF SCHOOLS SALARY: If the 1940 census shows a decrease in population putting county in lower salary bracket decrease in population would effect the salary of the County Superintendent of Schools effective July 1, '41.

January 20, 1941

Honorable A. L. Gates
Prosecuting Attorney
California, Missouri

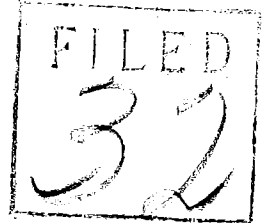
Dear Sir:

This will acknowledge receipt of your letter of January 14, 1941, in which you ask for an opinion as follows:

"As Prosecuting Attorney of Moniteau County I would like very much to have your written official opinion on the following state of facts.

"Our County Superintendent of Schools began his present term of office July 1, 1939, and his term ends June 30, 1943. In 1940 the decennial census was taken. Prior to 1940 decennial census his salary was based on the 1930 decennial census which according to the official record gave Moniteau County more than 12,000 population. According to the official census of 1940 Moniteau County has 11,775 population. Section 9463, page 384, Laws of Mo. 1933 states the salary schedule for the County Superintendent of Schools.

"The question which now arises in preparing the 1941 budget for the County Superintendent is whether or not he shall receive a salary of \$1600 as provided in said Sec 9463 in the bracket of 12,000 and less than 15,000 population or whether his 1941 salary shall be placed in the bracket of 10,000 and less than 12,000 population with a salary of \$1350.



January 20, 1941

"The question which this office would like to have determined is whether or not the 1940 census as officially determined will effect and change the salary of the County Superintendent during his term of office. If the 1940 census does effect our County Superintendent's salary when does such an effect take place?"

Givens v. Daviess County, 107 Mo. 603, 1. c. 609 is as follows:

"In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158; City of Hoboken v. Gear, 27 N. J. L. 278; United States v. Fisher, 109 U. S. 143."

Section 8, Article XIV of the Constitution prohibits an increase in compensation of an officer during his term, but this section does not prohibit a decrease in compensation. The section is as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of State ex rel. Moss v. Hamilton, 260 S. W. 466, 303 Mo. 302, this section was construed by the Supreme Court holding that it applied only to increases by legislative enactment during the term of office, and not to increases which occurred by reason of an already existing law.

In regard to the question of when a change in salary which might be caused by a change in population would take effect, this question was specifically answered

January 20, 1941.

in the case of State ex rel. Harvey v. Linville 300 S. W. 1066, in this case the Supreme Court at l. c. 1067, said:

"Section 10938, R. S. 1909, provides for ascertaining the 'annual' salary. Section 11352, R. S. 1919, says that the superintendent shall receive so much money, dependent upon the population of the county, without saying whether it was per annum. From the context it must be presumed that annual salary was meant. 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual' as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

Since the above decision was written the law governing the term of the County Superintendent of Schools has been changed so that the term will now begin on July 1st instead of April 1st.

CONCLUSION.

It is the conclusion of this Department, that if the 1940 census shows a change in the population of Moniteau County, which would place the county in a different salary bracket, that such change in population, if a decrease, would have the effect of lowering the salary of the County Superintendent of Schools; that such change would be effective July 1, 1941.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General.

APPROVED:

W. J. BURKE
Assistant Attorney-General.

COVELL R. HEWITT
(Acting) Attorney-General.

ROADS AND BRIDGES: Special road districts must pay the same rate of levy for the county generally as other road districts. Surplus in special road districts cannot be returned to the county court and can only be used for road and bridge purposes.

April 28, 1941

Honorable Marion R. Garstang
Prosecuting Attorney
Osage County
Linn, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of April 1, 1941, which reads as follows:

"The County Court of Osage County, Missouri, desires an opinion on the following:

"A special road district organized under Section 8710 et seq. Article 11, Chapter 46, R. S. 1939, originally had a substantial amount of roadway to maintain. Lately, a state road has been built through the district which at the present time is being maintained entirely by the State. The State road followed the only road which ran through the district with the result that at the present time there is only about 200 or 300 feet of public road in the whole district other than the State maintained road. The district is a rather wealthy district and the amount of the county levy for road and bridge purposes when extended into the district provides a revenue of several hundred dollars. The district has more money than it can spend on its few hundred feet of road.

"1. Can the road district in any way levy less tax than the amount of the

levy for the county generally. The county levies 25 cents on the hundred dollars valuation, which we understand must be extended into the district. Can the district pay less than this amount of tax, since it is not needed.

"2. If the district pays the amount of taxes extended into the district on the basis of the county levy, and a surplus accumulates each year, can the county court acquire title to this surplus in any way.

"3. If the surplus money should be spent in the Special Road District by the Commissioners thereof, in a manner which the county considered illegal, does the county court have any right to question what is done with the money.

"4. Assuming that the Special Road district has funds on hand each year which it does not spend on its public roads and which are not needed on its public roads, what can be done with these funds by the district."

Your first question reads as follows:

"1. Can the road district in any way levy less tax than the amount of the levy for the county generally. The county levies 25 cents on the hundred dollars valuation, which we understand must be extended into the district. Can the district pay less than this amount of tax, since it is not needed."

The statutes and constitutional provisions applicable to all four questions will be set out in answer to your first question.

Section 8715, R. S. Missouri 1939, partially reads as follows:

"County courts shall levy a poll tax in every district so incorporated, the same as required by law in road districts not incorporated, and such commissioners shall perform the duties, relative to such poll tax, that are imposed by law upon road overseers relative to the poll tax in road districts that are not incorporated; and county courts shall levy on the property taxable in every such incorporated district such taxes as may be levied by the authority of section 8526 on property taxable in districts not incorporated, and such taxes when so collected shall be set aside to and placed to the credit of the district in which the property was taxable; and county courts shall cause to be set aside and placed to the credit of each road district so incorporated all taxes collected, on property taxable therein, by authority of sections 8527 and 8821, R. S. 1939, or either of said sections,
* * * * *

Under the above partial section, when taxes are collected from any special road district, they should be set aside and placed to the credit of the district in which the property was taxed.

Section 8526, R. S. Missouri 1939, provides that in counties having a population of less than two hundred fifty thousand inhabitants the county court shall levy upon real and personal property of a county a tax of not more than twenty cents on the one hundred dollars valuation. This tax, when collected, must be placed in the county road and bridge fund. It is mandatory upon the county court to place this tax in the county road and bridge fund and cannot be used for any other purpose.

Section 8526, R. S. Missouri 1939, follows Section 11

of Article X of the Constitution of the State of Missouri.

Section 8527, R. S. Missouri 1939, provides for the collection of an additional tax other than that levied under Section 8526. The limitation under Section 8527, supra, is twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, and specifically provides:

"* * * but for no other purposes
whatever, and the same shall be
known and designated as 'the
special road and bridge fund' of
the county:* * * * *"

Section 8527, supra, follows Section 22, Article X of the Constitution of the State of Missouri.

In your first question you ask--Since the special road district cannot use the money allotted to it from the county treasury, can the district pay less than the amount of the tax since it is not needed?

Section 3, Article X of the Constitution of Missouri reads as follows:

"Taxes may be levied and collected
for public purposes only. They shall
be uniform upon the same class of
subjects within the territorial
limits of the authority levying
the tax, and all taxes shall be
levied and collected by general
laws."

Under the above section of the Constitution the county court would be prohibited from levying a higher tax in other districts other than the district in which you inquire about, and for that reason the levy for taxes must be uniform.

The taxes collected in the special road district must be allocated upon written demand to the district where the property is taxed. In the case of Hawkins et al. v. Cox et al., 66 S. W. (2d) 539, par. 1, 2, the court, in its

opinion, said:

"* * * Under these and other statutes referred to, it is settled that this special road district is entitled to whatever taxes are levied and collected on property within its boundaries, whether levied by the road district itself under section 8067 (Mo. St. Ann. section 8067, p. 6858), or by the county court under sections 7890 and 7891, R. S. 1929 (Mo. St. Ann. sections 7890, 7891, pp. 6765, 6766). State ex rel. v. Barry County, 302 Mo. 279, 258 S. W. 710; State ex rel. v. Holman, 305 Mo. 195, 264 S. W. 908; Billings Special Road District v. Christian County, 319 Mo. 963, 5 S. W. (2d) 378. * * * * *

Also, the court said at page 545:

"* * * It cannot restrain the district from levying taxes or receiving and using the taxes levied by the county court on the property within the district. Such taxes are levied and collected not for any particular purpose, but for the general purpose of constructing, improving, and keeping in repair the roads, bridges, and culverts within the road district, and such district has the right to use this revenue to rent, lease, or buy teams, implements, tools, and machinery, motor power, and all things necessary to carry on such work, subject to the constitutional and statutory restrictions in so doing. The board of commissioners in authority during any year must be left free to contract and spend the revenues provided for that year unhampered by the contract in question."

Also, in Rolla Special Road Dist. of Phelps County

v. Phelps County, 116 S. W. (2d) 61, par. 1, the court said:

"* * * This second count was based upon a levy made pursuant to section 7891, R. S. Mo. 1929, Mo. St. Ann. section 7891, p. 6766. Section 7890 reads as follows: 'The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the "county road and bridge fund." (R. S. 1919, section 10682. Amended, Laws 1921, 1st Ex. Sess., p. 172.)' The funds collected under a levy made by authority of the above section must be paid over to the special road districts in which the funds were collected. State ex rel. v. Burton, 283 Mo. 41, 222 S. W. 844; State ex rel. v. Barry County, 302 Mo. 279, 258 S. W. 710. Appellant does not dispute the correctness of this rule and we will not give it further consideration."

Under the holding in the above case it is the duty of the county court, upon written demand, to turn the taxes over to the special road district that are collected in the county upon the property in the special road district. The court also specifically holds that these taxes levied and collected are for the general purpose of constructing, improving and keeping in repair the roads and bridges and culverts within the road district and to further rent, lease and do other things necessary in the construction of the roads and bridges.

It is, therefore, the conclusion of this department that the special road district that you describe cannot pay a less amount of tax than any other district in the county even though it is impossible to spend the amount of tax re-allocated to that district.

Your second question reads as follows:

"2. If the district pays the amount of taxes extended into the district on the basis of the county levy, and a surplus accumulates each year, can the county court acquire title to this surplus in any way."

We find no law which would allow the county court to acquire title to the surplus left in the special road fund in a direct manner. By an indirect manner the county court may keep the taxes that should be allocated to the special road fund where no written demand is made by the special road district for the allocation of the taxes collected in the district. This will be more fully explained in answer to your fourth question.

Your third question reads as follows:

"3. If the surplus money should be spent in the Special Road District by the Commissioners thereof, in a manner which the county considered illegal, does the county court have any right to question what is done with the money."

In answer to this question will say that the taxes collected under Sections 8526, 8527 and other sections are for the specific purpose of the maintenance of roads and bridges and are placed in the special account known as "the special road and bridge fund." If the county court, or anyone in charge of this fund, should spend this money for any other purpose, they would be liable on their bond and anyone contracting for any other purpose than road and bridge work with the county court would do such work or furnish such property at their own risk.

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In the case of Mullins v. Kansas City, 188 S. W. 193, par. 5, the court said:

"But, be this as may be, it is plain that to allow such a doctrine upon a contemporaneous matter to be successfully asserted in the teeth of a statute which forbids, and of which statute plaintiff must be held to know, would be against public policy. Statutes and charter provisions constitute powers of attorney to the officers of municipalities, beyond which such officers may not go. Those dealing with such agents of municipalities must be held to know these statutory and charter powers, which effectually limit such officers' powers and radius of action. Officers of municipalities are not general agents; they are special agents, whose duties are set forth in the statutes which create them and which define their powers, and of these statutes, and therefore of these officers' powers, the public which deals with them must take notice and govern themselves accordingly. Lamar Tp. v. Lamar, 261 Mo. 171, 169 S. W. 12; Morrow v. Surber, 97 Mo. 155, 11 S. W. 48. Vain and futile would Constitution and statutes and charter be, if any officer of the state, or of a county, or of a city or other municipality, could follow them only when he saw fit.
* * * * *

Under the holding in the above case it specifically states that the public dealing with officers must know their powers and must take notice and govern themselves accordingly. Not only the county court but also any taxpayer could question the right to use the money unless it was used for the purposes for which it was collected.

Your fourth question reads as follows:

"4. Assuming that the Special Road district has funds on hand each year which it does not spend on its public roads and which are not needed on its public roads, what can be done with these funds by the district."

We do not find any authority which would permit a special road district to transfer the money allotted to them for road and bridge work to any other office of the county. Under Section 8691, R. S. Missouri 1939, it provides for the return of the money collected and then allocated to the special district where the property was taxed and it specifically states:

"* * * * so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

In the above partial section it will be specifically noted that the county court shall set aside to the credit of such special road district the money for taxes collected upon the property in that district upon written application by said commissioners of such special road district. It has been held that where no written application has been made for the taxes to be apportioned to the special road district that it is not necessary for the county court to allot the money to that district. In the case of Little Prairie Special Road

Dist. v. Pemiscot County, 249 S. W. 599, par. 1, this court has said:

"The statute formerly provided (sections 10481 and 10594, R. S. 1909; Laws 1913, pp. 667, 675), and still provides (section 10818, R. S. 1919), that the part of the general county levy which is set apart for road and bridge purposes and which is assessed and collected on property within a special road district, together with a designated part of certain licenses, shall be placed to the credit of such special road district and paid out to the commissioners or treasury of that district 'upon written application by said commissioners.' Carthage Special Road District of Jasper County v. J. C. Ross et al., 270 Mo. loc. cit. 82, 192 S. W. 976."

It has also been held that a district failing to demand such funds for several years cannot recover from the county. That was the holding in Holloway v. Howell County, 240 Mo. 601, 144 S. W. 860, and State ex rel. v. Holman, 305 Mo. 204, 264 S. W. 908.

CONCLUSION

In view of the above authorities it is the opinion of this department that one special road district, even though it cannot spend the money allotted to it for road and bridge purposes, must pay the same rate of levy as other districts in the county.

It is further the opinion of this department that the county court cannot acquire title to any surplus of money held by a special road district for road and bridge purposes.

It is further the opinion of this department that

Hon. Marion R. Garstang

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the commissioners of a special road district can only use the money allotted to the district as a road and bridge fund, for the purposes for which the taxes were levied, and that if the money is used for any other purpose the officer or officers using the money so illegally would be liable on their bonds.

It is further the opinion of this department that any surplus must be kept by the commissioners of a special road district but that it is not mandatory for them to make a written demand upon the county court for the taxes for road and bridge purposes that could be allocated to that district.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

RECORDERS OF DEEDS - Licenses issued on Sunday or other designated legal holidays are valid.

Marriage solemnized on Sunday or other legal holidays is valid.

August 21, 1941

Hon. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated August 15, 1941, which reads as follows:

"The circuit clerk and ex-officio recorder of deeds of this county has consulted me regarding the legality of his office issuing marriage licenses on Sunday.

"At this time I am unable to find in my office any law applicable to this question. I would, therefore, like for you to render me an official opinion as to whether or not the recorder of deeds may legally issue marriage licenses on legal holidays and Sundays."

Section 3360 R. S. Missouri, 1939, reads as follows:

"Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential."

It will be noted from reading the above Section that marriage contracts are of a civil nature.

We now call attention to Section 4739 R. S. Mo., 1939, which reads as follows:

"Every person who shall either labor himself, or compel or permit his apprentice or servant, or any other person under his charge or control, to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars."

We also call attention to the case of State v. Chicago, Burlington & Quincy Railroad Company, 143 S. W. 785, 239 Mo. 196, in which case there will be found an exhaustive opinion pertaining to the Sunday law. The court, in that case, had this to say, at l. c. 209:

"The Missouri Sunday laws have regard to that day as a day of rest, and not to the religious character of the day. They are civil, not religious regulations, and are based upon a sound public policy which recognizes that rest one day in seven is for the general good of mankind. (Hennington v. Georgia, 163 U. S. 299-304.) Those laws are sustained as civil, municipal or police regulations, without reference to the fact that the day of rest is also the Christian's day of rest and worship. * * *"

Further, Judge Woodson, in his separate concurring opinion, in the same case, had this to say at l. c. 247:

"The power of the Legislature to authorize the performance of any kind of labor on Sunday cannot be questioned, for the reason that in contemplation of law it is simply a civil institution, and may be regulated or abolished altogether by the lawmaking power of the State, as it may see proper, notwithstanding the fact that it is a day of the week given up by Christian people to religious worship. In the eyes of the law Sunday is merely a day of rest, and is not considered from the standpoint of religion."

Therefore, from reading this case, we find that the law in Missouri was established, that all laws pertaining to the prohibiting of certain acts on the first day of the week, commonly called Sunday, are civil regulations and the legislature has the right to make, or not to make, such regulations as they see fit through statute. This principle of law was further approved in the case of *State v. Springfield v. Smith*, 19 S. W. (2d) 1, l. c. 5. Therefore, from the reading of Section 4739, supra, we do not find that a recorder of deeds is directly, or indirectly, prohibited from accomodating some person who desires to procure a marriage license on Sunday.

Now turning to another legal phase presented by your question, which we deem very pertinent in reaching the proper conclusion, or answer to your question, we call attention to 38 C. J., Par. 74, Page 1307, where we find the following statement:

"A marriage license must be issued by the officer designated by the statute, and the duty, although ministerial,

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involves official and personal discretion and therefore is not susceptible of being delegated. Under some statutes a record must be made by the officer of the license when issued, and in some states a bond is required, conditioned that there is no lawful impediment to the marriage. A statute conferring a special authority upon an officer must be fully complied with before he is entitled to act. Where a license is improperly issued, neither the license nor the marriage solemnized under it is void, although the officer issuing it may incur a penalty for the act. * * * * *"(Underscoring ours.)

(Cases substantiating the above underlined portion are found in footnote 87 in 38 C. J. Page 1307)

It will be noted that the cases cited in the above footnote are collected from Alabama, Kentucky, Louisiana, Mississippi, New York and Pennsylvania. We do not find a Missouri case which directly holds this general proposition, but are of the opinion that if the question were raised, as it was in these cases, the Missouri courts would adhere to the same proposition of law. We say this for the reason that in the case of *Mayler v. Brock*, 120 S. W. 1167, 222 Mo. 74, 133 Am. St. Rep. 513, 17 Ann. Cas. 673 and also the case of *Mayler v. Waters*, 120 S.W. 1174, 222 Mo. 102, the court held that the law presumes that a marriage is valid and the burden is on those claiming the contrary to show why it is not, by strong and persuasive evidence, the presumption being one of the strongest known to law. We also call attention to the case of *St. Louis v. Sommers*, 148 Mo. 398, 1. c. 401, where the court had this to say:

"The solemnization of a marriage is in no sense a judicial act. Were a justice to perform it in his court, no record or note could be made of it. It may be per-

formed anywhere within his jurisdiction, at any and all hours of the night or on Sunday and there is nothing which requires the clerk to attend the justice in his perambulations or to take ex officio notice when parties will call upon the justice at his home to perform the marriage ceremony nor does it require the justice to report such ceremony to his absent clerk."

Further, the court in the case of State ex rel v. Moore, 96 Mo. App. 431, l. c. 435, had this to say:

"The manifest purpose of the marriage-license statute was to make such licenses, returns thereto, and certificates of marriage, public records so as to give notice to all the world of the occurrence to which they severally relate. Their contents thereby become matters of public knowledge because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them, that knowledge of them may be public. * * * "

From a reading of the Sommers case, supra, we find that the Supreme Court has directly ruled that a marriage ceremony may be entered into on Sunday, the same as any other day in the week.

In view of the fact that the cases supra conclusively rule that a marriage contract, being a civil contract, and that the solemnization of the marriage being the actual legal act which perfects the civil contract, ie of marriage, the courts having ruled that this contract could be performed on Sunday, we can see no reason why

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the parties would be affected or the contract rendered void by the mere issuance of a license, or a legal privilege to marry, on the first day of the week, commonly called Sunday, and, under the Missouri law the license could be either used or returned, and no marriage perfected thereto.

Our statutes do not directly or indirectly, as we read them, prohibit the person authorized under the statute to issue marriage license, to issue such license on Sunday.

CONCLUSION.

We are of the opinion that the issuance of a marriage license by a recorder of deeds on the first day of the week, commonly called Sunday, or other designated holidays, does not affect the legality of a marriage performed thereunder.

A marriage solemnized on Sunday is valid.

Respectfully submitted

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

BRC:RW

DEAD ANIMAL DISPOSAL PLANTS:
LICENSING:
PERIOD OF LICENSE:

The license fee for operation of dead animal disposal plants should be charged for a full year regardless of the date of application for the license.

October 20, 1941

Dr. John W. George
State Veterinarian
Department of Agriculture
Jefferson City, Missouri



Dear Doctor George:

This is to acknowledge receipt of your letter of recent date in which you request an opinion from this department based on the following statement of facts:

"Does Senate Bill No. 94 require me to collect application fees and issue licenses to Dead Animal Disposal Plants, also for trucks and sub-stations, for the short period from the time of inspection and final approval prior to December 31, 1941?"

The act to which you refer is found in Laws of Missouri, 1941, p. 290. Sections 14493-c, d, and f, found on pages 293 and 294, pertain to your question and are as follows:

"Section 14493-c. Any person desiring a license under this act to engage or continue in the business of operating a disposal plant for bodies of dead animals, shall file an application for such license with the state veterinarian, on a form provided by him without charge, which application shall set forth the name and residence of the applicant, the location of his place of business, the particular method, or methods which he intends to employ, or is employing in the transportation and in the disposal of the bodies of such dead animals; the number and location of all sub-stations he desires to operate, if any; the number and kind of vehicles he will use; and such other essential information relative thereto as the state veterinarian, by his rules and regulations may require. Such application shall be accompanied by an initial installment of fifty dollars (\$50.00) on the total annual license fee, to apply upon the expenses imposed by this act."

Section 14493-d. Upon receipt of such application, accompanied by the fee, the state veterinarian, or some person appointed and designated by him, shall, within thirty days, ascertain whether or not such applicant is a responsible and suitable person to conduct such business, and that if the disposal plant of such applicant, as herein defined, and if the methods of operation thereof comply with all the provisions of this act and with the rules and regulations herein authorized, and if such business is located in a place permitted by this act, he shall thereupon issue to such applicant a certificate to that effect."

"Section 14493-f. All licenses and vehicle certificates issued under this act shall remain effective until and unless voluntarily surrendered, or suspended or revoked, as provided in this act; conditioned, however, upon payment to the state veterinarian on or before January 15 of each calendar year subsequent to the year of issue, of the required total annual license and other fees herein provided for and specified, as aforesaid, to which payment shall operate, without further application, to continue such licenses and vehicle certificates in full effect during each calendar year for which such license and other fees shall be paid, unless sooner surrendered, or suspended or revoked, as herein provided."

It will be noted that Section 14493-f, supra, definitely provides that each licensee must pay the required fee on or before January 15 of each year subsequent to the issuance of such license.

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Since the act does not provide for the splitting up of the license fee in case applicants apply for a part of a year, then it would follow that if an applicant makes application at any time during the license year, or while the law is in effect, such applicant must pay the full amount of the license. This rule is supported by the statement in 37 C. J., p. 250, Sec. 116, as follows:

"* * * In the absence of a provision for a pro rata license, a person taking out a license must pay the full amount prescribed even though he taken out his license after the beginning of the license year, or discontinues his business before the expiration of such year. * * *"

Our Supreme Court, in the case of The City of St. Louis v. The Consolidated Coal Company, 113 Mo. 83, has applied the same rule.

In your letter you indicate that it will be some time before you will be prepared to furnish proper application blanks and make inspections of plants, because no appropriation was made for the carrying out of the provisions of this act. The law became effective ninety days after the adjournment of the General Assembly, however, on the question of whether or not a person would be guilty of violating this law in a case where the state officials were not able to make proper inspections or furnish proper blanks, we think that this would be taken into consideration in case proceedings were instituted against a party who was not able to obtain his license for that reason.

CONCLUSION

From the foregoing, it is the opinion of this department that this act would require the collection of fees for a full year from those who made application for a license prior to December 31, 1941, and that such license year would terminate January 15, following such application.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

VANCE C. THURLO
(Acting) Attorney General

TWB:NS

LOTTERIES: Tickets given with each sale of merchandise and weekly drawing had thereon, is lottery. The fact that tickets may be obtained upon request does not change rule.

October 21, 1941

Honorable A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"As Prosecuting Attorney of Moniteau County, Missouri, I have before me a problem on which I desire some help from your office. I would like to have a written opinion covering the following state of facts.

"Last week a man representing a sales promotion organization in Texas, came to Tipton, Missouri, and organized the merchants of that community to promoting a sales appreciation week. The following is the method used: it costs each merchant \$5.50 to belong to the association in Tipton. The merchants are given a treasure-chest coupon. Each merchant passes out to his customers a coupon with each purchase of merchandise in his store. A 25¢ to 99¢ purchase is given a 5% coupon; for every \$1.00 to 1.99 purchase, he is given a 10% coupon; for each \$2.00 to 2.00 purchase, he is given a 20% coupon; for a \$3.00 to \$3.99 purchase, he is given a 30% coupon; with each

\$4.00 to \$4.99 purchase, he is given a 40% coupon; for each \$5.00 to \$10.00 purchase, he is given a 50% coupon. The customer gets the coupon, turns it over and signs his name and address on the reverse side and places it in a box. Each merchant, belonging to the association, puts into a 'Treasure Chest' a dollar to three dollars each week, depending upon his rated gross annual sales of his business. On each Wednesday of the week, there is a drawing on the public street of Tipton. All the merchants put all of the coupons in one box, shake them up and draw a coupon therefrom until there is one winner. The highest prize that can be given each week at the drawing is 50% of the 'Treasure Chest.' The balance of the 'Treasure Chest' is carried over until the following week with the weekly contributions of the merchants added to it. By this manner, the 'Treasure Chest' is increased and if carried over a period of weeks, it will have several hundred dollars. On Wednesday, immediately before the drawing, the man in charge makes an announcement that if there is anyone in the crowd who does not have a coupon in his possession, if he will come forward he will be given a 5% coupon ticket. This is done because they have been told that the giving of the 5% coupon ticket to anyone in the crowd who does not have one will take the scheme out of control of the lottery laws in the State of Missouri.

"The first question is, is the sales promotion a violation of the lottery laws in the State of Missouri without the giving of the tickets gratis to members of the crowd who do not have a ticket.

"Second question: if they give a 5% 'Treasure Chest' coupon to any individual who asks for

one without requiring him to make a purchase, will that feature of the scheme avoid the lottery laws in the State of Missouri."

Section 10, Article XIV of the Constitution of Missouri, provides:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4704, R. S. Mo. 1939, provides:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more

than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

A lottery has been defined by our courts as every scheme or device whereby anything of value is for a consideration allotted by chance. *State v. Emerson*, 318 Mo. 633, 1 S. W. (2d) 109. The elements of a lottery are (1) prize, (2) chance, and (3) consideration. *State ex inf. McKittrick, Attorney-General v. Globe-Democrat Publishing Co.*, 110 S. W. (2d) 705. From the facts presented in your request there is no doubt but that the first two of these are present in the scheme here involved, that is, prize and chance. The sole question presented is whether the third element, that is, consideration, is present.

In regard to your first question, we believe that all courts are in accord with the view that a scheme that features a chance drawing for pay patrons only, is a lottery even though the price or cost of the chance is completely merged and concealed in the regular price of the goods. As was pointed out in *Williams on Lotteries*, page 126:

"the courts look at the scheme as a whole and reason with respect to consideration that the price received from the customer is a consideration for both the thing sold and the chance in the drawing, or simply that a scheme which uses prize and chance to encourage sales contains all the elements of a lottery even though the sale price is not thereby increased."

In support of this statement there are cited the Missouri cases of *State v. Emerson*, 318 Mo. 633 and *State ex rel. v. Hughes*, 299 Mo. 529.

Schemes practically identical with that set out in your first question have been held lotteries in the following cases: *State v. Powell*, 170 Minn. 239, 212 N. W. 169; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107, *Featherstone v. Independent Service Station Ass'n. (Tex.)*, 10 S. W. (2d) 124; *Chamber of Commerce v. Kieck*, 128 Neb. 18, 257 N. W. 493;

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People v. Bloom, 227 N. Y. S. 225 and Market Plumbing and Heating Supply Co. v. Spangenberg, 112 N. J. L. 46, 169 A. 660.

The courts, however, have not been in accord in respect to their views about the facts presented in your second question. While there is no doubt, as pointed out above, that where only those persons participate who purchase merchandise from the persons conducting the scheme, that this constitutes a lottery, still, where a person is entitled to a ticket or chance free and upon request, the question of consideration then becomes more difficult.

This type of gift enterprise lottery appeared first in the United States in 1889 (Yellowstone Kit v. State, 88 Ala. 196). The scheme is usually conducted by advertising free participation which is in fact, in most cases, accompanied and restricted by conditions that are favorable to pay patrons and unfavorable to non-pay patrons, thereby inducing many persons to become pay patrons.

Williams in his recent work on Lotteries, says (page 119):

"The trick in such schemes is to assign numbers without charge to prospective patrons on the pretense that they represent free chances in a drawing by lot or chance and at the same time surround the participation with conditions and restrictions more favorable to cash patrons than to non-cash patrons thereby producing two classes of chances--the bare chances which may be had without the payment of money and the better chances which cannot be acquired without the payment of money."

The principal case upon this "flexible-participation" lottery is that of Willis v. Young, 1 K. B. 448, which was decided by the Court of King's Bench in 1907. In that case a newspaper made a general distribution of numbered medals to

the homes of the people throughout London. Each medal carried a serial number. A drawing was had each week and the winning numbers were published in a newspaper. Many places were maintained in London where persons could read the paper without having to buy a copy and winners were given several days in which to claim their prizes. The Chief Justice in the close of the opinion made the pointed inquiry as follows:

"Looking at the whole of the circumstance of the case is it not plain that the circulation of the paper increased by reason of the people getting these medals?"

The court held the scheme to be a lottery under the theory that the opportunity to participate in the drawings were paid for in the mass by the general body of the purchasers of the paper even though many individual participants did not purchase the paper.

This rule is followed in the Federal Courts of the United States (Central States Theatre Corp. v. Patz, 11 Fed. Supp. 566), the Post Office Department (George Washington Law Review, May, 1936, p. 482) and in the majority of the states (103 A. L. R. 870; 57 A. L. R. 424).

In State v. McEwan, 120 S. W. (2d) 1098, this rule was followed by our Supreme Court. The so-called "free number feature" of the scheme was called "the goat's skin upon the hands of Jacob." It is there in an attempt to fool the law." Judge Westnues pointed out that:

"The test is whether that group who did pay for admission were paying in part for the chance of a prize. * * * * * It cannot alter the fact that the operator may have given free chances to some without the purchase of tickets; even so, the lottery scheme as to a gift enterprise was present to all the rest, and this fact did not prevent it from being a lottery."

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In view of what has been said above we believe it is the rule in Missouri that a scheme which is a lottery in all its essentials, does not lose its characteristics as such if some persons are given free tickets for the reason that the scheme is a lottery as to the great majority of those participating.

>
Conclusion

It is, therefore, the opinion of this Department that a scheme whereby patrons of business establishments are given numbered chances with each purchase of merchandise, which chances every week are drawn from a receptacle, and the persons whose numbers are drawn receive a prize, is a lottery under the Constitution and statutes of Missouri, and the fact that certain persons are given free chances does not in any way alter the makeup of the scheme so as to make the same not a lottery.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

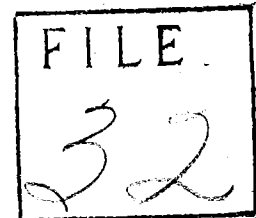
VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

CIRCUIT CLERK: Fees earned by a circuit clerk and collected
by his successor should be paid to the prior
OFFICERS: circuit clerk.

December 3, 1941

Hon. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of November 28th, 1941, which is as follows:

"As Prosecuting Attorney of Moniteau County I would like to have an official written opinion from your office concerning the construction and legal effect of Sec. 13408 R. S., 1939, pertaining to 'Salaries of Circuit Clerks in Certain Counties', with special reference to the proviso 'Providing further, that the clerks of circuit courts shall be allowed to retain in addition to the sums allowed in the section, all fees earned by him in cases of change of venue from other counties.'

"1. Do fees to the circuit clerk under this proviso go to the circuit clerk who was in office at the time the fees accrued, or do the fees go to the circuit clerk who is in office at the time the costs are paid?

"2. Are these fees on change of venue from other counties accountable by the circuit clerk to the counties?

"3. If change of venue fees are unaccountable fees and they go to the circuit clerk at the time they accrue will these costs be pro-rated between the two circuit clerks if the part of the costs accrued during the term of one official and part during the term of his successor?"

Section 13408, R. S. Mo. 1939, partially reads as follows:

"* * * Provided, it shall be the duty of the circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 13426 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk and ex officio recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county trea-

sury as herein provided: Provided further, that the clerks of the circuit courts shall be allowed to retain in addition to the sums allowed in this section, all fees earned by him in cases of change of venue from other counties: Provided further, that until the expiration of their present term of office, the persons holding the office of circuit clerk shall be paid the maximum amount as now provided by law, in the manner provided by this chapter."

Under the above provision it becomes the duty of the circuit clerk to charge all fees accruing to his office. He also charges all fees accruing to his office coming to the county on change of venue, but when ordered by the county court to pay all fees into the county treasury the amount ordered by the county court, who have examined his monthly report, which he should file with the county clerk in pursuance to Section 13436, R. S. Mo. 1939, should not contain the fees to be retained on change of venue cases.

Section 13446, R. S. Mo. 1939, reads as follows:

"It shall be the duty of each sheriff, marshal, coroner, clerk of the courts of record, and other officers, on the first day of January and the first day of July in each year, to pay over all fees in their hands belonging to others to the treasurer of the county, with the name and amount belonging to each person, date when collected and in what case, taking from the treasurer duplicate receipts therefor, one of which the officer shall file with the clerk of the county court, who shall immediately charge the treasurer with the same."

Under the above section it is the duty of the circuit clerk to pay over all fees in his hands belonging to others to the county treasurer. This payment must be made on the first day of January and the first day of July in each year. According to your request you state to the effect that a change of venue case has been tried in California, Missouri, wherein a circuit clerk has performed some of the duties and his successor has performed some of the duties, in which the fees are to be retained by the respective clerks. You also ask if the fees should be pro-rated between the two circuit clerks. Under Section 13446, R. S. Mo. 1939, it is the duty of the successor to pay into the treasury fees earned and due the former circuit clerk.

In the case of *Smith v. Pettis County*, 136 S. W. (2d) 282, Para. 15, the court in passing upon this question stated:

"* * * A probate judge may only collect fees for services which he has already performed. These services may be performed only while he is in office. His fees can accrue only while he is in office. These provisos only limit what he may keep. We said in *Corbin v. Adair County*, 171 Mo. 385, 71 S. W. 674, that a circuit clerk can demand and recover his uncollected fees from his successor. A suit for fees against a clerk's successor was upheld in *Lycett v. Wolff*, 45 Mo. App. 489."

Also, in the case of *Corbin v. Adair Co.*, 171 Mo. 385, 1. c. 389, the court said:

"* * * To the amount of the difference between the fees collected by him which he had earned in 1898 and retained, and the amount earned and not collected for that year, not exceeding \$1,600, he can demand and recover the uncollected fees

from his successor, and his own evidence shows they will be more than sufficient. * * * * *

Also, in the case of *Lycett v. Wolff*, 45 Mo. App. 489, the court in passing upon the following statement of facts,

"This case is here on the defendant's appeal. The plaintiff was elected to the office of circuit clerk of St. Louis county, at the November election, 1878. He was inducted into office on the first day of January, 1879, and performed the duties pertaining to such position for the term of four years. In the petition it was alleged that the plaintiff, as such clerk, was entitled under the law to receive out of the fees earned by him during his term of office the sum of \$9,000, that is a yearly salary of \$2,250; that, during the time he held the office, he only received of the fees collected by him, on account of his salary, the sum of \$8,070, leaving a balance of \$930 due on his salary for the four years; that, at the expiration of his term, he had earned as clerk a large amount of fees which had not been collected; that the defendant was his successor in office, and had collected the sum of \$930 of the fees so earned, and had refused to pay them to the plaintiff."

said:

"* * * 'In *Thornton v. Thomas*, 65 Mo. 272, it was held that the fees of the office constituted a trust fund, to be applied in the payment of deputies and

assistants, and the salary of the clerk fixed by law, and the surplus, if any, after such payments, to be paid into the treasury of the county. The question, as to whether one of these trusts would be to supply any deficiency in the receipts of a former year to cover expenses and salaries, was neither before the court nor decided in that case. If the annual fees earned by a clerk, as is held in the case above cited, are chargeable with a trust in favor of such clerk to the extent of his salary, and the compensation allowed his deputies, it logically follows, that, whenever collected, they should be applied to the discharge of that trust."

In the above cases both the appellate and Supreme courts have held that a circuit clerk can demand and recover his uncollected fees from his successor. Of course, these cases applied when the salary of the circuit clerk was obtained by the retaining of fees and not paid a regular salary as under the present law. But the same theory would apply on fees earned by a circuit clerk on change of venue cases and collected by his successor.

CONCLUSION.

In view of the above authorities it is the opinion of this department that fees due the circuit clerk on change of venue cases should be paid to the circuit clerk who was in office at the time the fees occurred and not to the circuit clerk who is in office at the time the costs are paid.

It is further the opinion of this department that change of venue fees should be reported to the county clerk, but that the order of the county court requiring him to pay fees into

Hon. A. L. Gates

(7)

December 3, 1941

the county treasury should not contain change of venue fees which are allowed to the circuit clerk.

It is further the opinion of this department that the present circuit clerk under Section 13446, supra, should pay the fees earned by the prior circuit clerk into the office of the treasurer in the amount of fees that was earned by the prior circuit clerk before the present circuit clerk took office.

Respectfully submitted,

W. J. BURNE
Assistant Attorney-General

APPROVED:

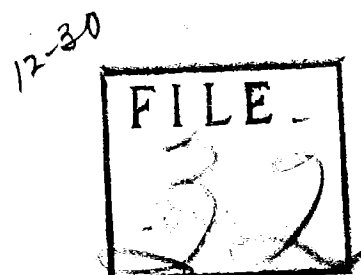
VANE C. THURLO
(Acting) Attorney-General

WJB:CP

INTOXICATING LIQUOR: Adult who purchases for person under
MINORS: 21 is guilty of a misdemeanor.

December 30, 1941

Honorable J. R. Garrison
Prosecuting Attorney
Johnson County
Warrensburg, Missouri



Dear Sir:

This is in reply to your request for an official opinion by your recent letter, which is in the following terms:

"I would like to have your opinion on a question under the liquor laws of this state. If two or three minors give a person of age the money to buy liquor and he buys it for them and gives it to them, is he guilty of a violation? I have been requested to secure your opinion concerning this matter and would appreciate hearing from you."

Section 4885, R. S. Mo. 1939, provides in part:

"Intoxicating liquor shall not be given, sold or otherwise supplied to any person under the age of twenty-one years, but this shall not apply to the supplying of intoxicating liquor to a person under said age for medicinal purposes only, or by the parent or guardian of such person or to the administering of said intoxicating liquor to said person by a physician. * * * "

Regarding a similar statute, the Kansas City Court of Appeals said, in State v. Bruder, 35 Mo. App. 475, 1. c. 479:

"This act to prevent sales of intoxicating liquors to minors is a police regulation, to protect the growing youth and to promote good morals, and we have no doubt, as repeated by the court in the case last cited, that the intention was to inflict the statutory penalty without regard to the motives or knowledge of the offender."

This statute likewise is to be construed in the light of the legislature's plain purpose to protect the health and morals of persons under twenty-one years of age. The attitude of the courts toward enforcement of such a statute is illustrated by the rule that (State v. Bruder, supra, 1. c. 478),

" * * * the seller's good faith, or want of knowledge, as to the age of the minor furnishes no excuse, or justification, for a violation of the statute."

Accordingly, in State v. Field, 139 Mo. App. 20, 1. c. 21, 22, 119 S. W. 499, the St. Louis Court of Appeals said:

"This information was filed on the statute which says any person who shall directly or indirectly sell, give away or otherwise dispose of or furnish, or deliver any intoxicating liquor, in any quantity, to a minor without the written permission of

the parent, master or guardian of such minor first had an obtained, shall be deemed guilty of a misdemeanor, * * * The gist of the offense is disposing of intoxicating liquor to a minor."

Section 4885, supra, provides that intoxicating liquor shall not be "given, sold or otherwise supplied to any person under the age of twenty-one years." It is unnecessary to decide whether the adult mentioned in your letter gave or sold the liquor to the minors. It is obvious that he supplied it to them. In Webster's New International Dictionary (2nd Ed.) p. 2534, the word "supply" is defined as follows:

"To furnish or provide. * * * Provide, administer, contribute. * * * Act * * * of providing something or someone; * * *"

In State v. Alvord, 271 Pac. 322, 46 Idaho 765, a conviction of furnishing liquor to a minor was affirmed under a statute providing in effect that liquor should not be "sold, given or furnished" to a minor. The court approved an instruction stating (271 Pac. 1. c. 324):

"The word 'furnish,' as used in these instructions, means to provide; supply; give; to supply or offer something."

In that case the defendant handed a drink to a minor who took it in her hand, but did not drink it. The court further said (271 Pac. 1. c. 323, 324):

"The word 'furnish' is broader than the words 'sell' and 'give,' as they are used in the statute * * * * *

" * * * 'It must be held that the legislature intended to prevent the delivering of liquor to children; that they should 'touch not, taste not, handle not.'"

In this case the adult furnished, provided and supplied liquor which could not legally be sold to the minors. That is the very act which the statute was designed to prevent, and which the statute prohibits. In a prosecution under this statute it is not necessary to prove that the minors drank the liquor. In *State v. Alvord*, supra, at 271 Pac. 324, the court further said:

"The rule, as stated by Woolen and Thornton, p. 1226, section 723, is as follows:

"'It is not necessary, under a statute forbidding a sale or gift to a minor of intoxicating liquor, that the minor should drink the liquor sold or given him in order to constitute the offense. The mere placing of the liquor in his possession is the offense.'"

Some portions of the Liquor Control Act of Missouri (Sections 4874--4949, R. S. Mo. 1939) apply only to persons licensed to sell liquor. But the above quoted portion of Section 4885, supra, applies to all persons in the state. A person who violates it is guilty of a misdemeanor. Section 4933 provides:

"Any person violating any of the provisions of this act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine

of not less than fifty (\$50.00) dollars, nor more than one thousand (\$1,000.00) dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence."

CONCLUSION

In our opinion any adult who receives from a person under twenty-one years of age the price of intoxicating liquor, and purchases such liquor and delivers it to such minor, is guilty of the misdemeanor of supplying intoxicating liquor to a person under twenty-one, under the Liquor Control Act, except that such liquor may be supplied to a minor by his parent, or by another on prescription by a physician.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

EH:VC

SENATE BILL NO. 101: If passed and approved will not affect present compensation of any officers except circuit clerks and prosecuting attorneys.

June 14, 1941

6-24

Honorable Bernard L. Glover
Missouri State Senator
State Capitol Building
Jefferson City, Missouri



Dear Senator Glover:

This will acknowledge receipt of your letter of June 10, 1941, in which you ask for an opinion from this Department, as follows:

"There has been perfected and is now listed on the Senate calendar for final passage Senate Bill No. 101, which proposes to increase the salary of the office of the prosecuting attorney of Jackson County from \$5,000 to \$6,000. It is contemplated by this bill, copy attached, to re-enact Section 13465, R. S. 1939, to effect the proposed change. This same section provides the salaries of other Jackson County officers and also the salaries of certain officers of St. Louis County.

"In addition to the salaries provided in Section 13465, certain fees and other compensation are provided in other sections; for instance, the prosecuting attorney of Jackson county is a member of the Parole Board and receives a salary of \$1,500, Sections 9168 and 9172, R. S. 1939.

"The Clerk of the Jackson County County Court receives a salary \$3,000, per Section 13465, and in addition receives other

compensation; for instance, notary commissions as per Section 13474.

"The Recorder of Deeds receives a salary of \$3,000, as per Section 13465, and in addition thereto is allowed certain fees and compensation as provided in Sections 3483 and 3488, R. S. 1939.

"The same situation may exist as to other county officers named in Section 13465, however, the above references to particular officers will serve to illustrate the point about which I desire to have your advice as to the effect of enactment of Senate Bill No. 101.

"It may be well to direct attention to Section 13473 which appears to place some limitation on the receipt of fees and compensation to county officers named in Section 13465. It is not likely that this Section 13465 could be interpreted as restricting the prosecuting attorney of Jackson County from receiving compensation allowed under Section 9172, as hereinbefore mentioned, for serving as a member of the Parole Board?

"It has been intimated that if Senate Bill No. 101 is enacted into law the question might be raised as to continuation of allowances of fees and additional compensation, as provided in other sections, to salaries prescribed in Section 13465. The only purpose of Senate Bill No. 101 is to increase the salary of the Jackson County Prosecutor from \$5,000 to \$6,000. If enacted, it would not change the salary of the present prosecutor. The next prosecutor elected after passage of this bill would receive \$6,000 in salary; plus additional compensation of \$1,500 allowed for duties as a member

June 14, 1941

of the Parole Board.

"I will appreciate your advice and ruling on the effect of Senate Bill No. 101 in its present form.

"You may observe this bill omits the Clerk of the Circuit Court. The reason for such omission is: In House Bill No. 379 it is proposed that the salary of the Circuit Clerk shall be \$6,750 instead of \$3,000 as now provided in Section 13465. I have not endeavored to ascertain what, if any, additional compensation, or fees, is allowed to the Clerk of the Circuit Court but if the suggested elimination from Section 13465 and the enactment of House Bill No. 379 would obstruct accomplishing what is intended in it, I would be pleased for you to so advise and to suggest amendments or corrections thereof.

"I might further state that it has been going over in my mind the advisability of having an amendment offered in the House to Senate Bill No. 101, providing, in substance, the following:

"line 22, page 2, continuing with new sentence -

'And further provided, that nothing herein shall affect any fees or other compensation authorized by law.'

"As to such an amendment, it would appear that Section 13463 might be affected."

The rule of statutory interpretation and application which guides us in the solution of your question is very aptly stated by the Supreme Court of Missouri in the case of Investment Co. v. Curry, 264 Mo. 483, at l. c. 495-6, as follows:

"At the revising session of 1889 the foregoing section was amended by a revised bill and all those provisions quoted in italics were eliminated, leaving the section in the form which it has ever since appeared in our statutes. (Sec. 4558, R. S. 1889; Sec. 2979, R. S. 1899; and Sec. 391, R. S. 1909).

"There seems to be no doubt that it was the legislative intent to repeal those provisions of the original act suspending its operation in favor of parties under legal disabilities, and possibly as to widows occupying the mansion houses of their husbands.

"So much of the original act as appears in the revised bill was taken from the Act of 1887. This is manifest by a reference in the revised bill itself to the Laws of 1887, p. 177, as the place from which this section as amended was derived.

"The usual rule is that when part of a former act is repeated in an amendatory statute, the provisions thus repeated are considered as a continuation of the former law, and not as a new enactment; while those parts of the original act which are omitted from the amendment are treated as repealed. This rule is announced by Lewis-Sutherland in the second edition of his work on Statutory Construction, vol. 1, pp. 442-3, as follows:

"The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act."

"See also 36 Cyc. 1082. This rule seems to have met with statutory recognition in this State. (Sec. 6606, R. S. 1889; Sec. 8086, R. S. 1909. See also State ex rel. Craig v. Woodson, 128 Mo. 497, 1. c. 512.)"

A comparison of Senate Bill No. 101 of the Sixty-first General Assembly with Section 13465, Article 4, Chapter 99 of the Revised Statutes of Missouri, 1939, reveals that the provision for the salary of the circuit clerk in Section 13465; supra, is omitted from Senate Bill No. 101; that the amount of salary prescribed for the prosecuting attorney by the terms of Senate Bill No. 101 is \$1,000 greater than that prescribed by Section 13465, supra, and that Senate Bill No. 101 does not in any way change the other provisions of Section 13465, R. S. Missouri, 1939.

Applying the above stated rule, it is quite clear that the passage and approval of Senate Bill No. 101 would repeal the salary provision for the clerk of the circuit court, increase the salary of the Prosecuting Attorney \$1,000 per annum, and in no way affect the provisions pertaining to other officers, merely continuing the present provisions.

Hon. Bernard L. Glover

(6)

June 14, 1941

CONCLUSION.

It is the belief of the writer that the passage and approval of Senate Bill No. 101 of the Sixtyfirst General Assembly would make the changes above noted with regard to the Prosecuting Attorney and the Circuit Clerk, but would have no effect upon the compensation of the other officers mentioned therein, continuing in existence the law as it now applies to the other officers mentioned.

Trusting this fully answers your question, it is

Respectfully submitted,

W. C. JACKSON
Assistant Attorney General

APPROVED:

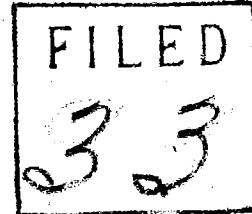
VANE C. THURLO
(Acting) Attorney General

WOJ/rv

WORKMEN'S COMPENSATION; Commission, in case of self-insurers, may forfeit deposit periodically to pay award, or may cause a sum sufficient to purchase an annuity to be forfeited and applied to that purpose.

August 11, 1941

Workmen's Compensation Commission
Jefferson City, Missouri



Gentlemen:

This will acknowledge receipt of your letter of July 8, 1941, as follows:

"The Commission is asking your interpretation of Section 3737, R. S. Missouri 1939, with special reference to a particular case which presents a new problem to us. For your convenience, we are enclosing with this letter a pamphlet copy of the Missouri Workmen's Compensation Law, which booklet contains the rules for Self-Insurers to which reference will be made.

"Under the authority granted it in Section 3751 R. S. of Missouri, 1939, the Commission adopted the Rules for Self-Insurers which are found on page 70 of the enclosed booklet. Under these rules, a self-insurance authority was granted to the Dixie Machinery Company, 226 West 39th Street, Kansas City, Missouri, on June 24, 1936, upon the deposit in escrow of \$3,000 in United States Treasury Bonds with the Produce Exchange Bank of Kansas City. Early in 1939 the Commission, upon investigation, felt that additional surety should be required of this employer, and asked that an additional \$7,000 be deposited to guarantee compensation payments. This request was complied with, and on February 16, 1939, the Dixie Machinery Company placed \$7,000 in

August 11, 1941

cash in escrow, also with the Produce Exchange Bank of Kansas City. We are enclosing a copy of each of these two Escrow Agreements.

"The Dixie Machinery Company encountered financial difficulties, and at the present time, according to the Commission's records, has but one compensation claim outstanding against it. The company has ceased operations as an employer, but continued to pay on this claim up until May 4, 1941.

"The case in question is one of permanent total disability, and the award calls for the payment of compensation at the rate of \$16.00 per week for 300 weeks, and at \$6.00 per week thereafter for life, beginning June 27, 1937. The orders of the Commission in regard to this award had been complied with up to May 4, 1941, when payments ceased. The Commission, therefore, feels that the escrow deposits made to guarantee compensation payments should now be forfeited to satisfy the award.

"The employee in the case is in such physical condition that the Commission feels that commuting the payments now due and ordering them paid in a lump sum would not be to the best interest of the employee (see Section 3736 R. S. of Missouri 1939), and feels, too, in this case, that the commutation represents too much of a sacrifice in the total amount payable. The commutation, according to the actuary employed by the Commission to compute it, would amount to \$5731.14 as of July 10, 1941--the present value of the award.

"Considering these background facts, we now arrive at the question presented by Section 3737. The Commission wishes to know if, in compliance with this section which provides

that the employer may be 'discharged from further liability under an agreement, award or judgment for compensation by furnishing to the person entitled thereto an annuity or other obligation,' it could buy an annuity on behalf of the employee with the cash and bonds in escrow from an insurance company duly licensed in this state to issue such annuities, providing for the payment by such annuity at the frequency and in the amounts now provided for in the award."

Before entering upon a discussion of the legal aspects of the question presented, we desire to point out that the Ten Thousand Dollars (\$10,000) at Six Dollars (\$6.00) per week will pay this award for 1666-2/3 weeks, or 32 years and 2-5/7 weeks. The proposed commutation, as ascertained by the Commission, has a present (July 10, 1941) value of Five Thousand Seven Hundred Thirty-one dollars and Fourteen cents (\$5731.14). This sum will furnish the disabled claimant with Six Dollars (\$6.00) a week for 955-1/7 weeks, or 18 years and 19-1/7 weeks. The claimant, we are informed, is 27 years of age and therefore has a life expectancy of 37 years and 22-1/7 weeks. At Six Dollars (\$6.00) per week, over this period of time he should receive Eleven Thousand Six Hundred Seventy-six Dollars (\$11,676).

Thus, at best, (the whole Ten Thousand Dollars (\$10,000)) if nothing else may be done, this claimant stands to lose Six Dollars (\$6.00) per week for five years and nineteen and three-sevenths weeks - the difference between the maximum the \$10,000 will furnish and his life expectancy -, or One Thousand Six Hundred Seventy-Six Dollars (\$1,676). At the worst (commutation) he stands to lose Six Dollars (\$6.00) per week for nineteen years and thirty-six and one seventh weeks - the difference between the maximum amount he would receive if paid Six Dollars (\$6.00) a week for his life expectancy and the commuted present value - or Six Thousand One Hundred Forty-four Dollars and Eighty-six cents (\$6144.86). (All the foregoing figures are approximates).

In view of the great financial sacrifice that will result in this case from commutation, it is not suprising that the General Assembly has provided that "commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that unusual circumstances warrant such a departure" and has required that in order to do so it must appear "that such commutation will be for the best interest of the employee * * * *, or that it will avoid undue expense or undue hardship to either party, or that such employee * * * * has removed or is about to remove from the United States, or that the employer has sold or otherwise disposed of the greater part of his business or assets." (Sec. 3736 R. S. 1939).

We are informed that the Dixie Machinery Company has encountered financial difficulties and all its property and assets have been seized to satisfy tax liens. Clearly this is a disposition of the business or assets as contemplated by the foregoing section and we entertain no doubt but that the commission has authority to commute this award. However, in connection with commutation, Section 3736, supra, enjoins the Commission to "constantly bear in mind that it is the intention of this chapter that the compensation payments are in lieu of wages and are to be received by the injured employee * * in the same manner in which wages are ordinarily paid."

With that admonition in mind, we will proceed to see if the law does not permit some way for this claimant to receive compensation in lieu of wages for the balance of his life, or at least until the \$10,000 is consumed.

The Dixie Machinery Company was a self-insurer. Section 3713, R. S. 1939, provides:

"Every employer * * * shall insure his entire liability thereunder except as hereafter provided, with some insurance carrier * * *, except that an employer may himself carry the whole or any part of such liability without insurance upon

satisfying the commission of his ability so to do."

Pursuant to the authority granted to the Commission in Section 3751 R. S. 1939, the Commission has promulgated rules and regulations specifying what is required of a self-insurer to satisfy the commission of his ability to carry the liability. The pertinent rules are as follows:

"Rule 2. Security Required.--The employer shall furnish security in the minimum amount of \$3,000.00, and the Commission may, if it deems advisable in any particular case, require a larger amount. The employer will have the option of furnishing security in any one of three ways: (1) by filing with the Missouri Workmen's Compensation Commission an approved surety bond; (2) by depositing in escrow approved securities; or (3) by depositing cash in escrow.

"Rule 3. Method of Furnishing Security.--If a surety bond is given, the surety shall be a company authorized to transact such business in the State of Missouri. The bond shall be on a form prescribed by the Missouri Workmen's Compensation Commission.

"If securities are deposited in escrow, they shall be direct obligations (either bonds or notes) of the United States or of the State of Missouri. In lieu of depositing the securities aforesaid, the employer, at his election, may deposit cash in escrow in an amount equal to the par value of securities otherwise required to be deposited. If securities or cash are deposited, as above provided, the employer shall file with the Commission, on a form provided by the

Commission, an agreement providing that upon failure or neglect of the employer to make payment of compensation upon final award or final judgment (after employer has exhausted his rights or review and appeal under the Missouri Workmen's Compensation Law) all, or any part, of such securities, as the occasion may require, may be sold, and the proceeds thereof, as well as any cash deposited, shall be used to pay any compensation obligations which such employer has so neglected or refused to pay; but no securities shall be sold or funds used to make payments of compensation until after the Commission has given the employer ten (10) days' written notice to make payment.

"After an employer has secured his liability by any one of the methods heretofore and hereafter set out, and desires to substitute one form of security for the other, same may be done upon approval of the Commission."

In accordance with the above rules the Dixie Machinery Company has deposited in escrow with the Produce Exchange Bank of Kansas City the sum of \$3,000 in U. S. Treasury Bonds and \$7,000 in cash, under two agreements, each containing the following provision:

"That the party of the first part (Dixie Machinery Co.) and the party of the second part (Produce Exchange Bank) expressly agree that should the party of the first part, after the final adjudication of any compensation claim or claims and after ten (10) days' written notice by the Missouri workmen's Compensation Commission to said party of the first part to make payment of any and all amounts due, neglect, refuse or fail to pay any such obligation imposed upon said party of the first part by the

Missouri Workmen's Compensation Law as the result of being granted the privilege to carry its own liability under said Law, then upon written order of the Missouri Workmen's Compensation Commission, reciting such default, the party of the second part shall within ten (10) days (selling at the current market price if necessary any or all securities deposited) pay to the Missouri Workmen's Compensation Commission out of the cash deposited, and out of the funds obtained from the sale of the securities, if sold, the amount specified by said Commission in said order, sufficient to pay the obligations which the party of the first part has neglected, failed or refused to pay, so that said Commission may apply the same to the unpaid obligations of the party of the first part;".

It seems clear that under the above rules and escrow agreement it is contemplated that the Commission, in case of default in the payment of an award against a self-insurer, may forfeit a sufficient amount of the deposit to pay the "unpaid obligation" of the self-insurer. Here the self-insurer is in default at the rate of \$6.00 per week from May 4, 1941 - 14 weeks to August 9, 1941, or \$84.00.

We therefore think the Commission could, by making the necessary order, forfeit that sum, order it paid over to the Commission by the Produce Exchange Bank, and then apply the same to the unpaid award. The Commission could also create a greater unpaid obligation by commutation of the award and forfeit that sum, order it paid to the Commission and apply the same to pay the commuted award in full.

However, heeding the admonition, that the compensation provided is in lieu of wages, we feel that in order to comply with the intent of the Legislature, \$6.00 per week would have to be forfeited and paid over to the claimant rather than waiting until a substantial sum is in default. This procedure would entail a greater hardship on the Produce Exchange Bank, and for that

matter, the Commission too, and will fall One Thousand Six Hundred Seventy-six Dollars (\$1676) short of supplying this claimant Six Dollars (\$6.00) a week for the balance of his life expectancy.

Commutation is completely out of harmony with the intent of the act, and you advise the Commission does not deem it to the best interest of the claimant. Forfeiture of Six Dollars (\$6.00) per week will not accomplish the purpose of the Act. Therefore, we will no longer concern ourselves with these methods.

The question remains, as to what else may be done. You mention the purchase of an annuity insurance policy that will provide the employee Six Dollars (\$6.00) per week.

In connection with this, it is apparent that under the Act, that it was the intention of the Legislature that every liability would be guaranteed by an insurance carrier. We do not feel, that in authorizing self-insurers, the Legislature intended that an award against a self-insurer be any less secure. If the Dixie Machinery Company had not been a self-insurer, but had carried its liability with an insurance carrier, this question would never have been presented. This claimant would have gone on receiving his Six Dollars (\$6.00) per week for life. We approach the question with that fact in mind.

Section 3737 R. S. 1939, provides:

"On notice to other parties the Commission or court may permit the employer to be discharged from further liability under any agreement, award or judgment for compensation, by furnishing to the person entitled thereto an annuity or other obligation, approved by the Commission or Court, by which payment is assumed by some responsible person, or by depositing the commutable value thereof with the commission to be disbursed to the persons entitled thereto in such manner as the commission shall determine."

The question is: Does Section 3737, supra, authorize the Commission to cause the purchase of an annuity for this claimant, and, if so, will the amount determined as necessary for that purpose be an "unpaid obligation" of the Dixie Machinery Company that it is in default, so that the Commission may order the escrow agent, Produce Exchange Bank, to pay over a sum sufficient to meet said unpaid obligation?

It is arguable that Section 3737 grants a privilege to the employer alone, to be exercised by him if he so chooses, and the Commission or Court permits. Such a construction, of course, will prevent the Commission from exercising that privilege for the employer.

In *Soars v. Soars-Lovelace, Inc.*, 142 S. W. (2d) 866 (Mo. Sup.) the Court, in speaking of the authority of the Commission, said, l. c. 871:

"Like other administrative tribunals, it is a creature of the Legislature and does not have any jurisdiction or authority except that which the Legislature has conferred upon it."

However, in ascertaining the authority conferred, we find that it has been uniformly held, as evidenced by *Dauster v. Star Mfg. Co.*, 145 S. W. (2d) l. c. 503 (Mo. App.) that:

"The language used in the act and all reasonable implications therefrom shall be liberally construed to effectuate its purpose, and all doubts resolved in favor of the employee."

This latter rule is particularly enjoined on those who are charged with construction of the act by Section 3764 R. S. 1939, thereof.

It will be noted that Section 3737 not only speaks of relieving an employer from further liability on an award by furnishing an annuity or other obligation, but also provides for the same relief by "depositing the commutable value thereof with the commission to be disbursed to the persons entitled thereto in such manner as the Commission may determine." This certainly is not a privilege that may be exercised only if the employer so chooses, and has the consent of the Commission. We say this, because under Section 3736 R. S. 1939, the Commission may, if the facts warrant, "upon application of either party, with due notice to the other," commute any award to a lump sum. Therefore, if a claimant or employee so requests, the Commission by commutation could cause the employer to relieve himself of further liability, by payment in a lump sum, whether he desires to be so relieved or not.

It is difficult to see why the Legislature would authorize the Commission to cause an employer to relieve himself of further liability in the case of commutation, and not also extend the same authority to the Commission in connection with the employer being relieved from further liability by furnishing an annuity or other obligation.

Section 3737, supra, is not at all clear in the meaning. It says, "On notice to the other parties" but does not in terms provide who is to give said notice - the employer, employee or the Commission. However, the statute by use of the term "other parties" eliminates the Commission. If the notice is to be given to the "other parties" then these words clearly contemplate that one of the parties is the person that gives the notice. The Commission is not a party to a compensation proceeding. (Workmen's Compensation Law - Schneider, 2nd Ed. Vol. 2, p. 2095, Sec. 566) Further, as previously noted in the case of commutation of an award, it is provided such may be done "upon application of either party, with due notice to the other." Clearly that statute contemplates the applicant for commutation is the party who is to give notice to the other. Neither does said section expressly provide for an application to be made, but the Commission, not being a party, could not of its own motion institute a proceeding to relieve an employer of further liability. The invoking of the authority of the Commission in any respect presupposes an application by someone.

Therefore, it would appear that, if either employee or employer applies to have the employer relieved of further liability on an award by furnishing an annuity or other obligation, the party making the application is the one required to give notice to the other. However, as yet it does not appear that the employee may make such application.

Section 3737 further says "the commission * * * may permit the employer to be discharged * * *" Note that the underlined words are concerned with what the commission may do and not what the employer or employee may choose to do.

The word "permit" means "authorize" (Words and Phrases, Perm. Ed., Vol. 4, p. 836. Vol. 32, p. 148.)

Section 3737 further says "by furnishing to the person entitled thereto an annuity or other obligation." Of course, this clearly means that the employer is to provide the annuity, but again there is nothing about this language that necessarily restricts the right to make that choice to the employer alone.

Thus it appears that Section 3737 not restricting the privilege granted to either employer or employee, (the designation being "parties"), may be construed to mean that upon application of either employer or employee, on notice to the other party, the Commission may, if it sees fit, "authorize" an employer to relieve himself of future liability by furnishing an annuity or other obligation.

With respect to whether such authorization would be binding on the employer, in the sense that he could not refuse to follow that method in liquidating his future liability, we find that the Commission has control, without regard to the desire of either party, over the method whereby an award is to be paid. (Subject of course to be reviewed by the courts to determine if the facts support the method authorized. Mitchell v. Knutson, 137 S. W. (2d) 648 (Mo. App.)) However, it does not generally (in case of insurance carrier) have any power to enforce such award. McCoy v. Simpson, 125 S. W. (2d), 833 (Mo. Sup.)

Therefore, when any such award is made the employer is authorized to pay the same in a particular manner, such as a certain sum a week, a lump sum or perhaps part of both. The point is that the employer can only liquidate the award in the manner "authorized" by the Commission. If the award be not paid, then the employee has recourse to the courts to enforce the same. (Section 3733 R. S. 1939.) The Commission never, in such case, "requires" an award to be paid in a particular way. It only "authorizes" the way it shall be paid and the court by enforcing such an award, requires it to be paid in that manner. Therefore, the use of the word "permit" meaning "authorize" does not vest an employer with any right to refuse to liquidate his future liability by furnishing an annuity or other obligation, if the commission "authorizes" that method as the way in which the award shall be paid.

Thus we can see no reason why, upon application by an employee and notice to the employer, the Commission cannot, on an award of a certain sum each week for life, after a hearing and if the facts warrant, authorize the future liability of the employer to be liquidated, by said employer furnishing an annuity or other obligation to the employee that will provide that sum each week.

If such an award was against an employer carrying its liability with an insurance carrier, the courts would enforce the same. In the case of a self-insurer, it seems, there would be no necessity of resorting to court action. By Rule 3, supra, and the terms of the escrow agreement, the commission could cause the award to be paid, by forfeiting so much of the deposit as may be necessary to pay the award in the mode authorized.

Section 3737 does not in terms vest in the employer a right of choice as to the method that may be authorized to liquidate his future liability. Nor does such privilege exist by "reasonable implication." On the contrary, reasonable implication, when considered with the rights granted to employer and employee in connection with commutation, indicates that the opposite view is the implication to be drawn from the language used in Section 3737.

It is our view, construing the act liberally in favor of the employee, as required, and resolving any doubt in favor of the employee, that Section 3737 merely provides additional methods by which the Commission may authorize an award to be liquidated; that nothing therein should be construed as dependent upon a choice being made by the employer as a condition precedent to the right of the Commission to designate the manner in which the future liability of an employer on an award is to be liquidated. To rule otherwise in this case would frustrate the very object of the act - to provide compensation in lieu of wages. This is apparent because nothing but an annuity can provide this claimant with Six Dollars (\$6.00) a week for life, assuming, as we may, that he will live his life expectancy. It will require Eleven Thousand Six Hundred Seventy-six Dollars (\$11,676) to do that, and there is only a deposit of Ten Thousand Dollars (\$10,000) to guarantee this award. Further, it would work an inequity between employees of self-insurers and employees

those who carry their liability with an insurance carrier. The former would receive compensation in lieu of wages for life while the latter would only do so to the extent that the deposit made would permit. Such inequity should be avoided if the act permits. The purchase of an annuity will place such employees on an equal footing.

As heretofore illustrated, the Commission having the right to authorize the liquidation of an employer's future liability by furnishing an annuity or other obligation, in effect, when it does so, makes the cost thereof an obligation of the employer which, if not complied with, will be in default, and it may therefore, under its rules, forfeit so much of the deposit as may be necessary to comply with the terms of the award.

CONCLUSION.

It is therefore our opinion that the Commission may (1) forfeit the deposit periodically and require the same to be paid over to the Commission to apply on the unpaid obligation of the employer, that is in default, or (2) upon application and notice, after a hearing and if the facts warrant, it may authorize that the employer be relieved of future liability on the award by furnishing an annuity or other obligation, and upon the award becoming in default may forfeit a sufficient amount of the deposit and require it to be paid over to the Commission to be applied as authorized by the award.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

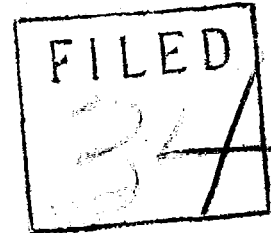
VANE C. THURLO
(Acting) Attorney General

LLB/rv

LIQUOR - State or county not liable for costs
(INJUNCTION) - or damages where injunction suit
is dismissed by prosecuting attorney.

February 18, 1941

Hon. Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
dated February 18, 1941, which reads as follows:

"Some time ago a suit was instituted
in the Circuit Court here entitled
State ex rel McKay, Prosecuting
Attorney, vs. Frank Werner, et al.,
being an action for injunction
against an alleged public nuisance.
A temporary injunction was granted
and the business closed. Later the
cause was dismissed by the Prose-
cuting Attorney.

"My inquiry is whether the County
is liable for the costs of this case,
and, if so, must they pay all the
costs? The defendant I understand
left here before the cause was dis-
missed by my predecessor and I don't
think any costs could be made off
him if he were liable."

Hon. Arthur U. Goodman, Jr. (2) February 18, 1941

We assume from the above statement of facts that this injunction was brought under Section 4943 and 4944 R. S. Missouri, 1939, under the Liquor Control Act.

Section 4944 R. S. Missouri, 1939, reads in part as follows:

"Sec. 4944. Action to enjoin nuisance - procedure. - That an action to enjoin any nuisance defined in this act may be brought in the name of the state of Missouri by the attorney general of the state of Missouri, or by any prosecuting attorney or circuit attorney of any county or city of the state of Missouri. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. * * * No bond shall be required in instituting such proceedings.
* * * "

Section 1671 R. S. Missouri, 1939, provides:

"No injunction, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for him, shall have executed a bond with sufficient surety or sureties

Hon. Arthur U. Goodman, Jr. (3) February 18, 1941

to the other party, in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction to the parties enjoined, or to any party interested in the subject matter of the controversy, conditioned that the plaintiff will abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved."

In reading the aforesaid two sections it will be noted that these sections provide that the State shall not be required to file a bond before the temporary writ of injunction is granted by the judge of the circuit court in which the injunction suit is brought.

In the case of Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505, 1. c. 506, the Court had this to say:

"The Circuit Court erred in overruling the demurrer of defendant, and the judgment cannot be sustained. There can be no recovery of damages arising from an injunction, except in an action on the bond, unless it be averred and shown that the process of the court was abused maliciously and without probable cause."

Hon. Arthur U. Goodman, Jr. (4) February 18, 1941

In the case of The City of St. Louis v. The St. Louis Gaslight Company, 82 Mo. App. 349, l. c. 354-357, the Court had this to say:

"* * * In Palmer v. Foley, 71 N. Y. 106, Judge Folger expresses this condition of the law:

"' It seems that without some security given before the granting of an injunction order, or without some order of the court or a judge, requiring some act on the part of the plaintiff which is equivalent to the giving of security such as a deposit of money in court -- the defendant has no remedy for any damages which he may sustain from the issuing of the injunction, unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution.'

* * *

"* * When a suitor procures a writ or order of injunction upon a fair presentation of facts to the court in good faith he has never been regarded as responsible in damages therefor, either in law or equity, unless he has made himself so by some voluntary undertaking. In such case he stands before the law like a suitor in any other process or proceeding. This I understand to be the rule, as universally recognized and approved. (Cases Cited) If, therefore, the plaintiff, in the absence of an undertaking

Hon. Arthur U. Goodman, Jr. (5) February 18, 1941

to indemnify, is exempt from damages consequent upon an interlocutory order of injunction when dissolved, a fortiori he will be exempt in the absence of such undertaking, when the injunction issues only after a final hearing upon the merits of the case. In this case there was no promise or undertaking of any kind to indemnify the defendant in the event of a dissolution of the injunction by reversal on appeal.

* * *

"* * A suit in which no bond or undertaking is provided for by law or exacted by the court, as to any damages resulting to the defendant from a legitimate prosecution thereof, presents an instance of damnum absque injuria, and is like any ordinary suit which leaves the defendant heir to much inconvenience and pecuniary loss, notwithstanding a final judgment in his favor.* * "

We do not find where the Legislature has ever passed any specific statute placing the obligation upon the State or the county to pay the costs, or to be liable for damages where an injunction suit is instituted by the State, and where these statutes specifically provide that the State shall not be required to give bond, it is our opinion that even though this suit was dismissed after the temporary writ was granted by the Court, that no costs or damages can be collected, for the reason that, as

Hon. Arthur U. Goodman, Jr. (6) February 18, 1941

was said in the Iron Mountain Bank case, supra, there can be no recovery of damages arising from an injunction, except in an action on the bond. There being no bond or any specific statute we see no way whereby the State or county could be held liable for the costs or damages.

Respectfully submitted,

E. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC:RW

TOWNSHIP ORGANIZATION: Outstanding warrants from the road and bridge fund of 1937-38-39 cannot be paid from the general revenue fund at this time. At the close of the fiscal year warrants may be paid out of any revenue remaining or from surplus or back taxes.

May 24, 1941

Honorable Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri



Dear Sir:

This department is in receipt of your letter of May 14, 1941, wherein you make the following inquiry:

"Dunklin County operates under the township organization law, and one of our townships has outstanding a number of Road & Bridge Fund Warrants for 1937, 1938, 1939 and 1940. Its road and bridge fund is depleted, but it has ample money in its general fund at this time.

"I would like to know if any of these road & bridge fund warrants can be paid out of the general fund."

The legal presumption is to the effect that when warrants are outstanding, payable out of a certain fund, that only the revenue of that fund can be used for the retirement of the warrants. If there are outstanding warrants from previous years, the only method by which the warrants can be paid is by back taxes or a surplus after all warrants and obligations of the current year have been met.

We think the decision of State ex rel. v. Johnson, 162 Mo. 621, and later followed and approved in the decision of Douglas County v. Bank of Ava, 333 Mo. 1195, l. c. 1200, is applicable wherein it was held that a county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued; that the surplus

Hon. Arthur U. Goodman, Jr.

-2-

May 24, 1941

county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years. We think this decision is applicable in the case of a township. Therefore, if at the close of the fiscal year there remains any surplus or there are any funds in the general revenue fund of the township which is not obligated or there are no other outstanding warrants which should be paid from the general revenue fund, the outstanding warrants for 1937-38 for the road and bridge fund may be paid from said general revenue fund, and in addition thereto, as stated above, any surplus from the current year resulting in the road and bridge fund may be used to pay the warrants; likewise, funds resulting from back or delinquent taxes.

Respectfully submitted

OLLIVER W. NOLAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN:DA

TOWNSHIP ORGANIZATION - Board of Directors of township
may furnish an office for justices
of the peace. However, there is
no statutory duty to do so.

July 9, 1941

7-11



Hon. Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

We are in receipt of your request for an opinion,
under date of July 3, 1941, which reads as follows:

"Dunklin County operates under the township organization law, and a controversy has arisen in one of our townships relative to the township board furnishing office space in their office for a justice of the peace. The members of the township board leased an office and same was occupied and used by the clerk & assessor, treasurer & trustee, board members, tax collector, and two justices of the peace. However, the board decided to move the office and notified one or possibly both justices there would not be room for them to have space in the new office, or words to that effect, according to my information.

"Please favor me with an opinion as to whether, under the above facts,

Hon. Arthur U. Goodman, Jr. (2)

July 9, 1941

a justice of the peace is entitled to use a part of the township office for his official business."

Section 13945 R. S. Missouri, 1939, reads as follows:

"There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, and one township clerk, who shall be ex officio township assessor, one constable, two members of the board, and two justices of the peace: Provided, the same persons may be elected members of the board and justices of the peace, at the same election, and hold both offices; also the same person may be elected constable and collector at the same election and hold both offices at the same time, by taking the proper oath of each office and giving the bond required by law."

It will be noted from reading this Section, that the office of justice of the peace stands on an equal footing with the other offices to be chosen in the township. Further, it will be noted, in Section 13946 R. S. Missouri, 1939, that provision is made for election of additional justices of the peace, in townships of certain population.

Section 13933 R. S. Missouri, 1939, provides as follows:

"Each township, as a body corporate, shall have power and capacity: First,

July 9, 1941

to sue and be sued, in the manner provided by the laws of this state; second, to purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of the general assembly; third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers; fourth, to make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof; fifth, to purchase at any public sale, for the use of said township, any real estate which may be necessary to secure any debt to said township, or the inhabitants thereof, in their corporate capacity, and to dispose of the same."

In the interpretation of this Section, we call attention to the case of *State ex rel Jordon v. Haynes*, 72 Mo. 377, 1. c. 379, where the court said:

"A building suitable for the purposes of township meetings, as well as for the various officers of the township, would seem to be as much a necessity as a similar provision for county officers. The legislature certainly never contemplated that a township should not possess ordinary facilities for the transaction of its corporate business. Will it be seriously contended that such business should be transacted in the open air? If, as much be admitted from the express language of the law, the township has the power

July 9, 1941

'to purchase and hold real estate within its own limits, for the use of its inhabitants,' to what conceivable purpose could such purchase be applied, except for the purpose which resulted in the issuance of the warrant in controversy? We are certainly at a loss to conceive of any other. In Wisconsin, under a similar statute, it was held that: 'The public use of the inhabitants demanded a sufficient and convenient room for all election and town meeting purposes.' Town of Beaver Dam v. Frings, 17 Wis. 398. From the foregoing considerations and authority, we take it to be very clear that the purchase of the site and the erection of the hall thereon, was abundantly authorized.

"The only remaining point requiring discussion is, as to whether the powers conferred for the purposes mentioned were to be exercised by the citizens of the township assembled en masse, or by the board of directors. We think by the latter. * * *"

You will note from reading this decision of the Supreme Court that nearly an identical situation arose in this case as the one to which you refer in your opinion request. Through the enactment of Section 13945, supra, it is evident that the legislature has placed justices of the peace on an equal footing with other township officers, and we think rightly so, because of the importance of their office, in both civil and criminal cases.

As said in the Haynes case, supra, could it be "seriously contended that such business should be transacted in the open air?"

Hon. Arthur U. Goodman, Jr.

(5)

July 9, 1941

We are of the opinion that the Haynes case, *supra*, is only authority for the proposition that the Board of Directors of the Township may, if they see fit, provide suitable office space for township offices. However, it will be noted in reading the various Sections contained in Chapter 101 R. S. Missouri, 1939, that there does not appear any Section which casts a statutory duty upon the Board of Directors to furnish an office to the justices of the peace of the township.

CONCLUSION.

We are of the opinion that under the authority of the case of *Jordon v. Haynes, supra*, that the Board of Directors may furnish an office to a justice of the peace, but there is no statutory duty cast upon the Board to furnish an office. Therefore, it is discretionary with the Board.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

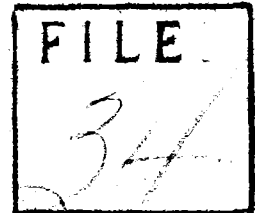
VANE C. THURLO
(Acting) Attorney General

BRC:RW

TOWNSHIP CLERK: Is entitled to ten cents for filing a cancelled warrant and ten cents for each complaint or statement filed with him as clerk of the township board.

September 26, 1941

Honorable Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri



Dear Sir:

We are in receipt of your request for an opinion dated September 16, 1941, which reads as follows:

"Please favor me with an official opinion as to the fees which may be legally charged and collected by a township clerk and assessor.

"Can such clerk and assessor legally collect \$100.00 annually for making up reports as to the amount of money each school district has on hand, etc.? This refers to the annual reports to the County Superintendent of Schools.

"Can such clerk and assessor legally charge and collect 20¢ for each check issued by the Treasurer (presumably 10¢ for the check and 10¢ for the claim filed) and/or 10¢ for filing such check when it is returned by the bank? I am informed at least one clerk has collected a total of 30¢ on each check issued."

The law applicable to your request is Section 13987, R. S. Missouri 1939, which reads as follows:

"The township clerk, as clerk, the township trustee, as trustee, members of the township board, and judges and clerks of election, shall each receive for their services two dollars and fifty cents per day:

Provided, that the township clerk shall receive fees for the following, and not per diem, for serving notices of election, or each: For filing any instrument of writing, ten cents; for recording any order or instrument of writing, authorized by law, ten cents for every hundred words and figures; for copying and certifying any record in his office, ten cents for every hundred words and figures, to be paid by the person applying for the same; and provided further, that the township trustee as ex officio treasurer shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent of all sums over said amount."

Under the above section it specifically allows, as salary to a township clerk, as clerk, a per diem of two dollars and fifty cents per day. It further allows the township clerk certain fees, which fees are to be paid in lieu of a per diem salary. The first provision is the filing of any instrument of writing for which the clerk shall receive ten cents. The second provision is for the recording of any order or instrument of writing authorized by law for which the clerk shall receive ten cents for every one hundred words and figures. The third provision is for copying and certifying any record in his office for which he shall be allowed ten cents for every one hundred words and figures to be paid by the person applying for the same. In all, the section only provides for a certain fee for filing, for recording and for copying. This section does not contain any provision for the payment of the township clerk for making up reports as to the amount of money each school district has on hand, that is, an annual report to the county superintendent of schools. The only reference we find as to the payment for reports made to the county superintendent of schools appears in Section 13967, R. S. Missouri 1939, which provides that the township trustee and ex officio treasurer "shall file with the township clerk on or before the day of the regular meeting of the township board in April a detailed statement of all money by him received

and paid out, to whom and out of what fund, and the amount on hand, * * " The fee for the filing of the above report by the township trustee and ex officio treasurer should only be ten cents as set out in Section 13987, supra, under the provision "for filing any instrument of writing ten cents."

In order that the township clerk should charge fees for certain services he must be able to point out the statute authorizing such fees. We have been unable to find where the township clerk is entitled to collect one hundred dollars annually for making up any school report to the county superintendent of schools. In the case of *State ex rel. v. Brown*, 146 Mo. 401, 1. c. 406, the court, in holding that an officer is only entitled to statutory fees, said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. *State ex rel. v. Wofford*, 116 Mo. 220; *Shed v. Railroad*, 67 Mo. 687; *Gammon v. Lafayette Co.*, 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' *Williams v. Chariton Co.*, 85 Mo. 645."

Also, in the case of *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 860, par. 8, the court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S. W. 532, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S. W. 655; *Williams*

v. Chariton County, 85 Mo. 645."

CONCLUSION

In view of the above authorities it is the opinion of this department that a township clerk and assessor cannot legally collect one hundred dollars annually for making up reports as to the amount of money each school district has on hand which report in your request is described as an annual report to the county superintendent of schools.

The second question in your request refers to the issuing of checks. I presume you mean the issuing of warrants by order of the township board. The section applicable is 13983, R. S. Missouri 1939, which reads as follows:

"When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed-- said order to be signed by the president of said board, and attested by the township clerk and delivered to said claimant."

We find no provision in Section 13987, supra, for the payment of a fee for the drawing of any instrument; in fact that section only provides a fee for filing, recording or copying, and in view of State ex rel. v. Brown, 146 Mo. 401, 1. c. 406, and Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860, par. 8, it is our opinion that the township clerk is not entitled to any fee for the issuing of a warrant on the order of the township board. Under Section 13978, before a claim shall be allowed by the township board it must be filed with the township clerk or with the board when in session and must be verified to the amount and nature of the claim setting forth that the same is correct and unpaid. For the acceptance of this filing of claim under Section 13987, the township trustee is entitled to ten cents for each claim filed.

In your second question you also inquire if the town-

ship clerk is entitled to a fee for filing the returned, cancelled check which means, I presume, the returned, cancelled warrant. In this state the courts have held that a paper or document is said to be "filed" when it is delivered to the proper officer and lodged by him in his office. At common law a file meant a thread, string, or wire upon which writs and other exhibits of courts and officers were fastened or "filed" for the more safe-keeping, and right turning of the same. Barber Asphalt Paving Co. v. O'Brien, 107 S. W. 25, 29, 128 Mo. App. 267. In other states it has been held that a paper is "filed" when it is delivered to the proper officer, and by him received to be kept on file. King v. Atlantic Coast Line R. Co., 68 S. W. 769, 770, 86 S. E. 510; Smith v. Geraty, 109 N. Y. S. 738, 739, 58 Misc. 556; Meek v. State ex rel. Linville, 88 N. E. 299, 301, 172 Ind. 654; Yaltz v. State, 103 P. 1104, 1105, 3 Okl. Cr. 20; Falley v. Falley, 50 So. 894, 895, 163 Ala. 626.

Since the warrant is returned to the township clerk after having been paid, it should be placed in the proper file with the claim as filed before the township clerk, and for that reason it is our opinion he is entitled to ten cents for the filing of the cancelled warrant.

CONCLUSION

In view of the above authorities it is our opinion that under Section 13978, supra, which describes the procedure of presenting claims against a township, upon the filing of the statement of the claim with the township clerk he is entitled to ten cents and upon the filing of the cancelled warrant he is entitled to ten cents, under Section 13987, R. S. Missouri 1939, so that on any one claim, which has been paid by a warrant drawn on order of the township board, the most that a township clerk can receive is ten cents for the filing of the claim and ten cents for the filing of the cancelled warrant.

It is further the opinion of this department that the township clerk is not entitled to any fee for the drawing of the warrant for the reason that the allowance is not set out in Section 13987, supra, but only provides a fee of ten cents for the filing, and not the drawing, of any instrument of writing.

Hon. Arthur U. Goodman, Jr.

-6-

September 26, 1941

It is further the opinion of this department that the township clerk is not entitled to collect one hundred dollars annually for making up reports as to the amount of money each school district has on hand but is entitled to a fee of ten cents for the filing of the report of the township trustee in the office of the township clerk a detailed statement of the financial condition of the township as set out in Section 13967 R. S. Missouri 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

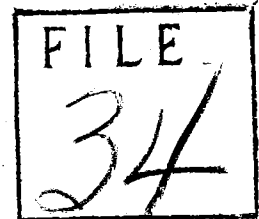
VANE C. THURLO
(Acting Attorney General)

WJB:DA

TAXATION: SALES TAX LIEN: Lien created by filing of sales tax assessment does not violate the due process clause of the constitution.

✓ / 16
November 13, 1941
11-14

Mr. Arthur U. Goodman, Jr.
Prosecuting Attorney
Kennett, Missouri



Dear Mr. Goodman:

This is in reply to your letter of recent date in which you request an opinion from this department on the question of whether or not the provisions of the sales tax act authorizing the State Auditor to file a notice of lien for the sales tax against persons showing a delinquent sales tax violates provisions of the constitution. You do not state in your letter to what particular provisions you refer and we assume that you have reference to the "due process" provisions of the constitution.

Ordinarily, administrative officers are not authorized to raise the constitutionality of laws which they are directed to administer. For your information I refer you to State ex rel. v. Williams, 232 Mo. 56. In this case the Supreme Court went into this question and cited a number of cases from other states. However, in view of the request and the law which we find on this question, we do not hesitate to submit the views of this department on this question.

The section of the statutes to which you refer provides as follows: (Laws of Mo. 1941, page 709, Section 11435)

"If any case in which any tax, interest or penalty imposed under this Article is not paid when due, the Auditor may file for record in the Recorder's office of the county in which the person owing said tax, interest or penalty resides or has his place of business, a notice of lien specifying the amount of the tax,

November 13, 1941

interest or penalty due and the name of the person liable for the same. From the time of filing any such notice the amount of the tax specified in such notice shall have the force and effect of the lien of a judgment against the person named in said notice of lien for the amount specified in such notice. Such lien may be released by filing for record in the office of the county recorder a release thereof executed by the Auditor upon payment of the tax, interest and penalties or upon receipt by the Auditor of security sufficient to secure payment thereof, or by final judgment holding such lien to have been erroneously imposed."

As stated above, the only sections of the Constitution which might prohibit such legislation, as we see it, are Amendments 5 and 14 of the Federal Constitution, and Section 30 of Article 2 of the State Constitution. The foregoing section of the Sales Tax Act is similar to Section 11086, R. S. Mo. 1939, authorizing the collector to seize and sell goods and chattels of persons liable for personal taxes. This section was attacked in *DeArman v. Williams*, 93 Mo. 158, on the ground that it deprived the property owner of property without due process. At 1. c. 163 the Court in speaking of this assignment said:

"2. The law (Acts of 1883, p. 143) provides that, when any person owing personal tax removes from one county in this state to another, it shall be the duty of the collector of the county from whence such person shall move to send a tax bill to the sheriff of the county into which such person may be found, and, on receipt of the same by said sheriff, it is made his duty to proceed to collect the tax bill in like manner as provided by law for the collection of personal taxes. The point made, that the tax bill issued under this statute is not 'due process of law,' is not well taken.

The mode of levying and collecting taxes is a matter confided to the legislative power, and such laws are 'laws of the land'. Cooley on Taxation (2 Ed.) 48, 49. This statute operates alike upon all persons who, owing a personal tax, move from one county to another, and is not open to the objection made to it. The tax-book, in the hands of the collector, constitutes his warrant and authority for collecting the tax. North Missouri Railroad v. Maguire, 49 Mo. 481. * * * ."

The lawmakers in passing the Sales Tax Act provided a mode of assessing and collecting this tax. As said in the Williams case, supra, this is a matter which is confined to the legislative power. It will be noted that the Court in the Williams case also said that the personal tax bill issued for personal taxes is not in violation of the due process clauses of the constitutions. For the same reason, said Section 11435, supra, is not in violation of the due process clause.

CONCLUSION

It is therefore the opinion of this department that the provisions of the Sales Tax Act which authorized the State Auditor to file notice of lien for sales taxes does not violate the due process clauses of the State and Federal Constitutions.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

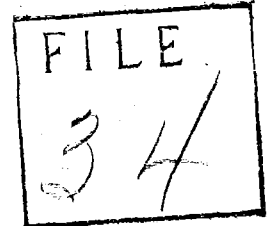
VANE C. THURLO
(Acting) Attorney General

TWB:NS

COLLECTORS COMMISSIONS: Township collectors should include income tax collections with general taxes collected in calculating their commissions for collecting taxes.

December 5, 1941

✓✓✓
Mr. Arthur U. Goodman, Jr.
Prosecuting Attorney
Kennett, Missouri



Dear Sir:

We are in receipt of your request for an official opinion under date of November 5, 1941, as follows:

"Dunklin County operates under the township organization law, and the township collectors collect income tax as well as the general real and personal property tax. Under Section 14014, R. S. Mo. 1939, the collector is allowed a commission of 2½% on the first \$40,000.00 collected, etc.

"Should the income tax collected by the township collector be included in computing the \$40,000.00 on which the collector is allowed 2½% on the first \$40,000.00 of general taxes collected?"

The fees of township collectors for collecting general taxes in counties under township organization are fixed by Section 14014, R. S. Mo. 1939. The portion of this section which applies to the question here is as follows:

"* * * He shall receive a commission of two and one-half per cent on the first forty thousand dollars collected; one per cent on the next forty thousand dollars collected; and three fourths per cent on the remainder of all moneys collected by him. * * *"

The question here involved, as stated above, is whether or not the amount of income tax collected by the township collector should be included in computing the \$40,000.00 upon which the collector is allowed the 2½% commission on the first \$40,000.00 of general taxes collected. The

Income Tax Act, in so far as it applies to compensation of collectors for collecting the tax is as follows (Sec. 11364, R. S. No. 1939):

"Compensation of assessors and collectors.
--Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by assessors and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state."

From your request we assume that your collector is not one on a salary basis which comes within the proviso clause of the foregoing section. It seems that in this section the lawmakers contemplated that in cases where the collector is on a salary basis, then the collector is entitled to retain as salary the additional charge he is permitted to make for work performed in assessing and collecting income taxes. If the collector is not required to take into consideration the amount of income tax collected, in computing his commission, then he would not be compensated for collecting said taxes in like manner and in like amounts, as provided by Section 11364.

The township collector in question should collect income taxes in his township the same as other personal or real estate taxes and he is legally entitled to compensation for collecting said taxes in like manner and in like amounts as for other taxes collected by him. It would necessarily follow that the township collector is allowed a commission of $2\frac{1}{2}\%$ on all taxes collected by him, including income taxes, in computing his commissions.

Mr. Arthur U. Goodman, Jr. -3-

December 5, 1941

CONCLUSION

From the foregoing, it is the opinion of this department that the township collector in a county which operates under township organization, is entitled to $2\frac{1}{2}\%$ commission on the first \$40,000.00 of all taxes collected by him, including income taxes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. TURLO
(Acting) Attorney General

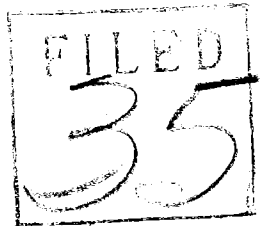
TWB:NS

ROADS AND BRIDGES: Taxpayer, in special road district, must also pay, in addition, general taxes issued for road purposes. Bonds voted on by entire township must also be paid by taxes received from a special road district where no outstanding bonds are against the special road district or any part of the special road district.

January 20, 1941

Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

1-24



Dear Sir:

We are in receipt of your opinion request, under date of January 13, 1941, which reads as follows:

"A question is being raised by some of the citizens of this county, taxpayers in one of the Municipal Townships, upon which I would like to have your advice and instructions.

"Livingston County has adopted and is operating under the Township Organization Law. In one township there is a Special Road District, consisting, however, of only a portion of the township and altogether in that particular township.

"The rate of taxation allowed by the Constitution in this County is \$.50 on the \$100.00 valuation, of which the County Court levies, 80% for County purposes and 20% for township purposes. The citizens who reside in this road district feel that they ought not to pay as much as 10¢ on the \$100.00 valuation for township purposes in view of the fact that, as they say, a portion of the levy for township purposes is used on the public roads in the township outside of the special road district. They insist that the purposes for which

Hon. Charles S. Greenwood

(2)

January 20, 1941

tax should be levied should be collected only for township charges under Section 12303, and that they ought not to be taxed for road purposes and that they ought not to be charged and required to pay taxes for use on roads outside of the Special Road District."

In answer to the first part of your request, as above set out, I am enclosing copy of an opinion rendered to the Honorable Forrest Smith, State Auditor, on July 2, 1934, which I believe fully answers your request. In that opinion this department held that in view of Section 22, Article X of the Constitution, persons in special road districts also were liable for the general road and bridge tax levied by the township board. This opinion almost answers the second part of your request which reads as follows:

"There is another question which some of them are raising and that is:-- Recently the township voted bonds for construction of gravel roads apparently without recognizing the fact that this Special Road District has sole charge of the public roads within its district; but these citizens say that the bonds were voted by the entire township and some of them question the validity of the bonds and of the tax levied to raise a sinking fund and to pay interest on these bonds.

"I would like to have any suggestions that you feel justified in making as to what opinion I would be justified in giving to these people with respect to these two questions."

Section 12304, Article 8, Chapter 86, R. S. Missouri 1929, which applies to township organization, reads as follows:

"The moneys necessary to defray the township charges of each township shall be levied on the taxable property in such township, in the manner prescribed in the general revenue law for state and county purposes."

Under the above section the levying of a tax reverts back to the general revenue law for state and county purposes.

Under Sections 7957, 7958 and 7959, R. S. Missouri 1929, which apply to bond elections, the county court has the authority to issue bonds for the improvement of public roads. Also, under Section 7960, R. S. Missouri 1929, the board of commissioners of any special road district and the county courts of the several counties on behalf of any township in their respective counties are authorized to issue road bonds. Sections 7961 and 7962, R. S. Missouri 1929, apply to the election for the issuing of said bonds. Section 7964, R. S. Missouri 1929, reads as follows:

"The four next preceding sections, to-wit: sections 7960, 7961, 7962 and 7963, R. S. 1929, shall not apply to any township, the whole or any part of which is included in a special road district that has issued bonds, the whole or any part of which are outstanding and unpaid; nor shall said sections apply to any special road district which includes the whole or any part of any township which has issued bonds for road purposes, the whole or any part of which bonds are outstanding and unpaid, nor shall said sections apply to any special road district which includes the whole or any part of the territory of any other special road district which has incurred an indebtedness evidenced by an issue of bonds, the whole or any part of

which are outstanding and unpaid."

This section was originally Section 10751, R. S. Missouri 1919, but was amended by the Laws of 1923.

Section 10751, R. S. Missouri 1919, reads as follows:

"The four next preceding sections shall not apply to any township where the whole township or any part thereof is included in a special road district, nor to any special road district including the whole or a part of a township which has heretofore issued bonds for road purposes which remain unpaid."

It was held in State ex rel. Jackson et al., County Judges, v. Hackmann, State Auditor, 249 S. W. 71, that a township which was included in the whole or part within a special road district was precluded from issuing any bonds for road purposes pursuant to Sections 10747-10751, whether or not the special road district of which it was a part had heretofore issued bonds that remain unpaid. In arriving at the conclusion in that case the Supreme Court said, l. c. 73:

"It is sufficient for us that the Legislature has clearly provided that townships wholly or partly within a special road district have no power to issue bonds for road purposes. The wisdom of such enactment was for the Legislature and is not for the courts. But a very good reason for such an enactment, outside the undesirable double taxation feature above discussed, is apparent. Special road districts often include several townships or part of townships. Were it not for section 10751, a

single township, within or partly within the district, could readily defeat the will of the great majority of the voters in a special road district to vote bonds for needed road purposes by proceeding for itself to vote a small amount of township road bonds extending in duration the full period fixed by section 10747, and thus tie up the special road district and prevent proper and needed improvement of roads therein for many years.

"It further seems apparent that while the Legislature intended to give townships, no part of which were contained in special road districts, the full right to vote bonds for road purposes, yet, whenever a special road district is organized and has taken in such township or part thereof, it tended to transfer to such special road district the management and control of road matters and the sole power thereafter to issue bonds for such purposes. The township is a political subdivision, organized for various governmental functions, while the special road district is a political subdivision created solely for the purpose of taking care of road maintenance and road construction problems within its boundaries. It is more fitting that all matters of voting bonds for road purposes should be committed to the special road district where it exists, and such, apparently, was the theory of the Legislature in enacting section 10751.

"We are satisfied the Legislature

clearly expressed its meaning in enacting said section 10751, R. S. 1919, just as it is printed, and that it meant to continue to deny to townships, wholly or partly within a special road district, the right to issue road bonds, which right it had so clearly and expressly denied in the act of 1911. Since Franklin township in Howard county is admitted to lie partly within a special road district, it follows that said township had no authority to issue the road bonds in question and that the state auditor was right in refusing to register the same."

In rendering this opinion, they construed the Legislature to mean that any township, lying partly within a special road district, was not empowered to issue road bonds and it made no difference if no bonds had been issued by the special road district. This case was handed down by the Supreme Court of Missouri, in Banc, on March 3, 1923, and the Legislature, in 1923, in view of the opinion of the Supreme Court, amended Section 10751, R. S. Missouri 1919, by what is now Section 7964, R. S. Missouri 1929, supra, which is unambiguous as to the intention of the Legislature. By reading this section, as amended, a township which is wholly or partly in a special road district, which road district has not issued bonds will still come within Sections 7960, 7961, 7962 and 7963 of the Revised Statutes of Missouri 1929. It further specifically allows any special road district, which includes wholly or partly any township, which township has not issued bonds for road purposes, to come within the above four named sections, and it specifically allows a special road district, which is wholly or partly in the territory of another special road district, which other special road district has not issued bonds, to come within the four above named sections.

The reenactment of Section 7964, R. S. Missouri

Hon. Charles S. Greenwood

(7)

January 20, 1941

1929, clearly shows that the intention of the Legislature was not the intention interpreted by the Supreme Court in the case of State ex rel. Jackson v. Hackmann, supra. If that was not the intention, the Legislature, in 1923, would have omitted the phrase as to each parcel of township or road district having issued bonds that are unpaid.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the recently voted township bonds for construction of gravel roads in the township voted upon by the entire township is a valid issue if the special road district in the township has no outstanding bonds unpaid, or if the special road district also includes the whole or any part of the territory of any other special road district which other special road district has no outstanding bonds unpaid.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED: .

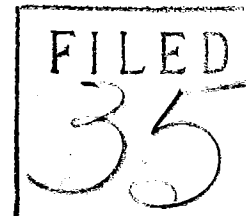
COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

SCHOOLS: Board can levy more than forty cents for a sinking fund if it does not violate the Constitution. Excess in interest fund can be transferred to sinking fund.

4/18
April 16, 1941

Mr. D. E. Grotjan, Secretary
Board of Education
Brunswick Public Schools
Brunswick, Missouri



Dear Sir:

This Department received your letter of sometime ago, wherein you make the following inquiry:

"At the time our school building was erected about ten years ago, our bond maturities were arranged to be paid off so that a forty cent levy on the valuation of the district would raise sufficient revenue to take care of the bonds as they became due. The valuation of our district since that time, has steadily declined until at the present time our district valuation is only about fifty three percent of the 1931 valuation. As a result of this decline in the valuation the sinking fund levy of forty cents will now raise only approximately two thousand five hundred dollars per year. The outstanding bonds mature at the rate of four thousand dollars per year for the next two years, and then at the rate of five thousand dollars per year. So that the only way the district can retire the bonds as they mature, is to levy more than forty cents sinking fund.

"At the present time there is quite a large surplus accumulated in the interest fund of the district. In order to retire the bonds as they become due, it has been suggested that this surplus be applied to bond retirement. If this was done, would members of the board incur liability, or would the board have the right to so apply funds raised by interest levy to bond retirement?

"Please write us giving your opinion whether we would be within our legal rights to levy more than forty cents sinking fund, whether it would be legally possible to use interest levy money to retire bonds or whether we will be forced to default on some of the bonds as they become due."

It is assumed that the bonds were originally issued under authority of Section 10328, R. S. Mo. 1939. The provisions for creating a sinking fund and the interest on bonds is contained in Section 10331, R. S. Mo. 1939, as follows:

"The loan authorized by the preceding section shall not be contracted for a longer period than twenty years, and the entire amount of said loan shall at no time exceed, including the present indebtedness of said district, in the aggregate five per cent of the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of said indebtedness, the rate of interest to be agreed upon by the parties, but in no case to exceed the highest legal rate allowed by contract; when effected,

it shall be the duty of the directors to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within the time said principal shall become due."

It appears that the present rate of taxation does not produce sufficient revenue to retire the principal of the bonds but that you have a surplus in the interest fund. It is a general rule of law that money collected by taxation for specific purposes should not be diverted from one fund to another except according to law and by the proper authority. *Cleveland Village School District v. Zion*, 195 Mo. App. 299.

In the decisions of *Benton v. Scott*, 116 Mo. 378, and *Evans v. West Plains*, 186 Mo. 703, the holdings are that when bonds are legally voted and issued no subsequent assent of the voters is necessary to authorize a tax levy to meet the annual interest and create the sinking fund to pay the principal of such bonds.

In the decision of *Lyons v. School District of Joplin*, 311 Mo. 349, the discretion and judgment as to the amount of the levy necessary for retiring bonds and paying the interest is largely in the hands of the Board of Directors.

Therefore, in the absence of any Constitutional barriers, such as Sections 11 and 12 of Article X of the Constitution, which fact can be determined by computing the total amount of levy that can be assessed, we are of the opinion that the Board may levy more than forty cents for the sinking fund.

As to the question of using the excess interest for the sinking fund, we are of the opinion that to use the same would not constitute diversion of funds from one purpose to another as, under the section the Board is authorized to make a levy for both the sinking fund and interest, and they are treated in the nature of one. We need no authorities to the effect that a bond is a contract between the debtor and creditor wherein the debtor is equally liable for

Mr. D. E. Grotjan

-4-

April 16, 1941

the principal and interest the same as in the case of a promissory note. Therefore, if there is an excess in the interest fund and the same can be transferred to the sinking fund without jeopardizing the current interest on the bonds we are of the opinion that such transfer may be made.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

OWN:CP

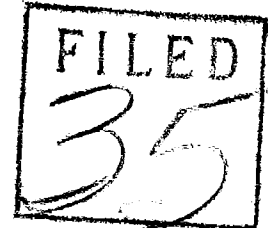
JUSTICES OF THE

PEACE: No specific constitutional or legislative prohibition against justices of the peace soliciting marriage ceremonies.

April 21, 1941

4-29

Hon. Joseph L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri



Dear Sir:

We are in receipt of your letter of April 19, 1941, wherein you make the following request for an opinion:

"Clark County is in the extreme north-east corner of the state, bounded on the east by the state of Illinois and on the north by the State of Iowa. Therefore many people come from both states to get marriage Licenses.

"Since Iowa has passed the three day waiting period and the physical test, many more come to this county to get married and on Saturdays 30 or 40 get married (I mean couples).

"There are two justices of peaces in this town and one of them employs people to contact people who come out of Iowa and Illinois and ask them to be married before this particular justice. This creates an adverse atmosphere here and many people do not like the fact that solicitation is made for marriages. I,

Hon. Joseph L. Gutting

(2)

April 21, 1941

as well as they, fear that if this can legally be done then the situation will grow worse and the other justice will be forced to do it. One of the persons so solicitating said he was doing it for nothing, however anyone knows he was doing it for pay or he would not be doing it.

"I would appreciate it if you would give me an opinion on the matter as to whether or not it can be stopped and if so how. As I remember, Justice hart of St. Louis was ousted out of office for the same practice but could continue as he was an ordained minister but could not as a justice of peace."

At the outset we wish to state that our office has had similar requests for opinions and we are enclosing an opinion which was rendered by this office on January 20, 1941, to Hon. James D. Clemens, Prosecuting Attorney of Pike County, Missouri. The opinion enclosed does not answer the identical question that you asked in your letter, but we thought perhaps that due to the fact that you were the prosecuting attorney you would also be desirous of an answer to the questions raised in this opinion.

Article 4, Section 37 of the Constitution of Missouri, page 122 C.R. S. Missouri, 1939, provides as follows:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

Hon. Joseph L. Gutting

(3)

April 21, 1941

Section 3363 R. S. Missouri, 1939, provides as follows:

"Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

In reading the remaining sections of the Statutes of Missouri, we do not think there will be found any specific section which prohibits a justice of the peace from entering into the activities in the procurement of persons who are contemplating an immediate marriage. Therefore, the only way that the situation which confronts you could be controlled or eradicated would be by legislative enactment or by restricting a justice of the peace through rules and regulations as explained in the opinion enclosed. The legislature may not have thought it advisable to enact a statute specifically prohibiting a justice of the peace from soliciting marriage ceremonies, thinking that the community could regulate the situation through the ballot.

In the case of State v. Richman, 148 S. W. (2d) 796, the court said:

"* * In order to sustain the State's contention on this point we would have to write into the statute something -- and an important 'something' -- which the Legislature did not see fit to put there. This we do not feel we have authority to do. As we have said we cannot pass upon the question of the wisdom of the legislative act. We may construe it, but, absent some

Hon. Joseph L. Gutting

(4)

April 21, 1941

constitutional consideration, not here present, we may not say the Legislature should not have enacted it, nor may we, under the guise of construction, say the Legislature meant something which clearly and distinctly it did not say and clearly and distinctly refrained from saying."

The above is taken from a criminal case, but it states the law in a civil case as well.

CONCLUSION.

Therefore, we are of the opinion, that there is no specific statute which prohibits a justice of the peace from soliciting marriage ceremonies, and the only regulation that can be brought to bear upon a justice is through regulations similar to the one which has already been passed upon by this office as set forth in the opinion herein enclosed.

Respectfully submitted,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

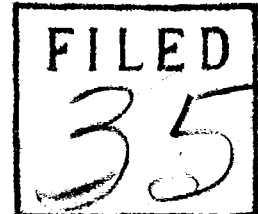
VANE C. THURLO
(Acting) Attorney-General

BRC:RW
ENC (1)

CRIMINAL LAW: Agent of the corporation can be prosecuted even though money obtained by fraud is paid into the corporation.

April 25, 1941

6-6



Honorable Jos. L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

In reference to your request for an opinion dated April 8, 1941, will say that you are right when you say "that Carder cannot hide behind the name of the corporation."

In your request you state that Clyde Carder, his wife, Mrs. Kapfer, and another person own all of the stock in the Kahoka Motor Company, a corporation. You also state in your request that Clyde Carder, as manager of said corporation, sold cars to Clark Bennett, Charles Foster and other persons but did not deliver the title to any of the cars. You also state that the Kahoka Motor Company went into the hands of a receiver and it was discovered that the reason why titles to the cars were not delivered was that the St. Clair Loan Company of St. Louis had mortgages on each of the cars.

Your question then is - Since the Mortgage Company has received its money from the owners of the cars and will not prosecute Clyde Carder, can the owners of the cars prosecute Clyde Carder and under what charge?

The proper charge to be filed against this man would be obtaining money under false pretenses as set out in Section 4487, Revised Statutes of Missouri, 1939. The approved form of information on this charge is set out in the case of State v. Loesche, 180 S. W. 875, Par. 5.

Clyde Carder, although a stockholder in the Kahoka Motor Company, cannot hide behind the corporation for the commission of the crime in which he committed the overt act.

In the case of State v. Chauvin, 231 Mo. 31, an agent of the Modern Horseshoe Club, which was a gambling club, set up as a defense to operating a gambling device that he was merely an employee of the club. He was found guilty, and in affirming the case the court said at page 38:

"The organization, as such, cannot be guilty of a felony, and it would not do to say that because the club owned the table and received the profits, the defendant, who in fact set up, kept and had actual control of the table, who represented the organization and acted for it, was guilty of no offense. Such doctrine would lead to such serious consequences in attempting to enforce this statute that its unreasonableness is shown in the bare statement. The law does not recognize the doctrine of agency as a defense to a criminal charge. It deals with the person who commits the overt act, and while others may be guilty as accessories, the party committing the prohibited act is not permitted to interpose the defense that he acted only as an agent or employee. (1 Bishop's New Crim. Law, sec. 355.)"

In the case of State v. Miller, 237 S. W. 498, the defendant was charged with the larceny of an automobile and was convicted on circumstantial evidence. The main link in the circumstantial evidence was that the car was found in the possession of the Blue Auto Livery Company whose president was the defendant. He was found guilty, and the court in affirming the verdict said at page 501:

"It is insisted by appellant that the court erred in refusing to give his instruction numbered 1, which reads as follows:

"The court instructs the jury that, if you believe and find from the evidence that the automobile mentioned in evidence was at the time of the arrest of defendant in the possession of the Blue Auto Livery Company, a corporation, the owner of the Blue cabs, then such possession in the corporation cannot be imputed to the defendant herein because of his being a stockholder of said corporation, and it is your duty to acquit the defendant.'

"This instruction announces a startling proposition of law. In legal effect, it said to the jurors, Notwithstanding you may believe and find from the evidence that defendant participated in the stealing of Bundy's car, or that he pretended to buy and pay for same, with knowledge of the fact that it had been stolen, still you cannot convict him, if he had the car delivered to the Blue Auto Livery Company, of which he was president and manager, and it was thereafter found in the possession of said company's chauffeur when recovered by the police officer and turned over to Bundy. As heretofore stated, the corporation could only act through its officers, agents, or employees. The jurors were justified in finding from the facts heretofore stated that, whatever possession the Blue Auto Livery Company may have had in respect to said stolen car, it acquired through the personal efforts of the defendant himself. If, therefore, the jury believed from the evidence he participated in the theft of said car, or pretended to buy the same with knowledge of the fact that it had been stolen, and turned it over

to his corporation under such circumstances, he was not entitled to an acquittal in this case. State v. Baker, 264 Mo. loc. cit. 354, 355, 175 S. W. 64; State v. Jenkins (Sup.) 213 S. W. loc. cit. 799; State v. Kehoe (Sup.) 220 S. W. loc. cit. 963, 964; State v. English (Sup.) 228 S. W. loc. cit. 751. We are of the opinion that the court committed no error in refusing above instruction."

Also in the case of Timell v. United States, 5 Fed. (2d) 901, 1. c. 902, Par. 2, the court said:

"Error is also assigned upon the refusal of the court to charge that, if the jury believed Timell acted as the agent of Armstrong, and simply as a messenger in the purchase of the whisky, and was not pecuniarily interested, then Timell was a purchaser, and not a seller, and should be acquitted. Whatever might have been said of the request, if it had been limited to the evidence under the count which charged a sale, it was clearly erroneous in assuming that one who has liquor in his possession must be acquitted of the charge of unlawful possession, if he can prove that possession was merely as the agent of another. The doctrine of agency is not applicable to such a case. State v. Caswell, 2 Humph. (Tenn.) 399; State v. Chauvin, 231 Mo. 31, 132 S. W. 243, Ann. Cas. 1912A, 992; State v. Bugbee, 22 Vt. 32."

In a supplemental letter addressed to this office on June 2, 1941, you state:

"Now I dont think Carder told him the car was not mortgaged, and I dont believe Bennett asked him that question, the transaction was all made on the idea that the car was not mortgaged and that

Bennett would get a clear title, just as any ordinary transaction. At the time of the transaction and at the time the Corporation went into the hands of receiver the car was mortgaged to the St. Clair Loan Co of St. Louis Mo and since that time Bennet paid \$100.00 as a compromise to keep the St. Clair Loan Co from taking the car (the real amount of mortgage being about \$160.00. During all the time of the sale to Bennett and after, the loan company was holding the title and that was the reason Carder could not deliver the title to Bennett. Of course the mortgage was on record in this county during all this time.

"I think that therefore I can prove all the facts necessary for prosecution as set forth in Par. 5 of State v. Loesche, except possibly that Carder did not expressly state that there was no mortgage of the used car."

The charge of obtaining money under false pretenses is a very difficult charge to prove even if under sufficient facts. The fact that nothing was said about the mortgage on the car can be inferred as a false representation but the courts are very reluctant to convict a defendant upon an inference. In the case of State v. Bowdry, 145 S. W. (2d) 127, par. 8, the court said:

"Appellant questions the sufficiency of the evidence. He concedes it was necessary for the State to prove the falsity of only one of the alleged representations constituting an offense. State v. Montgomery, Mo. Sup., 116 S. W. 2d 72, 74 (7). He argues there was no evidence establishing that he represented the bonds to be genuine, or that he knew the bonds were counterfeit, or that Soffer relied upon any representation of appellant in consummating the

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transaction. Without developing these issues in detail, we are of opinion the State made a submissible case. By presenting the bonds for sale appellant inferentially represented they were genuine. Considering the record as a whole, it was sufficient to authorize a finding that appellant knew the bonds were not genuine. Notwithstanding Soffer's wire to the New York office and his action based in part thereon, Soffer must have relied upon appellant's inferential representation as to the genuineness of the bonds and not solely upon the telegram from the New York office (as appellant argues), which had not had possession of the purported bonds. From our reading of the record, however, we are of the opinion the State may be able to adduce additional facts with respect to the above matters and suggest this be done if the facts are available."

In the above case railroad bonds were sold which later developed were counterfeit bonds and the court held that the defendant by offering them for sale by inference represented they were genuine, but in your case it is very doubtful if the courts would hold that there was an inference that the car sold was free of mortgage. The fact that the purchaser of the car paid a difference in cash between the value of the car purchased and the car traded in would possibly leave an inference that there was a misrepresentation that the car purchased was clear of any mortgage. This charge could possibly be brought, but, of course, there is that chance that all elements as set out in State v. Loesche were not proven.

I would suggest that you, as prosecutor, on your own initiative, file a charge of disposing of mortgaged property. The records and the representatives of the loan company in St. Louis could be used as proper evidence. There is also a misdemeanor charge as set out under Section 8382, R. S. Missouri 1939, which states that it is unlawful to sell a car without a certificate of title.

CONCLUSION

In view of the above authorities it is the opinion of this department that Clyde Carder, although acting as manager

Hon. Jos. L. Gutting

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of the Kahoka Motor Company, can be prosecuted on the charge of obtaining money under false pretenses, even though the money obtained was turned into the corporation.

It is further the opinion of this department that Clyde Carder should be charged with disposing of mortgaged property for the reason that the proof is more accessible and can be proven more easily than under the charge of obtaining money under false pretenses. Clyde Carder could also be prosecuted on a charge of selling a car without a certificate of title which is a misdemeanor.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

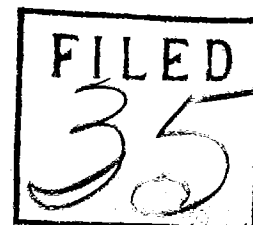
VANE C. THURLO
(Acting) Attorney General

WJB:DA

- MISSOURI ATHLETIC COMMISSION - (1) Commission has right of supervision
(Fort Leonard Wood) and tax, absent legislative consent, as provided in Clause 17, Sec. 8, Art. 1, U. S. Constitution.
- (2) Collection of 5% not an undue burden on the Federal Government.
-

May 29, 1941

Col. John J. Griffin, Chairman
Missouri Athletic Commission
St. Louis, Missouri



Dear Sir:

We are in receipt of your letter of May 13, 1941, wherein you request an opinion on the following statement of facts:

"The Army Post at Fort Leonard Woods are making arrangements to promote wrestling and prize fighting at the Post charging admission and using professional wrestlers and fighters.

"We have a ruling here in Missouri, under our Commission, that wrestlers and fighters must be licensed by the Commission. Their managers, their seconds, the doctors, and the referees must be likewise licensed.

"My understanding is that at Fort Leonard Woods they are going to use licensed performers and officials.

"I would like to ask you for an opinion as to what jurisdiction, if any, the State Athletic Commission will have over these events. Was any

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provision made in the transfer of that property to the Federal Government by the State to reserve the State's rights for certain forms and types of taxation?

"Will the Commission collect the State Tax of 5% on the admissions?

"Will the Commission have jurisdiction over the licensing of performers, managers, seconds, referees, and doctors who might not be licensed?

"I might state that you know there will be fifty thousand soldiers stationed at this Post. The events are to be held for the soldiers and their friends. There will be civilians paying admissions.

"The Post is contacting licensed promoters to make contracts with them to furnish the talent."

As we understand from the above statement of facts the area comprising what is known as "Fort Leonard Wood", has been acquired by the Federal Government and extensive improvements have been made upon this area for the housing and maintenance of soldiers.

We are unable to find that the State Legislature has given its consent as is provided in Clause 17, Section 8, Article 1, of the Constitution of the United States, and we hereby quote Clause 17, which reads as follows:

"The Congress shall have power:

* * *

"To exercise exclusive legislation, in all cases whatsoever, over such district

(not exceeding ten miles square)
as may, by cession of particular
State, and the acceptance of Congress,
become the seat of government of the
United States, and to execute like
authority over all places purchased
by the consent of the legislature of
the State in which the same shall be,
for the erection of forts, magazines,
arsenals, dock yards, and other need-
ful buildings; * * * * ."

Clause 18 of the same Section and Article, provides that
Congress shall have power:

"To make all laws which shall be
necessary and proper for carrying
into execution the foregoing powers,
and all other powers vested by this
Constitution in the government of the
United States, or in any department
or officer thereof."

In the light of the two clauses heretofore set
forth, we take it that your opinion presents the general
questions:

First - Whether the State of Missouri has juris-
diction, through its State Athletic Commission, to license
performers, managers, seconds, referees and doctors;

Second - Whether the Commission may collect the
State Tax of 5% on all admissions charged.

For the purpose of this opinion, we are adding
a third question:

Whether or not a tax, if valid, would create
a burden upon the operation of the Federal Government
of Fort Leonard Wood.

There is no question but what Congress, under Section 8, Article 1, had the right to create the funds and acquire the lands comprised in the area known as "Fort Leonard Wood." Congress passed the following constitutional act in pursuance to Clauses 17 and 18, - namely Section 171, P. 121, U. S. Code Ann.:

"The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, * * *."

We might state at the outset that we have made a diligent search of the Statutes of Missouri to ascertain whether our legislature has enacted any laws which cede to the United States jurisdiction over military forts, magazines, dock yards, arsenals and other needful buildings, and we find that in 1892 the legislature at special session enacted the following sections:

"That exclusive jurisdiction be and the same is hereby ceded to the United States over and within all the territory owned by the United States and included within the limits of the military post and reservation of Jefferson Barracks in St. Louis county in this state; saving, however, to the said state the right to serve civil or criminal process within said reservation in suits or prosecutions for or on account of rights ac-

quired, obligations incurred, or crimes committed in said state outside of said cession and reservation; and saving further to said state the right to tax and regulate railroad, bridge and other corporations, their franchises and property on said reservation. In the event, or whenever Jefferson Barracks shall cease to be used by the federal government as a military post, the jurisdiction ceded herein shall revert to the state of Missouri.

"The fact that the appropriation made by the Fifty-first Congress, if not used by June 30th of the present year, will revert to the treasury of the United States, creates an emergency within the meaning of the constitution of the State; therefore, this act shall take effect and be in force from and after its passage."

It will also be noted that there appears on our statute books, Section 12691, Revised Statutes of Missouri, 1939, which reads as follows:

"The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

From a reading of each of the three aforesaid sections, we find that neither section is so worded as to include the lands taken by the United States Government in the State of Missouri, and designated as "Fort Leonard Wood." Therefore, at the outset, we are dealing with lands rightfully acquired under Clause 17, Section 8, of Article 1, of the Constitution of the United States, but lands which, though rightfully acquired and for the purposes set forth in Clause 17, supra, are lands which have not been ceded by a legislative act of the State of Missouri, within the meaning of said section, and must be considered in the light of the wording as stated by Judge Story in the case of *United States v. Cornell*, 2 Mason, P. 60, l. c. 63, wherein the following statement was made in the opinion:

"The Constitution of the United States declares that Congress shall have power to exercise 'exclusive legislation' in all 'cases whatsoever' over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. When therefore a purchase of land for any of these purposes is made by the national government, and the State Legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution ipso facto falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State legislature is by the very terms of the constitution, by which all the states are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place. * * * "

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Judge Hughes in the case of James v. Dravo Contracting Company, 58 Sup. Ct. Rep. 208, l. c. 212, par. 6, in commenting on Clause 17, supra, had this to say:

"* * * As we said in that case, it is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. The lands 'remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.' Id., at page 650 of 281 U. S., 50 S. Ct. 455, 456, 74 L. Ed. 1091. Clause 17 governs those cases where the United States acquires lands with the consent of the Legislature of the state for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the state to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the federal jurisdiction. * * * "

In the case of People v. Vendome Service, 12 N. Y. S. (2d) (Magist.) Court, 183, 171 Misc. 191, the Court had this to say:

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"However, this not having been done, the rule to be applied in such a case is laid down in the leading case on the subject, Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 531, 5 S. Ct. 995, 998, 29 L. Ed. 264, wherein Mr. Justice Field said: 'The consent of the States to the purchase of lands within them for the special purposes named, is, however, essential, under the constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals.' * * * "

In the case of Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co., 99 Fed. Rep. 2d Ser., 902, 1. c. 909 and 910, the court laid down this general proposition:

" * * * It is elementary that when Congress gives its consent to the exercise of any privilege within the constitutional jurisdiction of the federal government it may impose conditions such as those contained in the act of March 23, 1906. Arizona v. California, 292 U. S. 341, 345, 54 S. Ct. 735, 78 L. Ed. 1298; James v. Dravo Contracting Co., 302 U. S. 134, 148, 58 S. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318. It is equally fundamental that such consent of Congress to the exercise of the privilege does not carry with it any right not strictly federal. It grants no right to the person given the privilege to invade rights strictly within the jurisdiction of the state."

Therefore, from reading the United States Constitution and the authorities heretofore set forth we must conclude that under the United States Constitution, Congress had the right to purchase the lands comprising "Fort Leonard Wood", also had the right to construct all necessary buildings and to inhabit the same with troops and had the further right to seek and procure from the State Legislature a legislative act which would grant to the Government all other state rights of the State of Missouri, which were not inconsistent with the rights that could be said to have been given up by the State when it ratified the Constitution of the United States, or, as the authorities hold, the United States Government may not ask the State Legislature for a legislative act of session as is contemplated in Clause 17, supra. We are of the opinion that if an act of session were not asked or procured, then all state laws which are not inconsistent with the purpose for which the land was acquired, would be binding unless Congress saw fit to pass Congressional acts which would by operation cause the state legislative acts to be superseded and rendered inoperative as to the area taken by the United States Government so long as said area was used for the purpose set forth in Clause 17, supra.

In the case of State v. Rainier National Park, 74 Pac. (2d) 464, 1. c. 465, the court had this to say:

"It is also an accepted rule of law that, where a cession of jurisdiction is made by a state to the federal government, it is necessarily one of political power and leaves no authority in the state government thereafter to legislate over the ceded territory. Arlington Hotel Company v. Fant, 176 Ark. 613, 4 S. W. 2d 7, affirmed by the Supreme Court of the United States, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447.

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State ex rel Grays Harbor Const. Co. v. Dept. of Labor and Industries, 167 Washington 507, 10 Pac. (2d) 213.

Therefore, we are of the opinion, in view of the United States Constitution and the cases heretofore cited that Port Leonard Wood is not an area which could be said to be all-inclusive within the jurisdiction of the Federal Government, but an area in which the State of Missouri could enforce any legislative acts not inconsistent with Clause 17.

Now, turning to the particular question sought by your inquiry, we are dealing with the rights of the State Athletic Commission to license performers, managers, seconds, referees and doctors: Should there come upon this area, comprising Port Leonard Wood professional wrestlers and fighters, whether or not the legislative enactments of the State of Missouri would be binding upon these professions. We cannot find from the examination of the authorities that there has ever been a judicial determination in any court of the right of an Athletic Commission to exercise the control and supervision as contemplated in your request. In order to pass upon this matter we must look to those cases which in theory would be identical in reasoning and in practice. Therefore, we call your attention to the case of State v. Mimms, 92 Pac. (2d) (N. Mex.) 993, this was a case wherein J. G. Mimms was found guilty of possessing wines for the purpose of sale without first obtaining a state license, at Elephant Butte Dam and that he was under a four-year exclusive contract with the Federal Bureau of Reclamation authorizing him to sell beer and wine and for other purposes, and that he was exposing to sale the articles in building occupied by him upon the land owned by the United States Government. In this case the Court said at l. c. 997:

"Our statute is different from the California statute, in this. Sec. 146-101 gives consent to the acquisition by the United States Government of land necessary for the purposes therein enumerated. Sec. 146-102 grants exclusive juris-

diction in and over the land so acquired. Sec. 146-103 defines the nature of the exemption from taxation granted the United States, namely: ' * * * and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this state.'

"True, the state cannot tax the land belonging to the United States, but the concession of the appellant to sell liquor on the land is not exonerated from taxation. When the Federal Government gave to appellant a concession to do business upon the Government's property, that business belonged to Mimms and not to the Government. The exemption from taxation goes only to the Government and not to its concessionaires.

"We hold it to be a principle of law that the State's jurisdiction to tax and regulate the liquor industry within its boundaries will not be presumed to have been legislated away unless such concession can be clearly found in the express statute of concession. This we do not find. * * "

It will be noted in this case that the court sets forth numerous cases and the language taken therefrom to sustain its opinion in the Mimms case, supra, and for the sake of brevity we are not citing the cases enumerated in this opinion, nor or the excerpts set forth in the opinion of Judge Zinn.

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In the case of Yosemite Park & Curry Company v. Johnson, 76 Pac. (2d) 1191, the Supreme Court of California upheld a tax imposed upon retail sales to visitors and others in Yosemite National Park, and reasoned, as will be noted in the opinion, that a private corporation authorized to do business in the state could not defeat the tax because of the fact that they were lessees and concessionaires in Yosemite Valley, under a contract with the Secretary of the Interior. This decision is based upon the reasoning of the same court in the case of Standard Oil Company of California v. Johnson, 76 Pac. (2d) 1184.

In view of the reasoning and authorities we are of the opinion that the Missouri Athletic Commission would have the unquestioned right to license professional performers, managers, seconds and referees, and would have the full power to carry out and put into effect all of the powers and duties placed upon the Commission by the legislative enactments now in force in the area comprising Fort Leonard Wood and further have the right to collect off of all professional performances a state tax of five per cent on all admissions charged, unless such tax would be an undue burden upon the Federal Government. In this connection, we call attention to the case of James v. Dravo Contracting Company, supra, where the court said at l. c. 216:

"The tax is not laid upon the government, its property, or officers.
Dobbins v. Erie County Commissioners,
16 Pet. 435, 449, 450, 10 L. Ed.
1022.

May 29, 1941

"The tax is not laid upon an instrumentality of the government. (cases cited) * * * Respondent is an independent contractor. The tax is nondiscriminatory.

"The tax is not laid upon the contract of the government. (cases cited) * * *

* * * * *

The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system. In *Weston v. Charleston*, supra, and *Pollock v. Farmers' Loan & Trust Co.*, supra, taxes on interest from government securities were held to be laid on the government's contract, upon the power to borrow money, and hence were invalid. But we held in *Willcuts v. Bunn*, supra, that the immunity from taxation does not extend to the profits derived by their owners upon the sale of government bonds. We said (*Id.*, at page 225 of 282 U. S., 51 S. Ct. 125, 127, 75 L. Ed. 304, 71 A. L. R. 1260):

'The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption of taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' * * * * *"

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In the instant case we do not understand the situation to be that the United States Government is entering into contracts with performers to appear at Fort Leonard Wood, or that such performers are procuring their full compensation from the Government, but we understand the condition to be that such performers come within the camp area and put on the entertainment and derive their compensation from paid admissions, which admissions are paid by the men in service and the public, who may be permitted to go, by the officers in charge of said area.

It may be argued, as was argued in the Western Union Telegraph Company v. Texas case, 105 U. S. 460, 25 L. Ed. 1067, that admissions paid by the United States soldiers should be exempt from State Tax, for the reason that they derive their monthly compensation from the Government. However, if this contention be true, then why would the situation not present itself that each man in uniform be entitled to have his purchases exempt from State taxes, at any place in the State of Missouri, wherein he purchased an article. This contention was not sustained in the James case, supra, and the court said, at l. c. 218):

"The question of the taxability of a contractor upon the fruits of his services is closely analogous to that of the taxability of the property of the contractor which is used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases the taxes increase the cost of the work and diminish his profits. * * * "

We quote further from the opinion in the James case, supra, as follows:

"It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the

property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. * *

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. * *"

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On the other hand, if Congress should see fit to pass an act of law providing that entertainment for the benefit of men in military camps was an incident to National Defense, and also set up machinery wherein the Government directly contracted with the entertainers, no doubt a different question would be presented than the one before us.

Therefore, in the light of the reasoning and Clauses 17 and 18, supra, we are of the opinion that the tax of 5% is not an undue burden upon the Federal Government.

CONCLUSION.

In conclusion, we are of the opinion that the State of Missouri, not having given up any of its rights through the State Legislature, as it may do under Clause 17, of Article 8, Section 1, of the United States Constitution, retains each and every right to supervise, license and tax for athletic performances, through its Athletic Commission, public performances at Fort Leonard Wood. Especially in view of the fact that the Athletic Commission is dealing with professional performers who have no connection with the United States Government, other than explained in this opinion.

Secondly, the collection of five per cent on paid admissions is not an undue burden upon the Federal Government.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

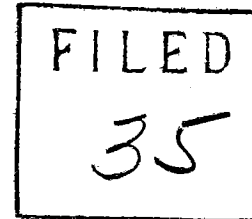
VANE C. THURLO
(Acting) Attorney General

BRC:RW

ARMORIES: The State has power to purchase or lease
NATIONAL GUARDS: armories. Municipal corporations has no
MUNICIPAL right in absence of statute to sell
CORPORATIONS: armories to state.

July 18, 1941.

Capt. Kyle T. Graham
Adjutant General's Office
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Enclosed herewith is letter dated June 26 from Ewing, Ewing and Ewing, attorneys-at-law, Nevada, Missouri, relative to the building of an armory in that city.

"Your attention is invited to the underlined question in the second paragraph of this letter: 'If, after the structure was completed, assuming that the structure was satisfactory, would it be possible, if the city then decided to do so, for the city to convey this property to the State of Missouri and receive what would have otherwise been paid to assist in the erection?'

"It is requested that you render this office an opinion as to whether or not, under the statutes of Missouri, a transaction of this nature would be legal."

There are two questions presented in your request:

- (1) Does the State of Missouri have the right to purchase an armory?

July 18, 1941.

- (2) Does a municipal corporation have the right to sell an armory to the state?

Article V, Section 7 of the Constitution of Missouri provides as follows:

"The Governor shall be commander-in-chief of the militia of this State, except when they shall be called into service of the United States, and may call out the same to execute the laws, suppress insurrection and repel invasion; but he need not command in person unless directed so to do by a resolution of the General Assembly."

Article XIII, Section 1 of the Constitution of Missouri provides:

"All able-bodied male inhabitants of this State between the ages of eighteen and forty-five years, who are citizens of the United States, or have declared their intention to become such citizens, shall be liable to military duty in the militia of this State: Provided, that no person who is religiously scrupulous of bearing arms can be compelled to do so, but may be compelled to pay an equivalent for military service in such manner as shall be prescribed by law."

Article XIII, Section 7 of the Missouri Constitution reads:

"The General Assembly shall provide for the safe-keeping of the public arms, military records, banners and relics of the State."

July 18, 1941.

From these provisions of our organic law it will be seen that that instrument recognizes and provides for the militia as a state institution of which the chief executive of the state is made the commander-in-chief, and it is designated therein as being "a militia of the state", and every able-bodied male inhabitant of the state between the ages of eighteen and forty-five, who are citizens of the United States, or who have declared their intention to become citizens thereof are made members thereof. The arms with which they are equipped are recognized as being the public property of the state.

There is no statute which specifically gives to the state the right to purchase or lease an armory, however, it is a well recognized principle of law that a state may acquire all property needed by it in its governmental capacity. State ex rel. Davis vs. Green, 116 So. 66, Guame vs. City of Redlands, 73 Pac. 917, In re Opinion of Justices, 234 Ala. 555, 176 So. 367.

Furthermore, this power of the state to purchase or lease armories is recognized by various statutes of this state. Section 15017 R. S. Mo. 1939 provides, in part:

"* * * The military council shall formulate plans for the organization, instruction, equipment and maintenance of the military forces of the state, provide for encampment and all other field and armory instruction and make allotments of funds and supplies appropriated or furnished for the support, equipment and maintenance of the military forces of the state. * * *"

Section 15063, R. S. Mo. 1939, provides as follows:

"All armories owned by this state or by any organization of the national guard and all buildings leased by the state for military purposes shall be exempt from taxation for all purposes during the period of such ownership."

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Section 15064, R. S. Mo. 1939, reads:

"Upon the application of all posts of the grand army of the republic, camps of the united confederate veterans, camps of the united Spanish war veterans and of other societies composed of veterans of any war in which the forces of this state have participated, the officer in charge of any armory owned or leased by the state may permit the use of such armory for the meeting of such veteran societies without charge on dates when the same is not in use for military purposes."

The right of the state to lease a building for use as an armory was recognized in State ex rel. vs. Fleming, 275 Mo. 509, 204 S. W. 1085. Therefore, we believe that the State of Missouri may acquire, by purchase, an armory for the use of the national guard of this state.

The question now arises whether a city may sell an armory to the state. For the purpose of this opinion we will determine whether the City of Nevada, a city of the third class, has a right to so do. However, what is said herein is equally applicable to all other cities and towns of this state.

The General Assembly has specifically given to all cities and towns of this state the right to build or acquire armories for the National Guard of Missouri. Section 7364, R. S. Mo. 1939, provides:

"All cities, towns, villages and counties in this state are hereby given power and authority to build or acquire, by purchase, lease, gift or otherwise, suitable armories, drill halls and headquarters, and the land necessary therefor, for such organizations of the national guard of Missouri as may be stationed or located therein, and to provide for the maintenance and repair of the same."

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Section 7365, R. S. Mo. 1939, reads as follows:

"In case any organization of the national guard of Missouri now or hereafter occupies any armory, drill hall or headquarters not owned or leased by the city, town, village or county wherein it is located, such city, town, village or county is hereby given power and authority to provide for the maintenance and repair of such armory, drill hall or headquarters."

These statutes have been held constitutional by this department in an opinion rendered to Honorable Lewis M. Means, Adjutant General of Missouri, May 31, 1940, wherein it is stated that the acquiring of an armory by a city or town is for public purpose. This is the rule in other jurisdictions as will be noted in *Jordon vs. Duval*, 68 Fla. 48, 66 So. 298, *Pierce County vs. Clausen*, 95 Wash. 214, 163 Pac. 744. *State ex rel. Ill. Armory-Board vs. Kelly*, 16 N. E. (2d) 693. See also 46 A. L. R. 723, as was said in the *Clausen* case, supra:

"* * * The mobilization and training of a state Militia may be a state purpose, but it is likewise a public purpose to which every political subdivision of the state may be called upon to contribute to the full extent of its power and ability. * * *"

While a municipal corporation in Missouri may legally acquire an armory, it does not necessarily follow that such municipal corporation may dispose of or alienate such armory by sale. While Sections 7364 and 7365, supra, gave all cities and towns the right to acquire an armory, there is no provision allowing such corporations to sell the same. The only right, by statute, a city has to dispose of its property is that given in Section 6865, R. S. Mo. 1939, in which it is said that a city of the third class in this state may "purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire;". However, such right given in general

July 18, 1941.

terms has always been held to mean only such property that is not used for public purpose and has not been dedicated to a public use. McQuillan on Municipal Corporations, Volume 3, Section 1242 and cases cited.

The general rule is that the charter or legislative act is the source of power as to the property rights of municipal corporations, and that when silent the implied power exists to acquire and alienate property. This general rule is subject to the qualification stated by Mr. Dillon, thus:

"Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons." 3 Dillon, Mun. Corp. (5th Ed.) Section 991."

3 McQuillin, Mun. Corp. Section 1140, states the same rule and says this:

"All property held by the city in fee simple, without limitation or restriction as to its alienation, may be disposed of by the city at any time before it is dedicated to public use. In other words, the city has the right to sell or dispose of property, real or personal, to which it has the absolute title and which is not affected by a public trust, in substantially the same manner as an individual unless restrained by statute or charter; and, this power is an incidental power inherent in all corporations, public or private.

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Thus, land held by the city in full use and ownership--e. g., commons acquired by confirmation under act of Congress--may be sold when no longer needed for public use. So land bought for a public purpose, if not actually so used cannot be said to be affected by a public trust, and hence may be sold."

1 Devlin on Real Estate (3d Ed.) Section 348a, recognizes the same doctrine, and says that--

"When title is vested in a municipal corporation by deed, without limitation or restriction as to its alienation, the property may be conveyed at any time before it is dedicated to a public use."

While at common law a municipal corporation could, unless restrained by its charter, dispose of its lands and other property just as private individuals could, in this country it is generally held that a municipal corporation has no implied power to sell property which is devoted to a public use, but property of which the public use has ceased, or which has never been devoted to any public use, may be sold by the municipality owning it, by virtue of its implied power. 19 R. C. L. 773.

These rules have been followed in Missouri. State ex rel. City of Excelsior Springs vs. Smith, 82 S. W. (2d) 37. Matthews vs. Alexandria, 68 Mo. 115.

Under the facts as presented in the instant case, the City of Nevada, in acquiring and holding the armory, would do so for a public purpose and public use. There is no statute which allows such cities to sell the armory. Under the common law, it could sell only if the property has ceased to be used for the public or if it was never in fact dedicated to the public for its use. Neither of these two situations are present here. The only case that we can find upon this subject is that of State ex rel. Parker vs. City of Lawrence, 92 Pac. (2d) 31, cited by the Supreme Court of Kansas in 1939. In that case the City of Lawrence voted a bond issue to be used for the construction of a national guard armory, which armory was to be leased to the state. The court said, at 1. c. 32:

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"* * * It is worthy of note that the statutes quoted give the cities authority to donate an armory to the national guard or donate the use of land or buildings but nowhere do these sections give the city the right to furnish the armory and charge rent for it. At this junction it must be pointed out that the authority for the action contemplated by the city must be found in the statutes. We are unable to find such authority."

We believe the holding in the above case, decided under facts identical with those in the instant case, is applicable herein.

It might be well to point out that those cases which hold that a municipal corporation may sell property which has never been dedicated to public purpose and use are not applicable here because a city can only tax for a public purpose, and if they built an armory and paid for it with tax money, while at the time they had no intention to use it for a public property, it would be a fraud upon the taxpayer and would be illegal and void.

Therefore, before a city may sell an armory, it will be necessary that the General Assembly pass a statute giving to them such right. This opinion is written upon the law as it is in Missouri at the present time. However, we point out that if the state would wish to acquire an armory, an appropriation would have to be made by the General Assembly and we believe that it would be an easy matter to have the General Assembly at the same time enact a statute allowing cities to sell armories which they had theretofore acquired.

CONCLUSION

It is, therefore, the opinion of this department that the State of Missouri may purchase or lease armories for the use of the national guard of Missouri. It is further

Capt. Kyle T. Graham

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July 18, 1941.

the opinion of this department, that cities and towns who have acquired armories may not sell such armories to the state in absence of a statute specifically allowing such a sale.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

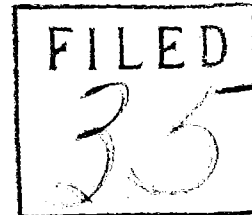
VANE C. THURLO
(Acting) Attorney-General

AO'K:LB

TAXATION AND REVENUE: The items of cost which should be included in the publication for sale.

2/22
August 18, 1941 8-20

Honorable Chas. S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri



Dear Mr. Greenwood:

We desire to acknowledge your request of August 12, 1941, for an opinion, which is as follows:

"The County Treasurer and Ex Officio Collector has been making his list of delinquent lands for publication under the Jones-Munger Tax Law, and is desirous of having an opinion as to what items of expense should be included in the publication.

"Section 11126 is the provision that provides for the publication of the delinquent lands list. It provides that the published list is to state in the aggregate, the amount of taxes, interest, and cost due thereon, each year separately stated and further provides that the cost of publication not exceeding \$1.00 for description shall be taxed as part of the cost of sale.

"Section 11133 provides that the collector shall collect from the purchaser 50¢ on the certificate of purchase.

"Section 11151 provides that the collector shall get \$1.50 for making the collector's deed to the purchaser and Section 11139 provides that the clerk for the County Court shall get 25¢ for clerking the sale and provides it shall be paid by the purchaser.

"Section 11150 provides that the purchaser shall pay to the collector the recording fee and shall be included in the cost of sale.

"The main question to be determined is whether these items that I have mentioned in Sections 11133, 11151, 11139, and 11150, should be included in the advertisement as part of the cost, as provided for by Section 11126,

"I would like to have an immediate response to this, as the collector is making out his delinquent lists for the newspaper."

Section 11126 Revised Statutes, 1939, is in part as follows:

"And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, * * *"

Section 11135 Revised Statutes, 1939, provides in part as follows:

"For each certificate of purchase issued, including the recording of the same, the county collector shall be entitled to receive and retain a fee of fifty cents, to be paid by the purchaser and treated as a part of the cost of the sale, and so noted on the certificate. For noting any assignment of any certificate the county collector shall be entitled to a fee of twenty-five cents, to be paid by the person requesting such recital of assignment, and which shall not be treated as a part of the cost of the sale."

The purchaser must, therefore, pay fifty cents for the issuance of the certificate of purchase, and the recording of the same, although it must be treated as a part of the cost of the sale and noted on the certificate as such.

Under such a circumstance the holder of a certificate of purchase, would in case of redemption have the right to recover from the redemptioner such sums.

Under the provisions of Section 11139 Revised Statutes, 1939, the county court clerk or his deputy shall act as clerk of the sale, and enter the same of record in the manner provided therein. For such services he shall receive twenty-five cents for each tract or lot sold. Such fee shall include entry or recital of the redemption on such record. The fee is to be paid by the purchaser, and to become part of the cost of sale. Such transaction shall be noted on the record of the county clerk.

Section 11150 Revised Statutes, 1939, relates to the execution of the deed, and a fee for the recording thereof, which must be paid by the purchaser, and included in the cost of sale.

Section 11151 Revised Statutes, 1939, provides under certain circumstances that the clerk shall make a collector's deed for which he shall receive a fee of \$1.50. No provision is made that such sum shall be treated as costs.

Section 11145 Revised Statutes, 1939, is in part as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale * * * " (Underscoring ours).

Therefore, in event the property is redeemed, the redemptioner must pay such cost including the publication.

Section 11129 Revised Statutes, 1939, is as follows:

"If at the first offering of sale of any tract of land or lot under the provisions of this law no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this law provided, if such lands or lots be at such time delinquent. If at the second offering for sale no person shall bid therefor a sum equal to the then delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact upon his record of the sale, and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots." (Underscoring ours.)

Section 11130, Revised Statutes, 1939, is in part as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales."

The right to costs is dependent on statutory provision. St. Louis v. Neintz 18 S. W. 30, 107 Mo. 611; 615; State ex. rel. Clarke v. Wilder 94 S. W. 499, 197 Mo. 27, 32.

Hon. Chas. S. Greenwood.

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August 18, 1941.

The statute relating to the allowance and collection of costs must be strictly construed. Van Trump v. Sanneman 187 S. W. 124.

CONCLUSION.

Therefore, in view of such statutes, it is clearly the intention of the Legislature that advertisement of published lists of lots and lands shall state in the aggregate the amount of taxes, penalty, interest and cost due thereon.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

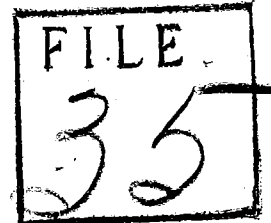
VANE C. THURLO
(Acting) Attorney General

SVM/mc

OFFICERS: Circuit clerk in a county of less than 50,000 population may purchase his own supplies within his budget.

December 23, 1941

Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of December 1, 1941, which is as follows:

"I would appreciate receiving an opinion from your office concerning the proper application of the County Budget law as applied to certain acts of our County Court and other County officers.

"Our County Court has taken the position that the purchase of all supplies, printed forms and record books should be made by them and that procedure has been followed in each office in the county with the exception of the Circuit Clerk and Ex Officio Recorder of Deeds. In other words, the procedure has been to submit a requisition to the County Court and they themselves contact the supplier and purchase the material requested except as stated above in the case of the Circuit Clerk and Ex Officio Recorder of Deeds. The Circuit Clerk feeling that under the budget law and other provisions of the statutes his office is entitled to make its own purchases of such office supplies and particularly record books and requesting the supplier to bill the County Court direct. At the present time, there are a number of accounts representing record books and other printed requirements which have been furnished the Circuit Clerk upon his order and which accounts have been refused payment by the County Court on the

theory that such purchases should have been made by the County Court.

"The Circuit Clerk contends that under Section 13291 and 1336, he has the authority to purchase such supplies for his office. It is also contended that the purchase of supplies of this character is not a matter of 'county business' as within the meaning of Article 6, Section 36, of the Constitution of the State of Missouri.

"Specifically the points at issue are:

"First, does the County Court under the County Budget law in counties of population less than 50,000 have the authority to require that all purchases of supplies be made through the County Court and by the County Court, particularly supplies used by the Circuit Clerk and Recorder of Deeds?

"Second, does the County Court have the authority to require any county office to make its purchases through the County Court?

"Third, can the County Court successfully resist the suit to compel payment of the accounts incurred by the Circuit Clerk for the supplies mentioned above?

"The Circuit Clerk by these purchases has not exceeded his budget allowances.

"An early opinion in this respect will be greatly appreciated."

Section 13291, R. S. Missouri 1939, provides as follows:

"Sec. 13291. Office supplies--duties relating to.--Each clerk shall preserve the seal and other property belonging to his office, and shall provide and

preserve suitable books, stationery and furniture for his office, and keep a correct account thereof; and each court shall audit such accounts, and allow such as shall be reasonable; but no article charged on any such account shall be allowed unless it properly comes within the description of those expressly named, except for fuel furnished for such office, for which the court shall make a reasonable allowance."

Section 13186, R. S. Missouri 1939, provides as follows:

"Sec. 13186. County court to settle accounts of recorder.--It shall be the duty of the county court to audit and settle the accounts of recorders for books purchased for the use of their offices, and allow, in their discretion, such sums as shall be reasonable, to be paid out of the county treasury."

The Missouri Courts have held, prior to the adoption of the County Budget Law, that a circuit clerk can legally provide supplies, such as a judgment docket, for his office with the approval of the circuit court and that the county is liable for said expense, if reasonable and covered by the statute. See *Maupin v. Franklin County*, 67 Mo. 327; *St. Louis County v. Ruland*, 5 Mo. 269; *State ex rel. Goldsby v. County Court of Livingston County*, 51 Mo. 557. In the case of *Smalley v. Dent County*, 177 S. W. 620, it was held that a circuit clerk and ex officio recorder of deeds in said county could legally provide for a telephone, without the approval of the county court, under the provisions of Sections 13291, 13148, 13149 and 13176, R. S. Missouri 1939. In the case of *Ewing v. Vernon County*, 216 Mo. 681, 116 S. W. 518, the court held that if the county court did not employ a janitor for the recorder that he could provide a janitor himself and compel county to pay reasonable compensation therefor.

The County Budget Law was passed by the Legislature in 1933 and provides for the classification of county expendi-

tures for the current year and for the filing with the county clerk, of estimates on the 15th day of January of each year by every officer claiming any payment for salary or supplies for that year, same to be approved by the county court and go into the yearly budget.

It is our understanding that the Circuit Clerk and Ex Officio Recorder of Deeds of Livingston County duly filed approved estimates of supplies needed which were then approved by the County Court at the February Term as his budget allowances for the year.

According to the terms of Section 10918, R. S. Missouri 1939, and the following Sections 10923 to 10933, inclusive, of the County Budget Law, apply to counties of over 50,000 population. Section 10931, supra, includes special provisions that the county court cannot change the budget estimates of the circuit courts and circuit clerks in the larger counties. In the case of *Graves v. Purcell, et al.*, 337 Mo. 574, 85 S. W. (2d) 543, said Section 10931, was held constitutional and not in conflict with Section 36 of Article VI of the Missouri State Constitution which provides that the county court shall have jurisdiction to transact all county business. In that case the court said:

"We do not think that the section of the act here complained of grants to the circuit court or to the circuit clerk any power to expend money, but merely provides for the payment to the court and its clerk of such expenditures as under existing law the court and its clerk may be entitled to make and which are chargeable to the county. As the circuit clerk is the ministerial officer of the circuit court, the expenses of both may properly be regarded as expenses of the circuit court. Within the confines of constitutional limitations, it was open to the Legislature to determine the policy to be followed in defining the scope of county budgetary control and procedure. It was certainly within the power and province of the Legislature to provide that in the matter of its lawful expenditures the circuit court

should be free from the control of the county court. We need hardly add that the duties performed by the circuit court and the circuit clerk do not constitute 'county business' within the meaning of section 36 of article 6 of the Constitution. State ex rel. v. Ieml, 242 Mo. 293, 146 S. W. 799; Little River Drainage District v. Lassater, 325 Mo. 493, loc. cit. 501, 29 S. W. (2d) 716." (See also State ex rel. Hill v. Thatcher, 94 S. W. (2d) 1053.) Consult Traub v. Buchanan County, 341 Mo. 727, 108 S. W. (2d) 340 and Carter-Waters Corporation v. Buchanan County, 129 S. W. (2d) 914.

Section 10931, supra, does not apply to Livingston County, but the fact remains that the budget estimate of the Circuit Clerk and Ex-Officio Recorder of Deeds was not altered by the County Court but approved by them. The case of Missouri-Kansas Chemical Corporation v. New Madrid County, 345 Mo. 1167 held against recovery from county for sheriff's purchase of disinfectant for county jail but the ruling was based upon the fact that the attempted expenditure exceeded the sheriff's budget allowance. See also the case of Buchanan v. Ralls County, 283 Mo. 10, 222 S. W. 1002, and Harkreader v. Vernon County, 216 Mo. 1. c. 693, 116 S. W. 523; also the late case of Rinehart v. Howell County, 153 S. W. (2d) 381.

In view of the foregoing statutes and court decisions, we believe that a circuit clerk and ex-officio recorder of deeds has authority to make necessary purchases of supplies for his office not inconsistent with the statutory authorizations and within the limits of his budget allowances. There is no statutory provision providing that the county court shall be a purchasing agent for the county officers.

We are enclosing copy of an opinion rendered by this office to the Honorable Gus James, Clerk of the County Court, Bollinger County, Zalma, Missouri, dated May 9, 1941, which holds that the county courts do not have exclusive control over the purchase of incidental expenses or supplies for the proper conduct of a county office.

Hon. Charles S. Greenwood

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December 23, 1941

CONCLUSION

It is, therefore, the opinion of this department that the Circuit Clerk and Ex-Officio Recorder of Deeds of Livingston County, a county of less than 50,000 population, has authority to purchase supplies for his office not in excess of his budget allowances and within the limits of the statutory provisions relative thereto, and that the County Court could not successfully resist suit to compel payment of accounts for such supplies lawfully incurred by the Circuit Clerk and Ex-Officio Recorder of Deeds.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

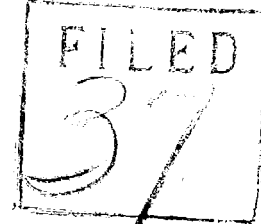
VANE C. THURLO
(Acting) Attorney General

WJB:DA

CITY MARSHALL CITY OF THIRD CLASS: Has power as ex officio constable to serve warrants in other counties.

January 30, 1941

Mr. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Sir:

This will acknowledge receipt of your letter of January 27, 1941, asking for an opinion upon the following questions:

- "1. Can the Constable or Chief of Police, who is ex officio constable in a third class city make an arrest under a state warrant issued by the Police Judge sitting as the ex officio Justice of the Peace in a county other than that in which the city is located?
2. Where a prisoner is arrested in another county is the Chief of Police who is ex officio Constable of a city of the third class or the Constable of the township in which the third class city is located empowered under a warrant issued by the Police Judge sitting as ex officio Justice of Peace to get and return the prisoner where he has been arrested by officials in another county or is this the duty of the sheriff of the county in which said city and township is located?"

In addition to the opinion furnished you herewith upon these two questions, we are also enclosing a copy of an opinion written by Wm. Orr Sawyers, Assistant Attorney-General, to Honorable Ernest Binnicker, Assistant Prosecuting Attorney, Buchanan County, under date of March 16, 1937, treating generally of the power of

constables and sheriffs to serve warrants in counties other than the counties in which the warrants were issued.

The determination of your questions requires consideration of several sections of the statutes. Section 6766 R. S. Mo. 1929, provides as follows:

"The police judge shall be ex officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be ex officio a constable to wait upon the police judge when acting as a justice of the peace."

The following definitions of "ex officio" are taken from Words and Phrases, Permanent Edition, Volume 15, page 658:

"The term 'ex officio' denotes by virtue of the office. King v. Physicians' Casualty Ass'n of America, 150 N. W. 1010, 1011, 97 Neb. 637."

"A finding in an action against an official and the surety on his bond for a defalcation as assessor that the official collected money 'as assessor' or as 'ex officio assessor' is of the same legal import, the charter of the city under which the officer acted declaring that the auditor shall be 'ex officio assessor', and whether he styles himself 'auditor and assessor' or 'auditor and ex officio assessor' is immaterial. He is none the less assessor because he is only 'ex officio assessor,' and being styled in the bond both 'auditor and ex officio assessor' is the same in legal effect as styled both 'auditor and assessor.' City of Oakland v. Snow, 78 P. 1060, 1064, 145 Cal. 419."

In the case of State v. Chappell, 179 Mo. 324, the Supreme Court in discussing Section 5798 R. S. Mo. 1899, which was the same as Section 6766 R. S. Mo. 1929, at l. c. 333, said:

"It is insisted that this was error, for the reason, it is asserted, that the police judge had no jurisdiction of the case. To this insistence we can not give our consent. Section 5798, Revised Statutes 1899, clearly confers jurisdiction upon the court presided over by the police judge. It provides: 'The police judge shall be ex officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be ex officio a constable to wait upon the police judge when acting as a justice of the peace.'

"The police judge had jurisdiction of the subject-matter (which was petit larceny) by virtue of the terms of the statute. He also had jurisdiction of the person of the defendant."

Following the above definition and the case of State v. Chappell, supra, the police judge and the city marshal would be justice of the peace and constable respectively for the city, with jurisdiction conferred by Section 6766, although called such officers ex officio.

Section 11756 R. S. Mo. 1929, pertaining to constables provides as follows:

"Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

Section 3481 R. S. Mo. 1929, provides for the issuance of warrants in justice of the peace courts in misdemeanor cases. This section is as follows:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged,

it shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the justice taking the complaint, and give to said justice a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the justice of the peace, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

Section 3467 R. S. Mo. 1929, provides for the issuance of warrants by the justice of the peace upon felony complaints, and is as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

Section 3469 R. S. Mo. 1929, provides as follows:

"Warrants issued by any judge of the supreme or circuit or criminal court of any county may be executed in any part of this state; and warrants issued by any other magistrate may be executed in any part of the county within which he is such officer, and not elsewhere, unless indorsed in the manner directed in the next section."

And Section 3470 provides as follows:

"If the person against whom any warrant granted by a judge of the county court, justice of the peace, mayor or chief officer of a city or town shall be issued, escape or be in any other county, it shall be the duty of any magistrate authorized to issue a warrant in the county in which such offender may be or is suspected to be, on proof of the handwriting of the magistrate issuing the warrant to indorse his name thereon, and thereupon the offender may be arrested in such county by the officer bringing such warrant, or any officer within the county within which the warrant is so indorsed; and any such warrant may be executed in any county within this state by the officer to whom it is directed; if the clerk of the county court of the county in which the warrant was issued shall indorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto; that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

In the case of State v. Dooley, 121 Mo. 591, the right of a constable to serve a warrant in a county other than that in which it was issued, when the warrant is properly endorsed or certified in accordance with the provisions of what is now Section 3470, and recognized at page 603, the Supreme Court said:

"The warrant was not in evidence, but it would seem plain that neither Bennett nor Evans, although officers of Lafayette county, had any right to serve a warrant in Saline county, unless it was indorsed by a magistrate of Saline

county or by the county clerk of Lafayette county, as provided by section 4024, Revised Statutes, 1889, and the warrant against Price, though properly indorsed, would not have justified them in taking the horses from the possession of defendants, if the latter were in the actual possession thereof, under a claim of right. Of course, if the jury should find as a fact that the possession of defendants was a mere sham to aid Price in retaining the possession from his wife and that defendants had not property rights in the horses by contract of purchase or hire, then they had no right to take them from Bennett and Evans, if the latter obtained possession by the consent of Price."

And in the case of Gower v. Agee, 128 M. A. 427, l. c. 437, the right of the marshal of a village to serve a warrant issued by the police judge in a county or village in an adjoining county when the warrant was properly endorsed or certified, was recognized in the following language:

"And, third, while the town marshal is prohibited by the terms of section 6025, supra, from serving the warrant outside of the limits of the county except by following the method provided in section 2444, supra, he is authorized, by following that method, to make the arrest in an adjoining county for an offense committed therein and within the territorial jurisdiction of the town."

CONCLUSION:

It is the conclusion of this department that the city marshal of a city of the third class, when acting in ex officio as constable, may serve a warrant in a county other than a county in which the warrant was issued, when the warrant is properly endorsed or certified in accordance with the provisions of Section 3470 R. S.

Mr. Leo J. Harned.

- 7 -

January 30, 1941

Mo. 1929; that the sheriff does not have exclusive power to serve warrants in other counties.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HERITT
(Acting Attorney-General

WOJ.mc

OFFICERS:

Legislature can terminate any office that it creates.

February 26, 1941

Honorable Roy Hamlin
State Representative
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of February 12, 1941, which reads as follows:

"I contemplate introducing a bill to amend Section 8011, page 675, Laws of 1939, by repealing the last proviso thereof. Will you please advise me whether, if this amendment is made, the added compensation of the surveyor for services as ex officio county highway engineer as now provided in said proviso will, as of the effective date of said amendatory act, be terminated, or whether the surveyors who went into office January 1, 1941, in counties between 20,000 and 50,000 inhabitants, will continue to receive such added compensation until the end of their present terms."

I presume you refer to the following proviso:

"* * Provided, further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex-officio

county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

There is no question but that when the Legislature creates an office it may also dispense with an office. If the amendment described by you is made, the salary of the surveyor for services as ex officio county highway engineer ceases at the time the amendment goes into effect. That the Legislature may dispense with an office which it has created was held in the case of *State v. Hedrick*, 241 S. W. 402, 1. c. 413, par. 11, where the court said:

"It is also held in several decisions that if the Legislature is empowered to create an office, it may provide for removal from that office as it wills. 'In creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it.' In *re Carter*, 141 Cal. loc. cit. 320, 74 Pac. 998; *State v. Houston*, 94 Neb. loc. cit. 453, 143 N. W. 796, 50 L. R. A. (N.S.) 227. Even in case a 'Constitution creates an office but makes no provision for the period of its term or method of removal from it, the power of the Legislature to act in the public interest in these respects is well settled.' *Op. of Justices*, 117 Mass. 603; *Wales v. Belcher*, 3 Pick. (Mass.) 508; *Op. of Justices*, 216 Mass. Loc. cit. 606, 104 N. E. 847.

"In case the Legislature is invested with 'power to provide the mode of filling, fix the term and prescribe the duties of such officers, it necessarily follows it may, in its discretion, not only discontinue them altogether, but determine the manner and by what tribunal an incumbent may be removed.' Hoke v. Richie, 37 S. W. 84, 18 Ky. Law Rep. loc. cit. 524. With respect to the office of police commissioner of Denver it was held in Trimble v. People, 19 Colo. loc. cit. 196, 34 Pac. 981, 41 Am. St. Rep. 236, that the Legislature had the power to create the office, provide the method of filling it, and the manner of removal from it. In Attorney General v. Tufts (Mass.) 131 N. E. loc. cit. 575, 17 A. L. R. 274, the court re-affirmed the doctrine announced in Opinion of Justices, 216 Mass. 605, 606, 104 N. E. 847, and quoted with approval from Graham v. Roberts, 200 Mass. 152, 157, 85 N. E. 1009, 1011:

"Where an office is created by law, and one not contemplated, nor its tenure declared by the Constitution but created by law solely for the public benefit, it may be regulated, limited, enlarged or terminated by law, as the public exigency or policy may require."

"The court also said:

"Even where the Constitution creates an office but makes no provision for its terms or the method of removal of its incumbent, the General Court may act in these particulars in the public

Hon. Roy Hamlin

(4)

February 26, 1941

interests. It may establish any rational means of removal from such office for any just cause.'

"In *Caldwell v. Wilson*, 121 N. C. loc. cit. 470, 28 S. E. 554, it was held that the Legislature in creating the office of railroad commissioner had authority to reserve to itself the power to remove, and to the Governor the power to suspend such official."

CONCLUSION

In view of the authority of the above case it is the opinion of this department that the Legislature may amend Section 8011, page 675, Laws of Missouri 1939, by repealing the last proviso thereof and the added compensation for the services of surveyor as ex officio county highway engineer as now provided in said proviso which applies to counties of not less than twenty thousand or more than fifty thousand inhabitants will terminate on the effective date of the amendment.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

CLERK OF COUNTY COURTS: Bondsmen of county clerks are not
COMPENSATION AS AGENTS, liable for acts of their principal
LIABILITY OF BONDSMEN : done while acting as an agent for
FOR : the county court.

May 13, 1941.

Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Mr. Harned:

In reply to yours of recent date wherein you submit the following question:

"I would appreciate your opinion on the following: On December 20, 1935, the County Court of Pettis County, Missouri, made an order appointing the Clerk of the County Court as agent, under section 9256 and section 12107 Revised Statutes of Missouri 1929, to take charge of the School Loans and handle the properties under said School Loans, and directed him to take out eighty dollars per month from the fees collected by him as County Clerk as compensation for the services to be rendered. Also the County Court for the years 1936, 1937, 1938, and 1939, by another order allowed the County Clerk fees in excess of the amount provided by statute for making and filing financial report of the County. Of course the Clerk has a bond and the question I would like your opinion on is, 'Under the Facts above stated is the Bonding Company liable for these over payments and the deduction of eighty dollars a month from his fees?'"

May 13, 1941.

The last part of your request, which pertains to a charge alleged to have been made by the county clerk for preparing a financial statement, you state that the amount allowed by the court was in excess of the amount permitted by statute. Your request does not indicate whether or not the county court ordered the clerk to prepare this statement or whether he prepared it without an order of court. Under the statute this might make a difference.

On this question I find that this department, on April 26, 1939, by an opinion to Honorable G. Logan Marr, Prosecuting Attorney of Morgan County, Missouri, and written by Mr. Drake Watson, held that the county clerk receives these funds officially and his bondsmen are liable if he receives an amount not permitted by statute. I note in this opinion, however, that the writer of the opinion relies on the case of Putnam County vs. Johnson, 259 Mo. 73, as authority. Under some circumstances it might be authority on this question, however I am particularly calling your attention to the statement of the court made on page 85, in reference to the facts in that case wherein the court said:

"We suspect plaintiff may have trouble in proving a case under counts 3 and 4 of the petition, but that remains to be seen."

Referring to the opinion in the Putnam County case, you will note that counts 3 and 4 of the petition charged that the clerk was acting as agent when he collected the monies for which the cause of action was brought. So, that case might not be a good authority on this question if the clerk is acting as agent.

Section 13285, R. S. Mo. 1939, requires the clerk to furnish a bond conditioned "that he will faithfully perform the duties of his office, and pay over all monies which may come to his hands by virtue of his office".

In Howard et al. vs. United States et al., 37 Fed. (2d) 243, at 246, the court, in speaking of the liability of the sureties on such a bond, and the construction which will be

placed on an official bond, said:

"A surety on such a bond undertakes that the officer will faithfully perform the duties stated and defined by law as pertaining to his office. He does not consent to become liable for any act in which the officer may become engaged in the pursuit of his office. Otherwise stated, an officer may so act as to render himself personally liable as a matter of general law, but it does not follow necessarily that his official bondsmen are liable. The liability of sureties is limited to that for breach of official duties of the principal, and does not include an undertaking against every act that the official may perform or every failure to act of which he may be guilty. (cases cited) Thus in *City of Wilkes Barre v. Rockefeller*, 171 Pa. 177, 33 A. 269, 270, the court said: 'The terms must receive a reasonable construction, and, if there has been no violation of official duty, there has been no breach of the condition for which the sureties can be required to account. It follows, necessarily, that for an extraofficial act or undertaking of the principal the sureties cannot be held responsible. 2 Am. & Eng. Enc. Law, 467b. And if the ordinary course of official action is departed from, for the benefit and at the instance of the party to whom the bond is given, and loss results, the sureties are not, in law or morals, responsible for such loss, unless they assented to the departure from the ordinary course of official action which made the loss possible.'

May 13, 1941.

"Contracts of sureties on official bonds are strictissimi juris. The instrument is required by a statute which defines its terms, and the law of the office is a part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability can be determined only from the bond and from the statutes creating the office and defining the terms of the bond. * * *"

Applying this rule, the extent of the liability on the clerk's bond can only be determined from the bond and from the statutes creating the office and defining the terms of the bond.

In the first part of your request you state that the county court had made an order appointing the county clerk, as agent, to take charge of school loans and handle the properties under these loans, and has allowed the clerk \$80.00 a month for this service. Then you ask the question, that if this allowance is illegal and the clerk has collected it, are his bondsmen liable under the bond for the re-payment of this. If the bondsmen are liable it is on account of the provision of the bond which requires him to faithfully perform the duties of his office and to pay over all monies which may come to him by virtue of his office so, if the foregoing are not duties of the office and the monies which he received, as compensation therefor, are not received by virtue of his office then, under the authorities hereinafter set out, the bondsmen would not be liable.

Under Section 10389, R. S. Mo. 1939, county courts manage the school funds and properties which it may become possessed of in connection with such management. This section authorizes the county court to appoint an agent to perform its duties in managing these properties. It was for this purpose that the county clerk was appointed and paid the compensation which you mention in your letter. It will be noted from this section that there is no provision whereby it is the duty of the county court to appoint the county clerk as its agent, for the foregoing duties,

May 13, 1941.

nor do we find any statute which makes it the duty of the county clerk to act as such.

You also state that the duties to be performed, by this agent, were those which are authorized under Section 13766, R. S. Mo. 1939, which reads as follows:

"The county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings, or for any other purpose authorized by law; and the contract of such agent, duly executed on behalf of such county, shall bind such county if pursuant to law and such order of court."

From this section you will note that there is no duty imposed on the county court to appoint a county clerk, as agent, nor do we find any statute which makes it the duty of the county clerk to act as such agent.

In the case of Knox County vs. Goggin, 105 Mo. 182, it was held that the county clerk had no authority to collect money due upon a bond given for a loan of school monies, nor to enter satisfaction of the mortgage.

In the case of State ex rel. vs. Moeller, 48 Mo. 331, the court held that it was not the duty of the clerk of a county court to collect the proceeds arising from the sale of swamp lands, and sureties on his official bond would not be held liable for monies so collected and not paid over as required by law.

In Vol. 46, C. J., page 1068, Section 399, the rule with reference to the liability of bondsmen, for acts outside of the official duty of the principal, is stated as follows:

May 13, 1941.

"Liability upon an official bond arises as a rule only with reference to acts of the officer which pertain to some function or duty which the law imposes upon his office. Thus sureties are not liable for a purely personal act of an officer not done as a part of, or in connection with, his official duties; * * *"

Referring to the school laws and particularly Article 2 of Chapter 72, R. S. Mo. 1939, it is quite apparent that the lawmakers have made the county courts trustees of the school funds and the managers of certain school properties, and in no instance have they imposed any of these duties on the county clerk.

CONCLUSION

From the foregoing, it is the opinion of this department that the sureties on the official bond of the county clerk are not liable for alleged over-payments made by the county court to the county clerk for services performed as agent of the county court in handling school properties as is authorized under Section 10389, R. S. Mo. 1939, and for acting as agent of the county court, under Section 13766, R. S. Mo. 1939, to make contracts on behalf of the county for erecting county buildings or any other purpose authorized by law.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

TWB:LB

COUNTIES:

INSURANCE: MUTUAL:

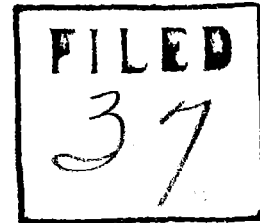
Prohibited from insurance in mutual companies where assessment liability is unlimited, but may insure where liability is fixed and would not exceed in any year revenue provided for such year. Also applicable to cities and school districts.

(More in box in vault)

June 5, 1941

6-7

*Memorandum copies
available 2-20-62*



Honorable R. Stuckey Harrington
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Reinstated 9-18-56

Dear Sir:

We are in receipt of your request for an opinion under date of June 3rd, wherein you state as follows:

"I wish to request your opinion as to the legal propriety of a county, through its county court, buying insurance from a mutual company. The type of insurance contemplated is fire and tornado.

"Section 5846, R.S. of Missouri, 1929, states that any public or private corporation may hold mutual policies. That section, I believe, is derived from Laws of 1919, page 397, Section 8.

"Knowing that a county - or its county court - is not incorporated, and is not considered a 'public corporation', I have advised that the statute does not authorize such a purchase from such an insurance company. Also, I felt that the liability of the county to unpredictable assessments, and their consequent interest, voting and otherwise, in the company, was improper.

"This office will appreciate very much your opinion upon this matter."

Although the question is not raised, we believe that we should point out that the court in the case of Walker v. Linn County, 72 Mo. 650, held that county courts have the power to enter into contracts for insurance of county buildings against fire or lightning. The question presented, however, is whether the county can insure its property in a mutual insurance company.

Section 47, Article IV, of the Missouri Constitution provides in part as follows:

"The general assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State, * * * to lend its credit * * * to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company * * *."

Section 6, Article IX of the Missouri Constitution is in part as follows:

"No county, township, city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning or other institution, whether created for or to be controlled by the State or others.* * * * *"

In the case of Lewis v. Independent School Dist., 147 S. W. (2d) 298, the question presented the court of Civil Appeals of Texas was whether the Independent School District of the City of Austin could legally purchase and hold the policy of fire insurance issued to it by the Millers Mutual Fire Insurance Company of Texas.

The appellee school district contracted for the insurance under the provisions of Article 4860a-8, Vernon's Ann. Civ. St., which is word for word identical to Section 5846, R. S. Mo. 1929, cited in your letter, and now designated Section 5957, R. S. Mo., 1939. Said section is as follows:

"Any public or private corporation, board or association in this State or elsewhere may make application, enter into agreements for and hold policies in any such mutual insurance company. Any officer, stockholder, trustee, or legal representative of any such corporation, board, association or estate may be recognized as acting for or on its behalf for the purpose of such membership, but shall not be personally liable upon such contract of insurance by reason of acting in such representative capacity. The right of any corporation organized under the laws of this State to participate as a member of any such mutual insurance company is hereby declared to be incidental to the purpose for which such corporation is organized and as much granted as the rights and powers expressly conferred."

Appellant recognized that under the above statute the school district had the right to contract with the company for the policy, but it was his contention that such statute contravened the following provisions of the Texas Constitution, which it is to be noted are similar to our Constitutional provisions above set out.

Vernon's Ann. St., Section 3 of Article 11:

"No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law."

Vernon's Ann. St., Section 52 of Article 3:

"The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."

The by-laws of the Millers Mutual Fire Insurance Company of Texas issued to appellee, provided that the policy was non-assessable and the liability of each policyholder limited to and determined to be the amount of deposit premium fixed and specified in the policy.

The court, in recognizing that a county is a public corporation, said (l. c. 300):

"The Millers Mutual Fire Insurance Company of Texas has been issuing fire insurance policies to public corporations (counties, cities, towns, independent and common school districts) for more than 20 years. At all times

during such time the company has had outstanding fire insurance policies held by such corporations. It now has such policies held by more than 50 of such public corporations, and writes about 50% of all mutual fire insurance held by such Texas counties, cities, towns and schools."

The court in holding that the statute authorizing public corporations to contract with mutual insurance companies for fire insurance policies was not unconstitutional where issued for cash unless prohibited by statute and as authorizing such a district to become a "stockholder" in, or "subscriber to capital stock" of, a private corporation, said (l. c. 300, 301):

"On the following propositions, pertinent to the facts of this case, Article 4860a-8 is not unconstitutional:

"(1) By purchasing the policy of fire insurance and by contracting to pay the premium in the amount of \$264, the School District did not make a loan of its credit to the Millers Mutual Fire Insurance Company. Unless prohibited by statute, mutual insurance companies may issue policies of fire insurance for a cash premium only, without contingent liability attaching to the policyholder. *Union Ins. Co. v. Hoge*, 1858, 21 How. 35, 62 U. S. 35, 16 L. Ed. 61; *McMahon v. Cooney*, 1933, 95 Mont. 138, 25 P. 2d 131; *Spruance v. Farmers' & Merchants' Ins. Co.*, 1886, 9 Colo. 73, 10 P. 285; *Patrons' Mut. F. Ins. Co. v. Brinker*, 1926, 236 Mich. 367, 210 N. W. 329; *State v. Manufacturers' Mut. Fire Ins. Co.*, 1887, 91 Mo. 311, 3 S. W. 383." (Italics ours.)

* * * * *

"The School District did not become a stockholder in the Millers Mutual Fire Insurance Company or a subscriber to its capital stock by its purchase of the insurance policy in issue.

"In its brief appellee has reviewed the authorities from many states, and on these authorities the following proposition is announced: 'It has never been authoritatively held by any court that a policy holder in a mutual insurance company is a stockholder in the company. Although courts have occasionally illustrated the rights and liabilities of policyholders in such mutual companies by comparison with the rights of stockholders in other types of corporations, it has always been clear in all these cases that the courts were merely drawing an analogy to cover only the immediate point being illustrated. The cases passing directly on this question have universally held that a policyholder in a mutual insurance company is not a stockholder.'

"Section 52 of Article 3 of our State Constitution has its counterpart in the constitutions of many of the states. The constitutions of thirty-five states, including Texas, definitely prohibit the lending of its money or its credit by a municipality or other public subdivision to a private corporation; the constitutions of these states also prohibit municipalities and other political subdivisions from becoming stockholders in private corporations. Twenty-nine of these states have enacted statutes

June 5, 1941

similar to Article 4860a--8, expressly authorizing the insuring of public property in mutual insurance companies. In no case has any court held its statute on this issue unconstitutional. These statements are made on authority of appellees' brief."

The court also cites the case of *Downing v. Erie School District*, 297 Pa. 474, 147 A. 239, 1. c. 241, involving constitutional provisions similar to the constitutional provisions of Texas. The Pennsylvania Court said:

"Our constitutional provision was designed to prevent municipal corporations from joining as stockholders in hazardous business ventures, loaning its credit for such purposes, or granting gratuities to persons or associations where not in pursuit of some governmental purpose. Taking of insurance in a mutual company with limited liability is not within the inhibition, for the district does not become strictly a stockholder, nor is it loaning its credit."

Section 5957, *supra*, is found in Article 7, Chapter 37 of the Revised Statutes of Missouri, 1939, and said article also contains Section 5955 which provides in part as follows:

"(7) Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance and fire insurance."

Section 5957 consequently does not relate to fire insurance. However, the question of whether a county may legally purchase insurance from a mutual company need not rest upon a specific authorization by statute.

In the case of School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co., 164 Pac. 1174, 1. c. 1175, the Supreme Court of Idaho denied recovery on a policy issued by the Mutual Fire Insurance Company to the school district. The Constitution of Idaho contains substantially the same provisions as those of Missouri. The court said (1. c. 1175):

"The sections of the Constitution referred to are self-operative. They are intended to prevent any county, city, town, or other municipal corporation from lending credit to or becoming interested in any private enterprise, or from using funds derived by taxation in aid of any private enterprise, with the exceptions provided for in section 4 of article 12. It is true that section 4 of article 12 does not specifically mention school districts, but when the other provisions of the Constitution are taken into consideration, as well as the objects sought to be attained, it must be held that school districts are municipal corporations within the meaning of said section 4. Maxon v. School Dist., 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; State v. Grimes, 7 Wash. 191, 34 Pac. 833; Pioneer Irrigation Dist. v. Walker, 20 Idaho, 605, at page 615, 119 Pac. 304."

The court however pointed out that it was not considering those cases where the maximum liability of the member was always fixed. The court said (1. c. 1175):

"It may be that the purpose of the respondent in attempting to become a member was simply to purchase insurance, and that the actual assessments which it would be called upon to pay probably would be less in amount than the fixed premiums required by regular insurance companies, but such considerations cannot prevail. The case of French v. Mayor of City of Millville, 66 N. J. Law, 392, 49 Atl. 465, is not in point. The law incorporating the mutual insurance company involved in that case is not at hand, but it appears from the opinion of the court that, though the city became a 'member' of a mutual insurance company, the company was entirely different from the appellant herein for the reason that the maximum liability of the member was always fixed, and therefore the city did not assume an unlimited liability and did not become an insurer of the other members of the corporation."

Said distinction is also recognized by the Supreme Court of California in the case of Miller v. Johnson, 48 Pac. (2d) 956, 1. c. 958, wherein the court said:

"Appellant, however, contends that section 6.2 of the School Code is unconstitutional in purporting to authorize a political subdivision to become a stockholder in an insurance corporation, and to lend its credit to a corporation, in violation of article 4, section 31, and article 12, Sec. 13, of the California Constitution. We cannot agree with this view. The mutual fire insurance company issues no stock, and the position of a member is not analogous to that of a stockholder in an

ordinary private corporation. As to the pledging of credit, this precise question has received the attention of a few courts, and an important distinction has been recognized. If the statute or policy subjects the political subdivision to a possible unlimited assessment to meet losses, it is objectionable under such constitutional provisions. *School Dist. v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho, 400, 164 P. 1174. But where the assessments are limited, as here, to some such sum as five times the original premium, there is no pledging of credit by the political subdivision. It is simply an arrangement where there is a maximum contingent liability by way of premium, but only one-fifth thereof need ordinarily be paid, and the balance is never collected unless some extraordinary losses occur. The lending of credit, if any, is by the insurance company to the public body; and neither the letter nor the spirit of the Constitution is violated by the transaction. In *Downing v. Erie School District*, 297 Pac. 474, 147 A. 239, 241, the court distinguished the Idaho case of *School Dist. v. Twin Falls County Mutual Fire Ins. Co.*, supra, and said: 'Taking of insurance in a mutual company with limited liability is not within the inhibition, for the district does not become strictly a stockholder, nor is it loaning its credit. It agrees to pay a fixed sum, and can be called upon for the total only in case of some unusual catastrophe causing great loss. Until this contingency arises it is required to advance but a small portion of the maximum, and is, in effect, loaned credit as to a possible future demand by the company for the balance which may become payable.' Leading text-writers have reached the

same conclusion, upholding the validity of such insurance by school districts. See 5 McQuillin, Municipal Corporations (2d Ed.) Sec. 2329; 3 Dillon, Municipal Corporations (5th Ed.) Sec. 976; 1 Cooley's Briefs on Insurance, p. 104."

Section 12 of Article X of the Constitution of Missouri provides in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose * * * * *

From the foregoing we are of the opinion that a county may purchase insurance from a mutual insurance company if said company has a fixed assessment liability and such fixed assessment liability would not, so far as the county is concerned, result in it exceeding in any year the revenue provided for such year. If, however, a county lays itself liable to an unlimited and unstated liability, dependent upon the amount of the loss sustained by the company, then the county could not legally purchase insurance from a mutual insurance company.

The above conclusion is equally applicable to cities, towns, townships, school districts or other political corporations or subdivisions of the State.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

PROBATE COURTS: Notices of Final Settlement should be directed to the first day of term of Probate Court and not to day during the term at which settlement is docketed.

September 11, 1941

Jessie B. Harrison
Acting Probate Judge of Dunklin Co.
Kennett, Missouri

9-29
FILE

Dear Madam:

We are in receipt of your request for an official opinion under date of August 6, 1941 relative to the legal sufficiency of certain newspaper notices of final settlements of estates in the Dunklin County, Missouri Probate Court, as follows:

"I am writing you requesting an opinion on the legality of notices of final settlement which I have caused to be published in the Dunklin Democrat.
* * * * * An objection has been made to the publication based upon the fact that the date of final settlement as contained in the notice is the date on which the case was docketed to be held (during the term), rather than the date of the first day of the term. * * * * *
In each instance the date of settlement contained in each notice conforms to that of the docket. Objection is made that all of the final settlement notices should have contained the date, the 11th day of August, 1941, which is the first day of the August Term, rather than the date that the settlement is actually scheduled to be made (after that date and during the term.) * * * * "

The Missouri Constitution, Article VI, Section 34, and Section 2436 R. S. Missouri 1939 provide for the establishment in every county of the state of a Probate Court as a court of record. Section 2441 R.S. Missouri 1939, provides for

the holding of terms of the Probate Court in the various counties of Missouri on the second Mondays in the months of February, May, August and November of each year and provides for holding of special and adjourned terms at any time required.

Section 229 R. S. Missouri 1939, provides as follows:

"Section 229. Final settlement made--when--notice. At the first regular term of the court after the expiration of one year from the date of granting of the first letters on the estate, as required by this chapter, unless further time has been given by the court by an order entered of record, every executor and administrator shall make final settlement, having first published once a week for two consecutive weeks in cities or counties having a population of over six hundred thousand as shown by the last preceding federal census and in all other counties once a week for four consecutive weeks prior thereto in some newspaper published and circulated in the county where such settlement is to be made, if there be one, and if there be none published in such county, then by ten printed handbills put up in ten public places in said county, a notice to all creditors and others interested in the estate that he intends to make such final settlement at the next term of the court. If any executor or administrator fail to so advertise and make such final settlement at such term or when required by the court at any time thereafter, he shall be proceeded against as for his failure to make annual settlements, unless for good cause shown the court shall continue same. If the first insertion of the publication required by section 75 is not published within ten days from the date of the granting of the letters, then the one year above mentioned shall begin to run from the date of the first publication of such notice: Provided, that where publication is made in a daily newspaper, publication for each week after the first shall fall on the corresponding day of the week as did the first publication."

The notices of final settlement of estates caused by you to be published in the Dunklin Democrat as shown by a copy of said newspaper enclosed, with the exception of certain estates where arranged by clerk on the

docket for settlement on the first day of the term, are shown to be directed to the day of the settlement as you arranged the docket, rather than to the first day of the term which was the 11th day of August, 1941.

One of said notices which is illustrative of all those in question being as follows:

"Notice of Final Settlement.

"Notice is hereby given to all creditors and others interested in the estate of Edward F. Robinson, deceased, that I, Everett J. Ezell, Administrator of said estate, intend to make final settlement thereof at the next term of the Probate Court of Dunklin County, State of Missouri to be held at Kennett, on the 15th day of August, 1941.

Signed EVERETT J. EZELL,
Administrator."

By the plain language and the meaning of the notice it is stated that the final settlement of the estate will be made by the Administrator at the next term of the Probate Court of Dunklin County, State of Missouri, to be held at Kennett on the 15th day of August, 1941. The regular term of Probate Court was to commence on the second Monday which was August 11, 1941 and the notices are inaccurate and confusing in that they refer in most instances to the next term of said Probate Court to be held on various dates after the 11th day of August, 1941, the commencement of the term. The arrangement of the Probate docket for the making of settlements is in proper order but the notices of final settlement should in all cases have been directed to the first day of the term, August 11, 1941 and then the settlements could be legally made at and during the term as shown by the Probate docket arranged for the August Term of Court.

The Probate Court is a regularly established court of record with statutory terms and the plain intent and meaning of Section 229 is as stated, "* * * Notice to all creditors and others interested in the estate that he intends to make such final settlement at the next term of Court."

Kelley's Missouri Probate Law and Practice, Fifth Edition, Section 350, states with reference to the requirements of notice of final settlement that "There must be four weeks between the first insertion in the newspaper and the beginning of the term at which the settlement is to be made". See also Limbaugh's Missouri Practice in Probate Courts, Vol. II, Section 860, sub-paragraphs (A, D & H), the latter paragraph containing an approved form of notice of final settlement.

Section 229, supra, is construed in State ex rel. Knisely vs. Holteamp, 266 Missouri 347, 181 SW 1007. Also prior to the amendment of 1911 the statute was construed in the leading case of Ratliff vs. Magee, 165 Missouri 461, 65 SW 713. See also State ex rel. Aufderheide vs. Stolte (app.) 1 SW (2d) 209.

Legal notices of final settlement in Probate Court should be directed to the first day of a term of court during which the estates may be docketed for settlement by the judge on different days during the term, but the term of the court and the day of the commencement thereof, and not the day during the term at which the settlement is to be made, is the date to which the notice of final settlement of the estate should be directed. In the early case of Holladay vs. Cooper, 3 Missouri 286, it was held that a writ made returnable to a term of court known to the law, but to a day not the commencement of the term, is void. The case of Brown vs. Marshal, 241 Missouri 707, 145 SW 810 which involved the question of the legality of an order of publication giving notice of application of administrator in Probate Court for an order to sell real estate to pay debts of the estate, approves the holding of the Supreme Court in the case of Holladay vs. Cooper, supra, notwithstanding that the case was distinguished by the court from the case of Holladay vs. Cooper, supra, because of a changed term of Probate Court in St. Louis County. See also Overton vs. Johnson, 17 Missouri 442, 1. c. 451.

Furthermore, we call your attention to Sections 877, 903 and 1690 R. S. Missouri 1939 relative to return days of writs, notices and orders of publication required in circuit courts with regular statutory terms similar to the terms of probate courts.

CONCLUSION.

It is, therefore, the opinion of this department that in order to comply with the plain intent and meaning of Section 229 R. S. Missouri 1939, all notices of final settlement should be directed to the first day of the term of Probate Court and not to the day upon which the particular estate is set for final settlement on the docket during the term. It is true that the notices in question were for four weeks prior to the day of final settlement and more, but they are insufficient in law in order to enable the administrator to make a binding final

Jesse B. Harrison

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September 11, 1941

settlement in Probate Court, as they do not strictly comply with requirements of the statute for a four weeks' publication prior to the next term of Probate Court, stating the day of the commencement of the term, which term of Probate Court was to be held and commenced on a day certain as fixed by Section 2441 R. S. Missouri 1939.

Respectfully submitted,

R. WILSON BARROW

Assistant Attorney-General

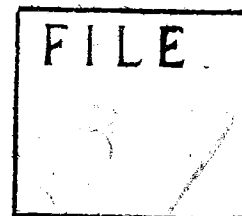
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

SHERIFFS: It is not mandatory upon the sheriff to appoint
STATE PARK BOARD: park superintendents as deputy sheriffs.

September 29, 1941

Honorable R. S. Harrington
Prosecuting Attorney
Clinton County
Plattsburg, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of September 17, which is quoted herewith:

"A park superintendent of this county has received notice from the State Park Board that on August 22nd that board determined that all park superintendents should be made deputy sheriffs in their respective counties.

"Although the sheriff of this county would have no objection to appointing our particular park superintendent a deputy sheriff, he would like to know whether or not this is compulsory or discretionary, and whether or not it serves any substantial purpose."

Section 13133 R. S. Missouri 1939, provides that sheriffs in such counties as Clinton County may appoint one or more deputies with the approbation of the judge of the circuit court.

"Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 13134, R. S. Missouri 1939, further provides that the sheriff's deputies shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

The word "may" has been construed as "shall" and "mandatory" where the public interest is concerned. The public or third persons have a claim de jure that the power conferred should be exercised whenever something is directed to be done for the sake of justice. Thus in *Kansas City, Mo., v. J. I. Case Threshing Machine Co.*, 87 S. W. (2d) 195, 1. c. 205, the court said:

"The words 'may, must and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. 59 C. J. 1081, Sec. 635; 25 R. C. L. 768, Sec. 12; 2 Lewis-Sutherland (2d Ed.) 1153, Sec. 640; Maxwell on Interpretation of Statutes (5th Ed.) 389; Endlich on Interpretation of Statutes, 416-419,

306, 307. 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' 59 C. J. 1083, Sec. 635. Of course, all of these rules of construction are auxiliary rules. 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent.' *Meyering v. Miller*, 330 Mo. 885, 51 S. W. (2d) 65, 68. We, therefore, must decide (with the aid of these rules) the original question of whether the Legislature intended that cities of 300,000 should follow the sales method of levying occupation taxes upon merchants and manufacturers."

However, as hereinabove stated by the court, the fundamental rule of construction is to determine the intention of the legislature. It has also been held that where a statute merely requires things to be done, and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. In *State v. Bird*, 295 Mo., 344, 1. c. 351-52, the court said:

"Under a more general rule this construction may be sustained in that if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be direc-

tory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. (State v. Cook, 14 Barb. 259.) By this we mean that if a fair consideration of the statute shows that unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory. (People v. Thompson, 67 Cal. 627; Kenfield v. Irwin, 52 Cal. 164; Westbrook v. Rosborough, 14 Cal. 180; Jones v. State, 1 Kan. 273.)"

In Section 13133, supra, there is no provision prescribing the results if such park superintendents are not deputized as sheriffs.

Therefore, under the foregoing provisions and authorities, unquestionably a sheriff may appoint a park superintendent within his county as a deputy sheriff upon securing the approval of the circuit court.

You inquire if such an appointment is compulsory or discretionary with the sheriff. We are unable to find any provision making it compulsory on the sheriff to appoint a park superintendent as a deputy sheriff. That is a matter that comes within the discretion of the sheriff.

You also inquire whether such an appointment will serve any substantial purpose. The writer happens to know the reason for the State Park Board action requesting the appointment of these park superintendents as deputy sheriffs. During the summer months, which is the busy season, frequent disturbances arise within certain state parks and as a rule it is necessary that some immediate action be taken. There was serious doubt in the mind of the State Park Board as to whether these park superintendents were authorized under the law to handle such disturbances. Frequently, it is impossible to call an officer of the law to the state park and have him arrive in time to apprehend offenders of the law.

Sept. 29, 1941

The State Park Board in making such a request had in mind that these park superintendents should be deputized only for the purpose of enforcing the law within the confines of the respective parks which they were supervising.

Therefore, it is the opinion of this Department that it is not mandatory upon the sheriff of your county to appoint park superintendents as deputy sheriffs. This is a matter within the discretion of the sheriff. However, under the law the sheriff may appoint such park superintendents as deputies, providing the sheriff secures the approval of the circuit court.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

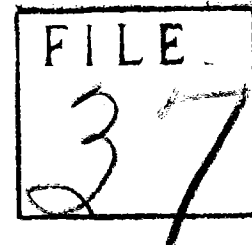
VANE C. THURLO
(Acting) Attorney General

ARH:EAW

SCHOOLS: Under the Act of 1941, page 546, it is proper
COUNTY for the State Superintendent to request
SUPERINTENDENTS: the County Treasurers of the various
counties to obtain an order from the
County Court to require the State
Auditor to pay the same.

November 15, 1941

Mr. R. Stuckey Harrington
Prosecuting Attorney
Clinton County
Plattsburg, Missouri



Dear Sir:

This Department is in receipt of your letter of
November 8, 1941, wherein you make the following re-
quest:

"I respectfully request an opinion
upon the legality of paying county
superintendents of schools additional
compensation in accordance with
Section 10327-b of the 1941 session
acts.

"Therein the State Superintendent of
Schools is to issue his warrant payable
to the treasurers of the several counties
who shall, in turn, pay over such com-
pensation monthly to the county superin-
tendent of schools. Under Section 13026 -
General duties of State Auditor - the
State Auditor 'shall draw all warrants
upon the treasury for money, except only
in cases otherwise expressly provided by
law.'

"Is the enactment of Section 10327-b of
the 1941 session acts 'a case otherwise
expressly provided by law.'?"

"And then in a letter from the State Superintendent of Schools, he states that the proper procedure is that he shall certify to the county treasurer each month that the county superintendent of schools is entitled to the additional compensation, based upon population of county, and that the treasurer shall order the county court to requisition the State Auditor for payment of same, and that the State Auditor shall send warrant for said amount to the county treasurer who, in turn, pays the amount directly to the county superintendent of schools.

"Which procedure - if either - should we pursue to make legal payment thereof?"

The Act to which you refer, being Section 10327-b, was passed by the General Assembly in 1941, Laws of Missouri, page 547. After enumerating the salaries, according to population, Section 10327-b contains the following provision:

"* * * * * On or before the 20th day of each month the State Superintendent of Schools shall issue his warrant payable to the treasurers of the several counties of the State of Missouri for one-twelfth part of the salaries herein provided, to be paid out of funds appropriated by the General Assembly for the support and maintenance of public schools under the provisions of Article XI, Section 7 of the Constitution of Missouri. The county treasurers of the several counties shall pay over such compensation monthly and at the same time he pays the county superintendent of schools his salary for the performance of his other duties."

Mr. R. Stuckey Harrington

(3)

Nov. 15, 1941

The statutes use the words "warrant payable to the treasurer by the State Superintendent of Schools," but we consider this as an error by the Legislature, in that it was intended that the State Superintendent of Schools should requisition the county treasurers of the several counties, and they in turn, through the county court, requisition the State Auditor, whose duty it is to pay out funds of any nature belonging to the State and duly appropriated.

Referring to Section 13026, R. S. Missouri, 1939, we are of the opinion that it is the duty of the State Auditor to pay out all funds appropriated by the General Assembly, as the statutes now require all funds of whatever nature and from whatever source to be paid in the state treasury.

Therefore, we are of the further opinion that the Act of 1941, page 547, does not constitute an instance "otherwise expressly provided by law, and the manner or procedure in which the State Superintendent of Schools proposes to pay the County Superintendent's additional salary is proper.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN/rv

COUNTY COURT: RIGHT OF RECOUPMENT: A county court may recoup against claim by officer for salary.

November 19, 1941

Mr. Leo J. Harned
Prosecuting Attorney
Sedalia, Missouri



Dear Mr. Harned:

This is in reply to your letter of recent date wherein you request an opinion on the following statement of facts:

"According to the State Auditor's report the Clerk of the County Court, Mr. William Bryan Rissler, is indebted to the County in a considerable sum of money, to wit; some (\$6,800) sixty-eight hundred dollars, for which suit has been filed by the County.

"The County Court has made an order to withhold the salary of the County Clerk until the determination of this matter. It is my theory that a set off applies.

"I would like your opinion as to whether or not it is possible for the County Court to withhold the salary of the Clerk of the County Court where the Clerk of the County Court is indebted to the County. I would appreciate this at your earliest convenience."

Inasmuch as this matter appears to be in litigation, and in view of the fact that it is the policy of this department not to write official opinions on matters which are pending before the courts, we hesitate to write an official opinion on your question. However, on October 22, 1941, we wrote to Mr. Rissler, the County Clerk, indicating that the County Court had authority to withhold his salary until the claim was settled, and for that reason we will furnish you with our opinion at this time.

Under Section 992, R. S. Mo. 1939, it seems that the right of set-off against a county is provided for. This section reads as follows:

"In all actions or suits at law, or any other legal proceeding instituted by any county, city or town within this state against any person for the enforcement, collection or recovery of any debt, demand, claim or pecuniary liability, any debt, demand or claim existing, due or owing to such person and held by him in his own right, against said county, city or town, before and at the time of the commencement of said proceeding against such person, may be set off against such debt, demand, claim or pecuniary liability of said county, city or town. (R. S. 1929, Sec. 340.)"

In the case of State ex rel. Buder v. Hackman, 265 S. W. 532, the Supreme Court of Missouri, en banc, had before it the question of recoupment by the state. In that case money had been paid to an assessor under a mistake of law. Later it seems that the assessor had billed the state for services rendered. The state in that case sought to offset the claim of the assessor for his compensation by the amount which it had paid to him under a mistake of law. At l. c. 536, the court said:

"We have thus found that \$589.36 of the relator's account is properly due him from the state. Respondent contends that he may lawfully withhold the payment of this amount, for the reason that he has previously overpaid relator on account of items, which he now claims relator was not entitled to receive when so paid. Such payments covered items for charges similar to those we have herein disallowed. Respondent claims this right under authority of the law of recoupment. There is no question under the record that respondent has previously paid relator money to which he was not entitled. Relator admits in his reply that, for the item of clerk hire alone, he received \$1,820.92 on claim filed January 2, 1922, and \$8,124.36 on his claim filed May 5, 1922, as well as compensation for other items we have disallowed."

"Certainly, if the state may, in a separate suit, recover back money paid by one of its

Mr. Leo J. Harned

-3-

November 19, 1941

officials to another public official under mistake of law, it may withhold money admittedly due such public official which is less in amount than the sum previously paid him by mistake. * * * *"

We think that the same rule would apply to the county that applies to the state.

CONCLUSION

We are therefore of the opinion that the County Court may withhold compensation due the Clerk of the County Court if the Clerk is indebted to the county.

Very truly yours,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

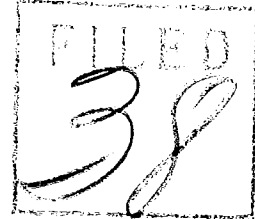
VANE C. THURLO
(Acting) Attorney General

TWB:NS

ELECTIONS: City Committee may nominate candidates for unexpired terms of members of the Board of Aldermen.

February 3, 1941.

Honorable Charles M. Hay, Chairman
Board of Election Commissioners
208 South 12th Street
St. Louis, Missouri



Dear Mr. Hay:

This is in reply to yours of recent date, wherein you submitted the question on whether or not the political Central Committees of the City of St. Louis are authorized to nominate persons to be elected to fill vacancies on the Board of Alderman of that city.

Under Article XIII, Chapter 61, R. S. Mo. 1929, special provisions are made for primary elections in cities having 400,000 population or more. The case of State ex rel. vs. Edwards et al, 206 Mo. 496 held that, this Article applied especially to the City of St. Louis. Nominations for candidates, insofar as they apply to your question, is provided for in Section 10438 as follows:

"Hereafter all candidates for elective offices other than those to be elected at a general state election and all special elections to fill vacancies in cities of this state which now have or which hereafter acquire 400,000 inhabitants or more, shall be nominated at a primary election by the direct vote of the qualified voters of such cities or by certificates of election, in accordance with the provisions of this article. * * * "

The language of this part of said section would indicate that the lawmakers intended that the nominee for the election to fill a vacancy should be nominated at the primary. Section 10452 R. S. Mo. 1929 and of this same Article, provides as follows:

"Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of such city: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

Section 5 of Article IV of the Charter of the City of St. Louis, provides as follows:

"Any vacancy in said board shall be filled for the unexpired term at the next general city or state election held fifty days or more after such vacancy occurs; provided, that whenever three or more vacancies exist in said board such vacancies shall be filled at a special election; but no such special election shall be held within three months prior to any general city or state election."

Sections 21 and 22 of the Revised Code of St. Louis 1936, reads as follows:

"Whenever a vacancy exists in the office of president of the board of aldermen or a vacancy exists or vacancies exist in the membership of the said board, the political central committees of the City of St. Louis recognized by the laws of

the State of Missouri are hereby authorized each to nominate by a vote of a majority of such central committee, including in such committee any successor of any member which successor has been recognized as such successor by such committee, a person or persons of the same political belief and party as the said nominating committee, and having the qualifications to hold such office to fill the same for the unexpired term."

"It shall be the duty of such central committees to certify to the board of election commissioners the name of the person or persons nominated, and also the party which such nominee or nominees shall represent. Such certificate or certificates of nomination shall be signed and executed by the presiding officer and secretary of the central committee making such nomination or nominations; provided that in case of the inability of the presiding officer or secretary of any central committee to perform such duty, the officers or officer thereof next in rank or all the remaining officers shall sign and execute such certificate or certificates of nomination, which shall be accepted as if executed by the presiding officer and secretary."

By reading said Sections 21 and 22 of the Revised Code and Section 10438 R. S. Mo. 1929, it seems that there is a conflict in the manner of nominating candidates for an unexpired term as Alderman. Under Section 23 of Article IX of the Constitution of Missouri, it pertains to the Charter of the City of St. Louis and provides as follows:

"Such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri, except only that provision may be made for the graduation of the rate of taxation for city purposes in the portions of the city which are added thereto by the proposed enlargement of its boundaries. * * * "

Section 25 of this same Article of the Constitution, provides as follows:

"Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State."

So it would seem from these two provisions of the Constitution that, if the ordinances or charter of the city of St. Louis are not in harmony with the Constitution and laws of the state, then such charter and amendments must yield to the provisions of the Constitution and laws of the State.

Section 10468 R. S. Mo. 1929, which is found in said Article XIII, provides as follows:

"Full power and authority are hereby conferred on every city in this state which now has, or may hereafter have, more than 400,000 inhabitants, to provide for and regulate all elections (for offices of and under such city and) for the nomination of candidates for such offices; and such provision for and regulation of such elections may be effected either by charter provisions therefor adopted by the people of

such city, according to law, or ordinances therefor duly enacted or by the people thereof under the power of initiative, if any, reserved in the charter of such city."

and Section 10469 of the same Article, provides as follows:

"Whenever any such charter provisions or ordinances so enacted shall take effect, such charter provisions or ordinances shall be deemed to supersede and render inapplicable as to such city, the provisions of the statutes of this state relating to municipal elections and nominations therefor which shall have been applicable to such city prior to the taking effect of such charter provisions or ordinances: Provided, that nothing herein contained shall be taken or deemed to affect the conduct and supervision of such elections by the duly constituted election officials appointed according to law for such city."

If Section 10438 were the only section of the statute to be considered in connection with your question, then we would say a candidate to fill a vacancy on the Board of Aldermen should be nominated as provided by that section, because we think it would take precedence over the provisions of the ordinances and charter of the city. However, by said Section 10468 and 10469, supra, the lawmakers apparently have provided that, if the city, by its charter or ordinance provides for the nomination for such special election to fill a vacancy, then the provisions of the charter or ordinance will prevail over the general statute applying to primary elections in such cities.

Hon. Charles M. Hay

- 6 -

February 3, 1941.

CONCLUSION.

It is, therefore, the opinion of this Department that the political Central Committee of the City of St. Louis is authorized to nominate persons to be elected to fill vacancies on the Board of Aldermen of that city at the April elections.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:LB

BURIAL ASSOCIATIONS: Agency contract entered into under authority of unconstitutional statute is void.

June 16, 1941

Mr. Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri



Dear Sir:

This will acknowledge receipt of your recent letters presenting for our opinion the following situation.

The Atlas Life Society of Springfield is a corporation existing under the provisions of Sections 5451 to 5456, inclusive, of R. S. Missouri, 1939, commonly known as a burial insurance association. Its method of operation in Southeast Missouri was by contracting with an undertaker, as follows:

"1. The Atlas Life Society hereby appoints _____ as its Exclusive general agent and branch manager, subject to the conditions of this contract and such instructions and regulations as may from time to time be executed by the Home Office, with the right and authority that said General Agent is to act as Branch Manager, with authority to accept applications for Burial Benefits on persons between the age of 3 months and age 65 at his or her nearest birthday, in any amounts at his discretion not to exceed \$300.00 on the life of any one person, such application to provide that the benefits be paid upon policy issued thereon, and shall be due and payable upon the death of the insured, in funeral service or merchandise, provided for, directed by the said General Agent, such applications to be taken only on forms furnished or approved by the Secretary Treasurer of the Atlas Life Society at its Home Office in Springfield, Missouri.

"2. Said General Agent shall have the right and authority to issue and countersign all policies providing for funeral benefits in his trade territory, on policy forms furnished only by the Home Office of the Atlas Life Society.

"3. The trade territory of the General Agent shall include the city of Caruthersville and a 50 mile radius, in the State of Missouri and the General Agent shall have the right to solicit applications on persons, or through any agent or agents he may appoint in the above designated territory.

"4. The General Agent shall issue policies only at such rates payable monthly, quarterly or annually at his discretion, such rates to be approved by the Home Office, but it is mutually agreed and understood that the matter of rates charged for funeral benefits shall be subject to the conditions extant in the General Agent's trade territory and conformed generally with the average death ratio in his trade territory, plus a reasonable charge for expense in producing and operating the Branch Office of the Atlas.

"5. The General Agent hereby agrees that he will keep an accurate record at the Branch Office of all policies issued and shall keep intact and in the office of the Branch Manager, all original applications, together with a carbon copy of the typewritten portion of all policies issued and that such record shall be open for inspection at any and all times to the proper officers of the Home Office of the Atlas.

"6. The General Agent further agrees that he will make a monthly report to the Home Office on or before the 15th., of each month, setting forth the business transacted by the Branch Office for the month previous, giving the following information.

- a. Total number of policies issued.
- b. Total amount of funeral benefits provided therein.
- c. Total premiums received during the previous month.
- d. No. of death claims paid.
- e. Total amount paid in death claims.
- f. Amount otherwise disbursed.
- g. Balance on hand.

"7. The General Agent shall deposit monies received or premiums (excepting the first quarterly premium) in some bank designated by the General Agent and subject to the approval of the Home Office, in the name of Atlas Life Society and subject

Mr. Robert W. Hawkins

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to the signature of Atlas Life Society, by _____
Branch Manager.

"8. The General Agent hereby agrees that he will remit with the above mentioned report, check in the sum equal to 10% of the gross premiums received by him during the month previous, said check for 10% to be made payable to Atlas Life Society and remitted direct to the Home Office, on or before the 15th., day of each and every month, covering the previous month's business.

"9. The General Agent hereby agrees that he will submit to the Home Office any special forms of literature or advertising matter which he may choose to distribute in his trade territory, to the Home Office for their approval before distributing same, unless said literature is practically the same as that already approved by the Home Office.

"10. Said General Agent hereby covenants and agrees that out of the 90% gross premiums received and retained by him that he will fulfill every policy contract issued by his Branch Office and furnish and pay for every funeral furnished by reason of the death of any policyholder under any and every policy contract issued by him and that he will not, at any time, call upon or cause the Home Office to be liable for the payment of any death claim under any policy issued by his Branch Office but shall pay the same through his funeral home in cash or in merchandise and service, as provided in the insurance contract and that should a deficit occur at any particular period of time, that the said General Agent shall absorb that deficit or lose himself and should any funds be created by reason of premiums received through his General Agency, over and above the amount necessary to pay all death claims, or expense of sending out notices and other incidental expense of his general agency, such amount shall be preserved by him and carried over as surplus until such time as it may be necessary for the payment of subsequent death claims.

"11. The General Agent hereby agrees that he will reimburse the Home Office of the Atlas for the printing of policies, circulars, literature, applications, stationery and any other forms of printing used by his Branch Office and authorized or ordered by him and that he will not incur any indebtedness in the name of the Atlas Life Society, other than that provided for in the policy of insurance issued through his Branch office.

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"12. (Omitted: Concerns furnishing grave markers and is not pertinent to our question.)

"13. The Atlas reserves the right to so inspect and audit the books of the Branch Manager at any time and to verify the statement and reports made by the General Agent, to the Home Office.

"14. This contract shall not be assigned by the General Agent to any person, firm or corporation, without first obtaining the consent of the Atlas and shall remain in continuous force so long as the arrangements and provisions herein are carried out to the mutual satisfaction to the parties to this contract.

"15. It is hereby agreed that the Branch Manager named herein will not be held liable for any legal litigation in connection with this contract or agreement, and in case that such legal litigation does arise in connection with the proper performance of the duty of said Branch Manager, the home office of the Atlas Life Society, hereby agrees to be solely liable and assume any and all obligations in connection therewith."

On December 11, 1940, the Supreme Court of Missouri handed down its decision in the case of State ex inf. v. Black, et al., 145 S. W. (2d) 406, in which it held void and unconstitutional Sections 5451 to 5456, supra. In view of this you ask:

Does said decision render void the contract above set forth?

Of prime importance in answering this question is the effect of the court's judgment holding these statutes unconstitutional.

In State ex rel. Miller v. O'Malley, 117 S. W. (2d) 319, (Mo. Sup.) at l. c. 324, the court said:

"An unconstitutional statute is no law and confers no right. 12 C.J. Sec. 168, p. 748; 6 R.C.L., Sec. 117, p. 117. This

is true from the date of its enactment and not merely from the date of the decision so branding it. * * *

In *Garden of Eden Drainage Dist. v. Bartlett Trust Co.*, 50 S. W. (2d) 627 (Mo. Sup.), the point involved was the right of a drainage district to enforce a tax claim in face of the challenge that the act under which it was organized was unconstitutional. The court said, l. c. 628-9:

"* * * * * as the plaintiff is a creature of the statutes in question and does not exist and cannot function except as such laws give it life, then, if such laws are void because violative of the paramount law of the land, plaintiff never had any life or legal existence, and cannot levy and collect taxes."

In *Lieber v. Heil*, 32 S. W. (2d) 792 (Mo. App.), the court, in speaking of a law held unconstitutional by the Supreme Court, said l. c. 793:

"* * * In other words, the statute is now to be regarded as void ab initio, and as though it had never been in existence; * * * * *

In *Clark v. Grand Lodge, etc.*, 43 S. W. (2d) 404 (Mo. Sup.) at l. c. 406, it is held that an unconstitutional statute leaves the question that it intended to settle just as it would be had the statute not been enacted.

It is, therefore, to be seen that, so far as the law recognizes, there has never been any corporation in existence in this state that was authorized to write burial insurance such as that written by the Atlas Life Society. However, it may be contended that while there has been no de jure corporation yet, Atlas Life Society has been a de facto corporation.

In Garden of Eden Drainage Dist. v. Bartlett Trust Co., supra, it was further urged to sustain the tax collection that the corporation had a de facto existence, and thus could exercise the right of tax collection, but on this the court said, l. c. 629:

"* * * Plaintiff cannot act as a de facto corporation unless there is a foundation on which it could, if properly done, be erected. There must be a 'charter or general law under which such a corporation as it purports to be might lawfully be organized.' * * *
* * And an unconstitutional law is no law and confers no rights. * * * *"

In Meramec Spring Park Co. v. Gibson, 268 Mo. 394, the court discusses the de facto existence of a corporation, saying l. c. 405-6:

"* * * a de facto corporation exists because (and only when) there is a law or statute permitting its incorporation for the purposes and with the powers assumed, but which law was not followed (though attempted so to be) in its organization.
* * * * * 'the first requisite' says Constantineau in his excellent work on the De Facto Doctrine, 'to constitute a de facto corporation is the existence of a law authorizing the incorporation. When, therefore there is no law providing for the organization * * *, there cannot be any such corporation either de facto or de jure.' * * * *"

We are not aware of any existing laws that would have permitted a corporation to be organized "for the purposes and with the powers assumed" by Atlas Life Society, and

therefore it could have had no de facto existence. The insurance code does not contemplate any insurance where payment is made on policies in other than money. One of the "powers assumed" by Atlas Life Society was payment under its policies in material and service. Neither was there any attempt on the part of said corporation in its organization to follow any provision of the insurance code.

The contract above set forth was entered into by the Atlas Life Society in furtherance of and to carry on the business it was purportedly authorized to engage in under Sections 5451 to 5456, R. S. Missouri, 1939. In substance and effect it appoints a person as its agent for the purpose of writing policies, collecting premiums, payment of expenses in connection with these activities, and payment of liabilities incurred upon the contracts entered into. It is an agency contract which has for its foundation an unconstitutional statute.

Lieber v. Heil, supra, was an action to legitimize a child. Pending the final disposition of said cause by the St. Louis Court of Appeals, the Supreme Court of Missouri held unconstitutional the statute that authorized the mother of said child to maintain such a suit. The Appellate Court said, l. c. 793:

"* * * It follows, therefore, that with the statute declared unconstitutional and void ab initio, she does not have, and has never had, a cause of action thereunder; and, further, that the judgment of the court rendered in the course of proceeding brought under such unconstitutional and void statute is likewise void. 12 C.J. 801."

This rule applies not only to legal proceedings under a void statute, but also to all other acts. In 16 C. J. S. p. 290, Section 101 (c), it is stated:

"As a general rule, all acts done under an unconstitutional law are void and of no effect, but acts that are merely incidental to an unconstitutional legislative enactment, it seems, may be valid. * * * * *

We need not pay heed to the exception above noted because the writing of policies and payment of claims arising thereunder certainly is not "merely incidental" to the purported authority granted in Sections 5451 to 5456, R. S. Missouri, 1939.

In *Klenk v. Metropolitan Life Ins. Co.*, 36 Pa. Dist. & Co., 266, 267, it is stated:

"The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute imposes no duties, confers no rights, creates no office, bestows no power, affords no protection, and justifies no acts performed under it."

Again, in *City of St. Louis v. Polar Wave Ice & Fuel Co.*, 296 S. W. 993 (Mo. Sup.), the court, quoting from *Cooley's Constitutional Limitations*, said l. c. 998:

"When a statute is adjudged unconstitutional, it is as if it had never been; rights cannot be built up under it; contracts which depend upon it for their consideration are void; * * * * *."

In *State ex inf. v. Black, et al.*, 145 S. W. (2d) 406, the Court, in speaking of the burial association involved, said l. c. 410:

"* * * this association is a business corporation, doing an insurance business and giving its members nothing for which they do not fully pay."

Following the above, it then appears that Sections 5451 to 5456, R. S. Missouri, 1939, settled nothing and did not authorize the Atlas Life Society to engage in the insurance business in which it is engaged. In this connection Section 6004, R. S. Missouri, 1939, provides:

"No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri, unless he or they shall first fully comply with all the provisions of the laws of this state governing the business of insurance. * * * * *

This section is contained in Chapter 37 of R. S. Missouri, 1939, relating to insurance companies and Section 6003 of said chapter provides:

"No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with authorizing it to do business; * * * * *

Of course, the Atlas Life Society has no such certificate and is thereby barred from engaging in the insurance business under Section 6004, supra, and has always been so barred. The contract above set forth is in furtherance of the very business in which no one can engage, absent the

Hon. Robert W. Hawkins

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June 16, 1941

certificate of the Insurance Department. It is therefore to be seen that this contract is in the face of Sections 6003 and 6004, R. S. Missouri, 1939, and is therefore void.

From the foregoing we conclude that Sections 5451 to 5456 being unconstitutional, the Atlas Life Society has never, in law, had any existence either as a de facto or de jure corporation; it had no power to contract and the contract it entered into is void. Not only is said contract void on this ground, but also because it is for the purpose of carrying on a business that is illegal, absent the proper authority from the Insurance Superintendent, which authority Atlas Life Society does not have.

What we have said here is to be confined solely to this agency contract. We do not rule that the policies of insurance issued by Atlas Life Society are unenforceable, (Clark v. Grand Lodge, etc., 43 S. W. (2d) 404) or that the promoters of said company may retain the fruits of their illegal enterprise against one who has paid in, as premiums, his money. Johnson-Brinkman Co. v. Central Bank, 116 Mo. 558; Bisesi v. Farm & Home Saving & Loan Association, 78 S. W. (2d) 871.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv

TAXATION: A law providing for remission of
PENALTIES: penalties on delinquent taxes in
UNIFORM LEGISLATION: certain parts of the State is un-
constitutional.

April 29, 1941

5-1

Honorable David A. Hess
House of Representatives
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of April 29th, 1941,
wherein you request an opinion as follows:

"I would appreciate it greatly
if you could give me an opinion
on House Bill 200 and 364 as to
the constitutionality, if an
amendment were adopted, limiting
its application to Jackson County,
St. Louis County, and St. Louis
City."

In our oral conversation you suggested that an
amendment to House Bills 200 and 364 was being considered.
This amendment would exclude Jackson County, St. Louis
County and the City of St. Louis from the provisions of
the foregoing bills. These bills, if enacted, would
relieve delinquent taxpayers of penalties on their taxes
if they paid the same before January 1st, 1942. The question
submitted brings up the issue of whether or not the bills as
amended would conform to the uniformity section of the Consti-
tution of Missouri, which is Section 3 of Article X. This
section reads as follows:

"Taxes may be levied and collected
for public purposes only. They
shall be uniform upon the same class

April 29, 1941

of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

In 1933 the Supreme Court, in the case of State ex rel. Crutcher v. Koeln, 61 S. W. (2d) 750, had before it Senate Bill No. 80, which had the same force and effect at that time as would House Bills Nos. 200 and 364. Apparently the court took the view that a law providing for the remission of penalties for delinquent taxes must comply with Section 3, supra, of the Constitution. At l. c. 753, the court used this language:

"* * * It seems clear that No. 80, if it includes respondent's commission, as we think it does, applying by express terms, as it does, to all collectors in the counties and cities of the state and to their fees, operates uniformly throughout the state and therefore fully satisfies the constitutional requirement of uniformity of operation. State ex rel. O'Connor v. Riedel, 329 Mo. 616, 627, 46 S. W. (2d) 131."

We might further suggest that such an amendment would be in violation of Section 53 of Article IV and especially subsections 23 and 28, which are as follows:

"The General Assembly shall not pass any local or special law:

"* * * * *

"(23) Exempting property from taxation:

"* * * * *

April 29, 1941

"(28) Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of their official duties, or their securities from liability:

"* * * * *

CONCLUSION.

From the foregoing authorities it is the opinion of this department that an amendment to House Bills 200 and 364 excluding Jackson County, St. Louis County, and the City of St. Louis from its provisions would violate the Constitution of this State, and especially Section 3 of Article X and Section 53 of Article IV.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

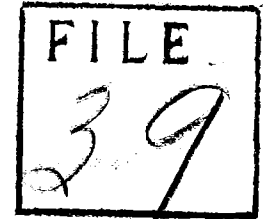
VANE C. THURLO
(Acting) Attorney-General

TWB:CP

INTOXICATING LIQUOR - * Licensed one-room restaurants selling
CLOSED PLACE - substantial quantities of food etc., ex-
cepted from closed place requirement.
Restaurant is eating house selling food
for consumption on premises. Substantial
quantities are actual amount of real
value, as distinguished from pretense
of substance.

October 9, 1941

Mr. W. G. Henderson
Supervisor
Department of Liquor Control
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for our opinion
by your recent letter in the following terms:

"With respect to Senate Bill No. 116
passed by the General Assembly, now
adjourned, to become effective October
10, 1941, I respectfully request your
opinion upon the following subject:

"Briefly, this Bill provides that an
intoxicating liquor licensee close his
place of business during prohibited
hours and days of sale with the ex-
ception of clubs, hotels, and res-
taurants.

"In this connection, I would appreciate
your opinion upon what constitutes a
bona fide restaurant. A copy of the
Bill is enclosed herewith."

Senate Bill No. 116, to which you refer, amended
R. S. Missouri, 1939, Sec. 4891, and is now Laws of
Missouri 1941, p. 413, Sec. 4891. After prohibiting the
sale of intoxicating liquor during certain days and hours,
it in part further provides:

"* * * and if said person has a license to sell intoxicating liquor by the drink his premises shall be and remain a closed place as herein defined upon the day of any general, special or primary election in this State or upon any county, township, city, town or municipal election day and between the hours of 1:30 o'clock A. M. and 6:00 o'clock A. M. on week days and 12:00 o'clock midnight Saturday and 12:00 o'clock midnight on Sunday. * * * * * provided further, that where such licenses are held by restaurants whose business is conducted in one room only and substantial quantities of food and merchandise, other than intoxicating liquors are dispensed, then the licensee shall keep securely locked during the hours and on the days herein specified all refrigerators, cabinets, cases, boxes and taps from which intoxicating liquor is dispensed. A 'closed place' is defined to mean a place where all doors are locked and where no patrons are in the place or about the premises. Any person violating any provisions of this section shall be deemed guilty of a misdemeanor."

The ultimate question presented by your letter is: What is a restaurant? But at the outset it is necessary to discuss the provisions of the statute with reference to restaurants.

Under said Section 4891, supra, effective October 10, 1941, establishments licensed to sell intoxicating liquor by the drink, and which are not restaurants as therein described, must be closed places as defined in the statute on Sundays, various election days, and between 1:30 and 6:00 A. M., of week days.

With reference to a one-room restaurant selling substantial quantities of food and merchandise, etc., licensed to sell intoxicating liquor by the drink, etc., this statute does not expressly provide that such establishment is excepted from the requirement of being a closed place during the hours and days there mentioned. However, this statute provides that one who violates its terms shall be deemed guilty of a misdemeanor, and is a penal statute. Such statutes must be "strictly construed against the state." (State v. Green, 130 S. W. (2d) 475, 1. c. 476, 344 Mo. 985.) They are subject to the rule stated in State v. Taylor, (Mo. Sup.) 133 S. W. (2d) 336, 1. c. 341 (6-8), as follows:

"* * * * The statute is penal and criminal and such statutes are generally 'construed strictly as to those portions which are against defendants, but liberally construed in those which are in their favor-- that is, for their ease and exemption. * *"

Construing this statute strictly against the state, and liberally in favor of the "ease and exemption" of those who might be charged with its violation as defendants, we believe restaurants as described above are excepted from the "closed place" requirement, for the following reasons.

Of course, our business is to ascertain and give effect to the intention of the legislature. In Artophone Corporation v. Coale, (Mo. Sup.) 133 S. W. (2d) 343, 1. c. 347 (2-4) the court said:

"* * * 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object * * .'"

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Places other than such restaurants must have their doors locked and have no patrons in them during closed days and hours. The statute provides that such restaurants during the same periods must keep securely locked all cabinets, cases etc., from which liquor is dispensed. If the doors of such restaurants were locked and all patrons were out, that would prevent the dispensing of intoxicating liquor, and it would then be meaningless and superfluous to require that the cabinets, cases etc., in such restaurants be securely locked. In construing the Liquor Control Act, in State v. Wipke, 133 S. W. (2d) 354, l. c. 356 (1), the Supreme Court of Missouri said:

"It is a cardinal rule of construction that every word, clause, sentence and section of an act must be given some meaning unless it is in conflict with the legislative intent. (citing cases)
* * * * ."

Likewise, in Graves v. Little Tarkio Drainage Dist. No. 1, (Mo. Sup.) 134 S. W. (2d) 70, l. c. 78, it was ruled that:

"* * * a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, * *.
* * * Moreover, it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect.' State ex rel. Dean v. Daves, 321 Mo. 1126, 1151, 14 S. W. 2d 990, 1002. * * * * ." (Underscoring ours.)

Having the foregoing principles in mind it is our opinion that the legislature meant the restaurants described in this statute may legally, during the days and hours mentioned, have their doors unlocked and may have patrons in the place, but must keep securely locked all cabinets, cases, etc., from which intoxicating liquor is dispensed, and must not sell any intoxicating liquor during Sunday and the other days and hours mentioned. We think it was the intention of the legislature that a bona fide restaurant business may be conducted during the days and hours mentioned, even though at those times the sale of intoxicating liquor is prohibited.

The exception is applicable only "where such licenses are held by restaurants whose business is conducted in one room only and substantial quantities of food and merchandise, other than intoxicating liquors are dispensed." The following definitions of a restaurant are found in 37 Words & Phrases (perm. ed.) p. 439:

"A 'restaurant' is an eating house. Cecil v. Green, 60 Ill. App. 61.

"A 'restaurant' is an establishment where refreshments or meals may be obtained by the public. Donahue v. Conant, 146 A. 417, 419, 102 Vt. 108."

And, at P. 442, of the same authority:

"'Restaurant,' as used in an ordinance requiring persons keeping a 'restaurant' to procure a license, etc., means an eating house, a place where something to eat ready prepared, or which can be readily prepared may be obtained; * *"

In Rex v. Wells, 24 Ont. L. Rep. 77, 18 Can. Crim. Cas. 377 the court said of a restaurant keeper that, "... it is of the essence of his calling that what he sells is sold for consumption on the premises."

A distinct analogy is found in State v. Shoaf, 9 A. L. R. 426, 1. c. 427, 428, 179 N. C. 744, 102 S. E. 705. There, a statute of North Carolina in part provided that, "No person... shall sell.. on Sunday, any goods. . .or merchandise. . . . Provided, that this act shall not be construed to apply to ...restaurants." The court held that an establishment having no tables, and only stools and counters, and selling only lunches and sandwiches, was a restaurant and was excepted from the Sunday closing requirements of that statute. The court further said at 1. c. 427, and 1. c. 428 of 9 A. L. R.:

"* * * A restaurant is generally understood to be a place where refreshments, food, and drink are served. Whether they are served to guests seated at a table or on a stool at a counter does not affect the definition, that being merely a detail in the operation of the restaurant. The evidence shows that the defendant had no tables in his place, but had a counter with stools arranged along in front of it, and to the guests seated on these stools he sold lunches, wieners, and egg sandwiches. This, it seems to us, was strictly a restaurant business within the approved definition as shown in the dictionaries, and in 7 Words and Phrases, p. 6180. While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating house and cookshop to any other place where eatables are furnished to be consumed on the premises. Richards v. Washington F. & M. Ins. Co. 60 Mich. 420, 27 N. W. 586; Lewis v. Hitchcock

(D. C.) 10 Fed. 4. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat (People v. Jones, 54 Barb. 311, 317), and a restaurant keeper as a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the taste of his patrons (Re Ah Yow (D. C.) 59 Fed. 561, 562; Swift & Co. v. Tempelos, 178 N. C. 487, 7 A. L. R. 1581, 101 S. E. 8; 7 Words & Phrases, pp. 6180 & 6181. * * * * *

* * * * *

So far as appears, there was absolutely nothing done that would mar in the least the proper and peaceful observance of the Sabbath, no more than there would be in a well-conducted hotel or in one's home. Food and drink are necessary to the sustenance of man, and the statute was not intended to prohibit the furnishing of them to patrons when there is, in no other respect, a violation of the law alleged or shown."

Not all restaurants are excepted from the "closed place" requirement. The restaurant business must be "conducted in one room only." This undoubtedly refers to the serving and consumption of food; cooking in a separate room is permissible in restaurants otherwise coming within the excepted definition. Finally, to be excepted a restaurant must be one in which "substantial quantities of food and merchandise, other than intoxicating liquors are dispensed." The following definitions or descriptions of the word "substantial" are found in 40 Words & Phrases (perm. ed.) p. 492,493:

"'Substantial' means 'of real worth and importance; of considerable value; valuable.' * * * Tax Commission of Ohio v. American Humane Education Soci. (Ohio App.) 181 N. E. 557.

* * * * *

" * * 'Substantial' is relative term, the meaning of which is to be gauged by all the circumstances surrounding the transaction, in reference to which the expression has been used. It imports a considerable amount or value in opposition to that which is inconsequential or small. Fuhrman v. American Nat. Building & Loan Ass'n, 14 P. 2d 601, 604, 126 Cal. App. 202.

* * * * *

" * * * The word 'substantial' is susceptible to different meanings according to the circumstances, and is variously defined as actual, essential, material, fundamental, although no rule of thumb can be laid down fixing its exact meaning. * * * * *

"Quantity" means amount, how much. In 35 Words & Phrases (perm.ed.) 609 it is said that, "Quantity . . . according to Webster is that which answers the question how much. Texas & P. Ry. Co. v. Cuteman, (Tex.) 14 S. W. 1069, 1070."

"Merchandise" is a term "including all those things which merchants sell, . . . as dry goods, hardware, groceries, drugs, etc." (27 Words & Phrases (perm. ed.) 69, 70).

Under the above definitions of restaurant and of substantial quantities, it is plainly impossible to lay down a fixed rule to fit all cases. The style, size and extent

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of establishments included in the term may vary greatly. The amount and extent of food and other merchandise constituting substantial quantities also may vary widely. An establishment selling two hamburgers per average day might well be regarded as not dispensing substantial quantities of food, but one cannot say in advance exactly how much must be dispensed in order to constitute substantial quantities. In order to be excepted from the "closed place" requirement an establishment must actually and in good faith be engaged in the restaurant business as above defined, as a regular and continuous course of dealing.

CONCLUSION.

It is our opinion that restaurants licensed to sell intoxicating liquor by the drink, whose business is conducted in one room, and which dispense substantial quantities of food and merchandise other than intoxicating liquor, are excepted from the "closed place" requirement of Laws of Missouri, 1941, p. 413, Sec. 4891. A restaurant is an eating place where food ready or readily prepared may be obtained for consumption on the premises. A substantial quantity is an actual considerable amount of some real value, as distinguished from a mere inconsequential pretense of substance. In determining what establishments and what amounts are within the terms "restaurant" and "substantial quantities", discretion must be exercised in judging each case on its own facts.

APPROVED:

Respectfully submitted

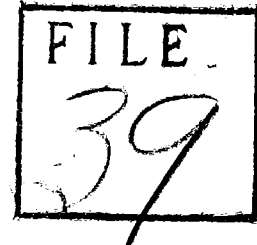
ERNEST HUBBELL
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General
EH:RW

NON-INTOXICATING BEER: License may be issued to person whose license was revoked prior to Oct. 10, 1941, not if
LICENSE: revoked thereafter. License may be issued to
PREVIOUS REVOCATION: person whose intoxicating liquor license has been revoked, and vice versa.

December 29, 1941

Honorable W. D. Henderson
Supervisor of Liquor Control
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for an official opinion by your recent letter which is in the following terms:

"I respectfully request an official opinion relative to the provisions of Section 4952 a, revised statutes of Missouri 1939, with respect to qualifications for a non-intoxicating beer permit.

"This section states briefly that no person shall be granted a permit or a license hereunder whose permit or license as such dealer has been revoked or who has been convicted since the ratification of the 21st Amendment in the Constitution of the United States of a violation of the provisions of any law applicable to the manufacturing or sale of intoxicating liquor or non-intoxicating beer

"Does this section prohibit a person from obtaining a permit whose permit has been revoked prior to October 10, 1941, the date this law became effective?

"In this same connection, if an applicant for a 3.2% beer permit had suffered a revocation of a 5% permit prior to October 10, 1941, would this revocation

prohibit him from obtaining a 3.2% beer permit?

In view of the fact that this question arises daily, I would appreciate this opinion as soon as possible."

Laws of Missouri, 1941, p. 411, 412, provides in part:

"That Article 2, Chapter 32, R. S. Mo. 1939, be, and the same is hereby amended by adding a new section to said Article to be known as Section 4952a, relating to the qualifications and requirements of persons or corporations for permits or licenses to manufacture, brew or sell nonintoxicating beer, * * * so that said new section of said Article and Chapter shall read as follows:"

Said Section 4952a in part provides:

" * * * and no person shall be granted a permit or license hereunder whose permit or license as such dealer has been revoked, * * * "

(Such a license can be revoked only by the Supervisor (Section 4996, R. S. Mo. 1939)).

Of course, that new statute amended the Non-Intoxicating Beer Law, and became effective October 10, 1941. Under the law prior to said amendment, a license to sell non-intoxicating beer could be issued to a person whose license to sell such beer had previously been revoked. The first question is, under the new amendment, may a license now be issued to a person whose non-intoxicating beer license

was revoked prior to October 10, 1941? In other words, is that statute retrospective or prospective? The statute contains no express provision in that respect. It is well settled that in case of doubt and absent express provisions in that regard, statutes are construed by the courts as being prospective instead of retrospective. In Mott Store Co. v. St. Louis & S. F. R. Co., 254 Mo. 654, 158 S. W. 108, the Supreme Court adopted as its own an opinion in which the Springfield Court of Appeals said (254 Mo. 1. c. 661, 662):

"Again, the law as announced in 36 Cyc. 1223, in dealing with the subject of amendatory acts, is as follows:
"Unless required in express terms or by clear implication, an amendatory act will not be given a retrospective construction. Proceedings instituted, orders made, and judgments rendered before the passage of the amendment will therefore not be affected by it, but will continue to be governed by the original statute. Where a statute, or a portion thereof, is amended by declaring that, as amended, it shall read as follows, and then setting forth the amended section in full, the provisions of the original statute that are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act takes effect.""

So, in Cleveland v. Laclede-Christy Co., (1938) 113 S. W. (2d) 1065, 1. c. 1072, the St. Louis Court of Appeals said:

"By the amendment of 1931 referred to, the provision with respect to occupational diseases was merely added to

subdivision (b), but the language above quoted still remains and there is nothing in the amendment to warrant a construction that would give it a retroactive effect. The rule is well settled that statutes must be construed to operate prospectively only, unless the legislative intent to the contrary clearly appears. *Jamison v. Zausch* 227 Mo. 406, 126 S. W. 1023, 21 Ann. Cas. 1132; *State ex rel. Harvey v. Wright*, 251 Mo. 325, 158 S. W. 823, Ann. cas. 1915 A, 588. * * * "

Statutes providing a remedy in judicial proceedings are often construed to operate retrospectively (*McManus v. Park*, 229 S. W. 211, 213 (2) 214, 237 Mo. 109), but this is not a remedial statute.

On the foregoing authority it is our opinion that Section 4952a, supra, is prospective in its operation, and a non-intoxicating beer license may be issued to a person whose license to sell such beer was revoked prior to October 10, 1941. Of course, such a license may not be issued to a person whose license to sell non-intoxicating beer has been revoked subsequent to October 10, 1941.

You then ask whether a non-intoxicating beer license may be issued to a person whose intoxicating liquor license was revoked prior to October 10, 1941. On the same authority with reference to the statute being prospective, the answer is in the affirmative. There is an additional reason.

The Non-Intoxicating Beer Law and the (intoxicating) Liquor Control Act, are by their express terms separate and distinct. They were enacted at different times. The former was first enacted at the regular session of the Legislature in 1933 (Laws of Missouri 1933, p. 256-267, approved, March 15, 1933). The latter was enacted at the Special Session of 1933-34 (Laws of Missouri, Extra Session, 1933-1934, p. 77-95, approved, January 13, 1934).

The Non-Intoxicating Beer Law, in Section 4952a, supra, provides that no person shall be granted "a permit or license hereunder," whose permit or license "as such dealer" has been revoked. That refers only to non-intoxicating beer licenses, and non-intoxicating beer dealers. It does not apply to intoxicating liquor licenses and dealers. Therefore, a non-intoxicating beer license may be issued to a person whose intoxicating liquor license has been revoked. Vice versa, the (intoxicating) Liquor Control Act provides in part in Section 4906, R. S. Mo. 1939, that no person shall be granted "a license or permit hereunder," whose license "as such dealer" has been revoked. That refers only to intoxicating liquor licenses and dealers. It does not apply to non-intoxicating beer licenses and dealers. Therefore, an intoxicating liquor license may be issued to one whose non-intoxicating beer license has been revoked.

CONCLUSION

It is our opinion that the provision in the Non-Intoxicating Beer Law (Laws of Missouri, 1941, p. 411, Section 4952a) that no license thereunder shall be granted to a person whose license as such dealer has been revoked, operates prospectively from the date it became effective, October 10, 1941, and that a non-intoxicating beer license may be issued to a person whose license to sell such beer was revoked prior to October 10, 1941. A non-intoxicating beer license may be issued to a person whose intoxicating liquor license has been revoked. An intoxicating liquor license may be issued to a person whose non-intoxicating beer license has been revoked.

Respectfully submitted,

APPROVED:

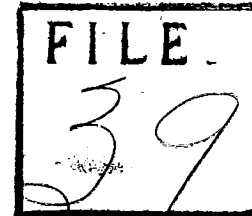
ERNEST HUBBELL
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General
EH:VC

INJEXICATING LIQUOR: Rathskeller may be licensed if interior
RATHSKELLER: visible from entrance or approach,
LICENSE: though not visible from street.

December 31, 1941

Honorable W. G. Henderson, Supervisor
Department of Liquor Control
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for an official opinion by your recent letter, which is in the following terms:

"I respectfully request an opinion upon the following subject:

"Do I have the authority under the provisions of Section 21a to issue a permit to sell 5% beer covering premises commonly referred to as a rathskeller? This Section is not clear as to whether or not this type of beer, as mentioned above, located in the basement is permissible. I will agree that such room is hidden from public view due to its location but would appreciate being officially advised as to whether or not this particular Section actually prohibits the granting of 5% beer permits to such location."

The only definition which we have found for the term "rathskeller" is (Webster's New International Dictionary, 2nd Ed., p. 2066):

"rathskeller - A restaurant, usually below the street level, at which drinks are served, patterned after the German cellar or basement of a city hall where beer or wine is sold."

The only section of the Liquor Control Act which could have any application to this question is Section 4899, R. S. Mo. 1939, which in part provides:

"Nothing in this act shall be so construed as to authorize the sale of intoxicating liquor in the original package, or at retail by the drink for consumption on the premises where sold, * * * in any building or room where there are blinds, screens, swinging doors, curtains or any other thing in such building or room that will obstruct or obscure the interior of such room from public view. * * * "

From your above quoted letter, it is understood that the rathskeller in question has in it no blinds, screens, swinging doors, etc., but that the only question is whether a license may be granted to an establishment which is below street level. The word "public" means "open to all; common to all or many, general; open to common use." It means the "community at large;" and is "not limited or restricted to any particular class of the community." It has been defined as "the body of the people at large; the people of a neighborhood; the community at large." 4 Words & Phrases (5th Ser.), pages 1068-1070. A rathskeller is a public place. The populace at large, without restriction, has a right to resort to it. Such an establishment must have a public entrance or method of approach. If the interior of such an establishment may be seen by a person of ordinary ability, from such entrance or place of approach, it is open to public view, and the rathskeller may legally be licensed to sell intoxicating liquor. It is immaterial that the place from which the public may view the interior of a rathskeller may not be on the street. All that the law requires is that there shall not be "in such building" anything obstructing public view of the interior of the premises.

There is no doubt that licenses may be granted for sale of intoxicating liquor in hotels in places that are not visible from the street. The interior of such places may be seen from an entrance or approach to which the public in general has a right to resort. Rathskellers are in the same category.

We have found no adjudicated case applicable to this question. Cases arising under laws similar to Section 4899, supra, dealt with the use of screens or blinds (Black on Intoxicating Liquor, p. 195, Section 154).

CONCLUSION

A rathskeller may legally be licensed to sell intoxicating liquor, if the interior of the premises may be seen from the entrance or approach, though not visible from the street.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney General

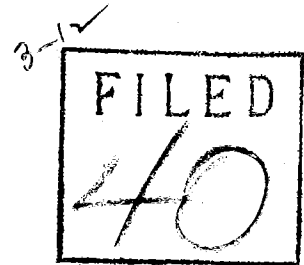
APPROVED:

VANE C. THURLO
(Acting) Attorney General

EH:VC

JUSTICE OF THE PEACE: Justice of the peace appointed upon petition may hold court any place in township.

March 10, 1941



Honorable Wilson D. Hill
Assistant Prosecuting Attorney
Richmond, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which request reads as follows:

"A justice of the peace was appointed by the county court under Section 2137, Revised Statutes 1929, for the town of Rayville, Ray County, Missouri, upon the petition of twelve householders of said town.

"Rayville is in Richmond township. It is about eight miles from the city of Richmond. Can this justice of the peace hold court in the city of Richmond?

"He is still within his township, but due to the fact that he was appointed under the section referred to, would he be limited to holding court in Rayville, Missouri, alone?"

The question presented by your request is whether a justice of the peace appointed by the County Court, upon a petition of twelve voters of any township setting forth that they live more than five miles from the nearest justice of the peace in their township, can hold court any place in the township. And it is to these facts that we limit this opinion.

March 10, 1941

Section 2524, R. S. Mo. 1939, which was Section 2137, R. S. Mo. 1929, provides in part as follows:

"Whenever a petition shall be presented to the county court of any county in this state, signed by twelve or more qualified voters of any township in said county, setting forth that they live more than five miles from the nearest justice of the peace in their township, the county court shall have power to appoint an additional justice of the peace for such township, and the justice so appointed shall live in the immediate neighborhood of the petitioners, and at least five miles from any other justice of the peace of such township: * * * * *"

The general rule is stated in Kelly's Justice Treatise, Section 5, page 7, as follows:

"A justice of the peace may in general * * * hold his court at any place within his township."

In *Altergot v. O'Connor*, 6 S. W. (2d) 1012, the following language is quoted with approval:

"He (meaning the justice) can perform his official duties only in his own township."

This rule is recognized in *State Bank v. Anderson*, 36 S. W. (2d) 138, in which the court holds that:

"The law is now well settled in this state that an appointive justice of the peace whose commission limits his acts to a certain territory may not perform any official acts outside of such territory."

March 10, 1941

In view of the above authorities it will be seen that a justice of the peace of a township may hold court any place within the township.

Conclusion

It is, therefore, the opinion of this Department that a justice of the peace, appointed by the County Court, upon a petition signed by twelve voters of any township in said county setting forth that they live more than five miles from the nearest justice of the peace in their township, may hold court at any place within the township.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

NOTARIES PUBLIC * Acknowledgments attached to intoxicating liquor and non-intoxicating beer applications for license shall be received in a court of record as prima facie evidence where the same are regular on their face: Second, should the evidence warrant, a notary public could be removed from office through a quo warranto proceeding: Third, the office of notary public could be forfeited and the notary removed under Sec. 12828 R. S. Mo. 1939, should the evidence warrant.

June 27, 1941

Hon. Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri



Dear Sir:

We are in receipt of your request for an opinion upon the following statement of facts:

"In this term of the Ray County Circuit Court, I had occasion to try one Edith Van Meter Sexton, charged with making a false affidavit in connection with an application for a liquor license. The certificate on the affidavit was that of Paul White, Notary Public of Ray County, Missouri. When called before the Grand Jury, and when giving testimony upon which the indictment on which Mrs. Sexton was preferred, Mr. White testified that he had sworn her to the application, administering the oath on the bottom of the application provided for that purpose. When called upon to testify in Circuit Court, and after the jury had been sworn, Mr. White testified definitely that he had not sworn her to the application, but that all that transpired was that she had brought the application filled in and signed, into his office, placed it before him, that he had placed his seal on it and signed his name to the certificate and told her she owed him fifty cents (50¢). Since I could not prove any swearing, I was forced to nolle pros this case and the defendant went free."

Hon. Wilson D. Hill

(2)

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"Mr. White has certified most of the liquor applications in this County, and I am of the opinion that they are worthless as far as any guarantee of their verity is concerned.

"I think I shall probably prefer charges against this Notary under Section 4585 for affixing a false jurat, and I would like to know how to proceed to take away his commission, as the officers are powerless to keep undesirable persons from making applications and falsifying their answers as to their prior convictions and revocations if they can not be prosecuted for making false affidavits."

From reading your request we think that perhaps the primary difficulty that you are anticipating is in the prosecution which might arise in the future on similar bonds given by individuals in your county, wherein, either the named notary or some other notary affixed his acknowledgment, or jurat, as the case may be. Therefore, we shall endeavor to take up questions which may present themselves in the future.

Section 13360 R. S. Missouri, 1939, designates how a notary is appointed, and reads as follows:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall

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hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

Section 13364 R. S. Missouri, 1939, provides for the oath of office and the bond. This Section we are not copying in this opinion, for brevity sake.

In 1 C. J., P. 810, Par. 124, we find this statement, in part:

"In some jurisdictions it is held that the act of the officer in taking and certifying an acknowledgment is judicial, or, as it is sometimes called, quasi judicial, in its nature. * * * "

In 1 C. J., P. 810, Par. 125, the following is found:

"The preponderance of authority favors the view that the act of an officer in taking an acknowledgment is of a merely ministerial nature. * * * For if the act be judicial it would seem to follow that the officer could not be held liable for negligence in the performance of it; * * * ."

Hon. Wilson D. Hill

(4)

June 27, 1941

From viewing authorities, the Courts in Missouri apparently follow the latter view and hold that the taking of an acknowledgment is of a merely ministerial nature. Stevens v. Hampton, 46 Mo. 404.

In the case of State to use v. Plass, 58 Mo. App. 148, l. c. 150, the court said:

"The duties of a notary public in taking acknowledgments of deeds and certifying thereto are ministerial not judicial."

In the case of State ex rel. v. Balmer, 77 Mo. App. 463, l. c. 473, the court said:

"* * * It was an official act, such an one as business men every day and everywhere must rely upon in the transactions of their business, and they are not required to doubt the truth of such certificate and go out to verify it, before acting on it; on the contrary the law makes a notary's certificate evidence of the fact contained in it, and if it turns out to be false, the notary -- not his confiding victim--should suffer the consequences. * * *"

See State v. Ryland, 163 Mo. 280, Vol. 1 C. J., Pars. 293 and 294.

With these fundamental principles of law before us, we shall now attempt to review some of the authorities, to determine the validity and credence that shall be given an acknowledgment in a court of law, when the instrument to which it is attached is at issue before the court. In this connection, we call your attention to Section 3435 R. S. Missouri, 1939, which reads as follows:

"Every instrument in writing, conveying or affecting real estate, which shall be acknowledged or proved, and certified as hereinbefore prescribed, may, together with the certificates of acknowledgment or proof, and relinquishment, be read in evidence, without further proof."

Then, the court in the case of Wintz v. Johannes, 56 S. W. (2d) 109, 1. c. 115 ruled as follows:

"As shown by the testimony of William Wintz, Albert J. Michel, and Frank H. Michel, the contesting defendants plant themselves behind the notary's certificate of the acknowledgment of the deed in question. Our statute, of long standing, now section 3050, R. S. 1929 (Mo. St. Ann. sec. 3050), says: 'Neither the certificate of the acknowledgment nor the proof of any such instrument nor the record nor the transcript of the record of such instrument, shall be conclusive, but the same may be rebutted.' Under this statute a notary's certificate of an acknowledgment is only prima facie evidence of the facts recited therein."

See State v. Page, 332 Mo. 89, 58 S. W. (2d) 293.

It will be noted in reviewing the cases, supra, that in no incident are they cases in which the notary's acknowledgment is identical in character to the one referred to in your request, and in most instances grow out of acknowledgments taken under the Married Woman's Act, now repealed. It will also be noted that the courts in some instances have reasoned that due to the existence of a specific legislative act prescribing the manner and method of taking the acknowledgment of a married woman that the statute must be strictly complied with. There-

fore these cases are only beneficial for the general proposition of law declared therein. Further, it will be noted that affidavits, or acknowledgments taken under Article 1, Chapter 32, R. S. Missouri, 1939, are executed on prescribed blanks and printed forms prepared by the Supervisor of Liquor Control, made in pursuance to Section 4889 R. S. Missouri, 1939. Whereas, under Article 2, of Chapter 32, R. S. Missouri, 1939, they are made in pursuance to Sections 4959 and 4960. We do not find any specific section similar to Section 3435 R. S. Missouri, 1939, or Section 3437, R. S. Missouri, 1939, pertaining to acknowledgments attached to applications for intoxicating liquor and non-intoxicating beer. We are unable to find any specific case in Missouri identical with the facts as stated in your request. Therefore, we cannot cite in this opinion any Missouri precedent as to how the higher courts would treat an acknowledgment attached to an application, such as the one above described; nor, can we say what the court's views would be on the degree of evidence which would be necessary to make a substantial case of impeachment of an acknowledgment of this character. Neither can we say, with certainty, that such an acknowledgment must be received in evidence with the same degree of proof as is required in proving an acknowledgment attached to a conveyance of real estate, and as contemplated in Sections 3435 and 3437, *supra*.

Now we consider some of the authorities which have to do with the method of impeaching an acknowledgment. We call attention to the case of *Lancaster v. Whaley Lbr., Co.*, 18 S. W. (2d) 796, 1. c. 798, wherein the court had this to say:

"The appellants challenge as error the action of the trial court in permitting the witness J. O. Green to testify, over objection, that it was his custom, at the time of taking the acknowledgment of S. E. Lancaster, not to permit the husband to remain in the room while the wife's acknowledgment was being taken, and that he thought he followed that custom on that occasion, because such

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testimony was hearsay and an opinion of the witness. The witness testified:

"I recall the time that J. S. and S. E. Lancaster came to my office to acknowledge a contract between them and M. T. Daniell. My recollection is that they came to the office, and that the contract and note and transfer had already been prepared; that they came into my room together, and that both of them signed the instrument in said room. I don't remember whether Mr. Lancaster was in the room at the time his wife acknowledged or not, but it was my custom at that time not to permit the husband to remain in the room while the wife's acknowledgment was being taken, and think I followed that custom; but I will not say whether he was in the room or not. I would not state that he was not in the room, or that I requested him to leave the room on this occasion."

"Wigmore on Evidence, vol. 1, p. 335, sec. 98, says: 'Thus a notary may testify that his habit is always to mail a notice of protest, and this habit alone (apart from or in the absence of a minute of the sending) would be receivable to indicate the probability that a specific notice was sent.'"

"In State v. Day, 108 Minn. 121, 121 N. W. 611, the Supreme Court of Minnesota says: 'A similar question was raised in Komp v. State, 129 Wis. 20, 108 N. W. 46, where the notary testified that to the best of his belief and judgment he administered the oath to Komp on or about the date of the jurat; that he was a busy man and administered many oaths; that his testimony was based on the fact that he made a practice not to put his name to the jurat unless he swore the affiant, and upon the fact that he found his name to the jurat and Komp's name to the affidavit; that he had

no recollection independent of the papers, but to the best of his judgment the oath was administered. The court remarked, in the course of the opinion, that the mere want of present recollection as to the exact circumstances under which the oath was taken did not necessarily control the presumption of fact arising from the official certificate.' And the testimony was held admissible. * * * * *

"See, also, Gurley v. Pilgrim Oil Co. (Tex. Com. App.) 285 S. W. 283; Leonard v. Nixon, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134.

"The acknowledgment of the notary public is in statutory form and states that 'the said Mrs. S. E. Lancaster, wife of the said J. S. Lancaster, having been examined by me privily and apart from her husband,' etc. The testimony of the other witnesses on this issue was conflicting. * * *

"In our opinion, it was not error to admit the testimony objected to, and the sufficiency of the evidence to support the finding of the jury is not questioned, and, in our opinion, warrants the finding that J. S. Lancaster was not present at the time the notary took the acknowledgment of his wife, S. E. Lancaster. * * *

It will be noted that this is a Texas case, but would, no doubt, be authority in Missouri, should a person be forced to call the notary to testify as to what took place when he executed the acknowledgment attacked in the proceeding. The court, in the case of Barrett v. Davis, 104 Mo. 549, 1. c. 555, said:

"In our state, in view of the obvious meaning of the statute on this subject, the courts have felt constrained to hold that such certificates may be avoided by evidence aliunde showing their falsity

Mays v. Pryce (1888), 95 Mo. 603;
Pierce v. Georger (1891), 103 Mo.
540; 15 S. W. Rep. 849. That con-
struction has been too long accepted
as settled law to require re-examination
now. But, in applying it, in view of
the recognized presumption of correct-
ness attaching to the acts of public
officials, we are of opinion that there
should be a clear and decided preponder-
ance of evidence to warrant discarding
as false any such certificate. * * "

The case of Mays v. Pryce, 95 Mo. 603, holds officer compe-
tent to either support or impeach certificate. See
Wannell v. Kem, 57 Mo. 478, Commings v. Leedy, 104 Mo.
454, Drew v. Arnold, 85 Mo. 128.

The cases seem to uniformly hold that a notary public
cannot contradict his own acknowledgment. However, in
Missouri, there are certain exceptions. In this connec-
tion we call attention to the case of Commings v. Leedy,
supra, Mays v. Pryce, supra, and the case of Stiffen v.
Bauer, 70 Mo. 399.

For other cases see 1 C. J. 896, Note 63, and 1 C. J.
S. 901. 1 C. J. P. 894, Par. 277, reads as follows:

"The presumption being in favor of the
truth of the certificate, it follows
that one who seeks to impeach it has the
burden of proof as to the matters relied
on to invalidate it."

See Missouri Cases, Note 48 C. J., supra.

From the review of the foregoing statutes and cases
herein enumerated, one must conclude that an acknowledgment,
regular on its face, attached to an instrument, wherein,
such instrument becomes the subject of legal inquiry, the
person relying upon said instrument has the right to have
the acknowledgment attached thereto admitted in evidence.

In *Pierce v. Goerger*, 103 Mo. 540, 1. c. 544, the court said:

"* * * This statute has been in existence since 1845 and possibly longer. The rule adopted has stood, through several revisions of the statute, without statutory change, and it must be regarded as in accord with the policy of the state. * * *"

Section 3435, *supra*, provides that any person who desires to attack said acknowledgment on any grounds must do so through a direct proceeding. We think that if an attack is made it must be proved through competent witnesses and substantial evidence that such acknowledgment is, in fact, a purported acknowledgment and is untrue and this must be proved through clear, cogent and convincing evidence, leaving no doubt in the minds of the court but what such acknowledgment is false.

It was reasoned in the case of *Kennedy v. Ten Broeck*, 11 Bush (Ky) 241, 1 C. J. S. 900, as follows:

"Since the officer will not be allowed to stultify himself by impeaching his certificate, ex parte statements made and signed by him in the form of affidavits are inadmissible to show the falsity of the certificate of acknowledgment."

Now we shall turn to that part of your request which makes inquiry as to the method of revoking a commission given to a notary public in accordance with Section 13360, *supra*.

In reading the aforesaid Section it will be noted that the Section provides, in part, as follows:

"Each such notary shall hold office for four years, * * * ."

In the case of *The People ex rel Finlay v. Jewett*, 6 Calif. 291, the court had before it a case wherein the question was presented whether the Governor of the State can remove from office a notary appointed under the provision of an act of the legislature. In refusing the right to the Governor to remove said notary, the court reasoned as follows: (1. c. 293)

"* * * But when the duration of the office is fixed by the law creating it, and where there is a provision for removal during the time limited for the continuance in office, it would seem to me that the officer is not removable, except in the manner prescribed by the law. This incidental power of removal is not expressly given by the Constitution, and it extends only by necessary implication to such offices as the Governor possesses exclusively the power of appointment to, under the Constitution, or the power is granted to him by the law creating the office, where there is no restriction on the power of removal."

"The Supreme Court of Illinois has gone further, and decided in *Field v. The People*, 2 Scam., 79, 'that when the Constitution creates an office, and leaves the tenure undefined and unlimited, the officer holds during good behavior, and until the Legislature by law limits the tenure to a term of years, or authorizes some functionary of the government to remove the officer at will, or for good cause.'"

"The soundness of this decision may be questioned, but I apprehend that there can be no doubt that the power of removal by the executive of this State

has been circumscribed, and can only exist in the cases enumerated in the Constitution, section 7, Article XI, which provides as follows: 'Where the duration of any office is not provided for by this Constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office, not fixed by this Constitution, exceed four years.' The obvious meaning of which is, that in those offices the term of which is not fixed by law, the incumbent may be removed at the pleasure of the appointing power; but where the tenure is defined, then the officer shall hold for his full term. * * *

We have not been able to find a case wherein a contrary view has followed. Therefore, on the authority of this case, it is our opinion that the Governor could not remove a notary for the reasons set forth in the Jewett case, Supra. The only other way that suggests itself is through a quo warranto proceeding. After a diligent search, we have not found a case in any jurisdiction wherein this method was attempted. The foremost authority to substantiate this method in Missouri, is the case of State ex rel McKittrick v. Wymore, 119 S. W. (2d) 941, 1. c. 943, wherein, the court said:

"* * * The writ is not directed against the individual claiming the office. It is directed against his right to hold the office. It is not an action in the interest of any individual. It is an action to protect the public against usurpation. 22 Stan. Ency. of Procedure, p. 25. The dominant issue in quo warranto is title. It proceeds on the theory that the office has been for-

feited by an act of misconduct on the part of the official. On the other hand, removal concedes title and proceeds on the theory that the official either has not 'forfeited by the act forbidden' or has committed a criminal offense and subjected himself to punishment and forfeiture of the office on conviction. The courts are without authority to create and declare a forfeiture of office. Absent forfeiture at common law, the forfeiture can be created and declared only by either the constitution or valid legislative enactments. The rule is stated by standard texts as follows:

"'Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause. And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the quo warranto proceeding, may determine the question of forfeiture for itself. The question must, however, be judicially determined before he can be ousted. "And if the alleged ground for ousting the officer is that he has forfeited his office by reason of certain acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient. The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of quo warranto is commenced.'" Mechem, Public Officers, Sec. 478, p. 308. * * * "

June 27, 1941

If it could be said that the language of the court in this case is strong enough in reasoning to give this right, then this remedy would be the proper remedy in Missouri. However, we doubt very seriously whether the courts would uphold a quo warranto proceeding against a notary public unless the relator (who would have the burden of proof) would have to bring forth evidence of a sufficient amount and character, which would convince the court that the public interest could only be served through the ouster of the named defendant, for the court said further in this case, at l. c. 943:

" * * * The court which has original jurisdiction in quo warranto may determine the question of right or the question of forfeiture for itself, unless the statute provides that forfeiture shall follow a criminal prosecution and sentence, and if the act complained of does not ipso facto create a forfeiture, and is only a misdemeanor in office on account of which the law provides the manner in which the vacancy is to be declared, it is held that quo warranto will not lie.' Ency of Pleading & Practice, Vol. 17, p. 400. * * * "

It will be noted in the same opinion at l. c. 944, the Court, in interpreting Section 11202 R. S. Missouri, 1929, (now Section 12828 R. S. Missouri, 1939) said that the Section, through the use of the word "may" makes it permissible only, and an offending official, within the meaning of this Section may also be removed, should the Courts declare a forfeiture under said Section. This Section reads, as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such

officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

In the case of *Bakersfield News v. County*, 338 Mo. 519, 92 S. W. (2d) 603, the court held that a public officer who is guilty of any wilful or fraudulent violation or neglect of any official duty may be removed from office by the method provided in this Section.

Section 1886 R. S. Missouri, 1939, reads as follows:

"In all cases in which an oath or affirmation is required or authorized by law, every person swearing, affirming or declaring, in whatever form, shall be deemed to have been lawfully sworn, and to be guilty of perjury for corruptly and falsely swearing, affirming or declaring, in the same manner as if he had sworn by laying his hand on the gospels and kissing them."

It will be noted in the case of *State v. Privitt*, 337 Mo. 1194, 39 S. W. (2d) 755, l. c. 757, the court said:

"* * * It is true that, by uniform decisions of our courts and by our statutes, no set formula is required to

Hon. Wilson D. Hill

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constitute an oath or to impose the
obligation of an oath. * * * "

See also Silver v. K. C. St. L. & C. Ry. Co., 21 Mo. App.
5.

CONCLUSION.

In conclusion, first, we are of the opinion that an acknowledgment, or jurat, attached to an application for a liquor license, or a non-intoxicating beer license, when the same is at issue in a court of record, should be received by the court as prima facie evidence of all the matters and things set forth in the acknowledgment or jurat, if the same is regular upon its face, notwithstanding the fact that there is no specific statute as there is in the case of conveyance of real estate.

Secondly, we are of the opinion that should the evidence warrant, a notary public could be removed from office through a quo warranto proceeding.

Thirdly, we are of the opinion that the office of notary public could be forfeited and the notary removed under Section 12828 R. S. Missouri, 1939, should the evidence warrant.

Respectfully submitted,

B. RICHARDS GREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

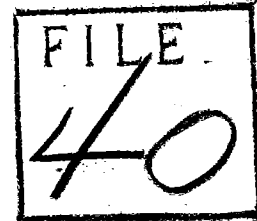
HIGHWAYS:

MUNICIPAL CORPORATIONS:

State Highway Commission has exclusive control over location of highways within the confines of municipal corporation.

September 10, 1941

Mr. Roger Hibbard
City Attorney
Hannibal, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"A question has arisen before the City Council of the City of Hannibal concerning the right of the City to erect certain highway markers designating an optional U. S. Highway.

"At present United States Highway No. 36 passes through Hannibal, and enters Hannibal at the Mark Twain Memorial Bridge on the east from the State of Illinois. It then proceeds along North Third Street to its intersection with Broadway street, thence west along Broadway to St. Marys Avenue, and thence west along St. Marys Avenue, from which Avenue it is diverted approximately one (1) block to an intersection outside of the City Limits, with U. S. Highway No. 61.

"At a meeting of the City Council of the City of Hannibal on September 2, 1941, the City Council passed a resolution directing the Traffic Commission of the City of Hannibal to erect signs reading, 'Optional Route U. S. Highway 36', over a route described as follows:

"From the Mark Twain Memorial Bridge, proceed thence west along Mark Twain Avenue and Harrison Hill to the City

Limits of the City.

"For your information, the proposed optional route would intersect United States Highway 61 at a point outside of the City Limits and would pass over a road now controlled by the Missouri State Highway Department, and known as City Route U. S. 61, for a distance of about five-eighths ($5/8$) of a mile, which said distance also lies outside of the City Limits.

"As City Attorney I would like an opinion from your office as to the right and power of the City of Hannibal to erect such markers, first, over that part of the proposed route as lies within the City, and, second, as to that part of the route which lies outside of the City.

"Since this matter concerns the state, through the act creating the Missouri State Highway Commission, I am asking your office for this opinion."

Section 8782, R. S. Missouri 1939, provides in part as follows:

"The state highways as herein designated shall be under the jurisdiction and control of the commission. * * * * "

Section 8768, R. S. Missouri 1939, provides:

"There is hereby created and established a state wide connected system of hard surfaced public roads extending into each county of the state, which shall be located, * * * as public roads, * * "

The power of the State Highway Commission is set forth in *Selecman et al. v. Matthews et al.*, State Highway Commission, 15 S. W. (2d) 788, 321 Mo. 1047, as follows:

"Said section 29 of the State Highway Act describes in general terms the routes along which the state highways shall be 'located'; the power to so 'locate' them is conferred upon the state highway commission. See concurring opinion of White, J., in *Castilo v. State Highway Commission*, 312 Mo. 244, 276, 279 S. W. 673. Such power is circumscribed by no limitations, nor are any rules or regulations prescribed for the manner of its exercise. So far as any of the express terms of the statute are concerned, the power is plenary.
* * * * *

Therefore, the Legislature has, by statute, given to the State Highway Commission the "plenary" power as to the location of the state highways.

Section 8781, R. S. Missouri 1939, permits the location of a state highway through city streets. See *State ex rel. City of Hannibal v. Smith*, State Auditor, 335 Mo. 825, 74 S. S. (2d) 367. The general rule in regard to the location of highways is given in 25 Am. Jur., page 545, as follows:

"* * the state has absolute control of the highways, including streets, within its borders, even though the fee is in the municipality. * * * * *

A reading of the statutes discloses that our Legislature has given to the State Highway Commission exclusive control over the location of the state highways and nowhere has delegated to the various municipal corporations any power in regard thereto. This view is recognized in *State ex rel. McKittrick v. Missouri Utilities Company*, 96 S. W. (2d) 607, in which our Supreme Court, speaking of the highway commission's powers over highways within the confines of a city, said:

"* * In matters immediately concerned with the construction of paving of the highways and their maintenance, the commission has jurisdiction. * * * * *

Mr. Roger Hibbard

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September 10, 1941

Section 8755, R. S. Missouri 1939, provides in part as follows:

"The commission is authorized to prescribe uniform marking and guide boards on the state highways, and to cause to be removed all other markings and guide boards and advertising signs. * * * * *

Under the authorities of the above statute, the commission has the exclusive power to erect guide boards and markings, and any action on the part of a municipality which attempts to invade this exclusive right is unlawful and said markings and guide boards may be removed by the State Highway Commission.

In answer to your second question, we believe it is obvious that since a municipal corporation has no power in regard to the location of a state highway or right to erect highway markings and guide boards within the confines of the city limits that it would certainly have no right to do such things outside of the city limits.

CONCLUSION

It is, therefore, the opinion of this department that the State Highway Commission has exclusive jurisdiction and control over the state highways and has the exclusive right to prescribe the location of such highways and to erect guide boards and highway markings and no municipal corporation is authorized to alter or divert such location or to erect guide boards of its own.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

AO'K:DA

FEES: A sheriff, constable or any other officer is not entitled to a statutory fee for serving notice on insufficient check.

✓ / ✓ 2
October 3, 1941

Honorable Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of September 26, 1941, which is as follows:

"May I have an opinion on your interpretation of the law applicable to the following facts:

"Under Section 4696, Missouri Revised Statutes, 1939, the maker of 'an 'insufficient fund check' is deemed to have the intention to cheat and defraud if within five days after receiving notice that such check has not been paid by the drawee, he fails to pay the amount of the check together with all costs and protest fees.

"Is the serving of the notice under this section restricted to an officer?

"Is a Sheriff or Constable who served such a notice entitled to a fee of fifty (50¢) cents, together with a mileage fee of ten (10¢) cents per mile for the miles actually traveled in serving the notice? If the foregoing are true, then should the maker of the check be taxed the Sheriff's fee and mileage as part of the costs mentioned in said check?

"If the check is not paid after a no-

October 3, 1941

tice has been served by the Sheriff, and an affidavit is filed and a warrant issued and the defendant is adjudged guilty can the Sheriff recover both mileage on the warrant and on the notice which he served?"

Section 4696, R. S. Missouri 1939, provides as follows:

"As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, (together with the drawee thereof the amount due thereon), together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."

The above section specifically states, "* together with all costs and protest fees, * *" This section is not a part of the criminal prosecution for the reason the drawer of the instrument may pay the same to the drawee before the five days have expired and in that way would have no connection with the criminal prosecution of the case. That part of Section 4696, supra, is merely a civil matter and a matter of evidence. That it bears no connection with a criminal charge and is only a civil procedure to aid in the collection of an insufficient check was indirectly held in the case of State v. Taylor, 73 S. W. (2d) 378, 1. c. 381, where the court cited the following:

"In the case of City of St. Louis v. Sternberg, 69 Mo. 289, the defendant appealed from a judgment imposing a fine for violation of an ordinance requiring persons practicing law to obtain a license

and to pay the city collector \$25 annually therefor. The judgment was attacked here on constitutional grounds. But this court upheld the judgment of the trial court. In its opinion it made a distinction which seems to be in point here (69 Mo. 289, loc. cit. 303): 'This is not a proceeding on the part of the city to collect the amount of license required by the ordinance, but is instituted to recover a fine for a breach of it committed by defendant in practicing law without such license, and although he may be subjected to the payment of the fine he would not thereby be entitled to the license. The mere fact that defendant did not procure the license does not create the liability, but the fact of his practicing as a lawyer without such license. It was his privilege to decline to pay the \$25, the required sum for the license, and it was only when he continued or entered upon such practice without such license that he became liable to a fine. It is, therefore, the collection of the fine, and not the license tax, which is sought to be enforced in this proceeding.'

In this case the question of imprisonment for a debt was before the court and it held that the \$25.00 to practice law was a civil matter, but when the attorney continued to practice law without the payment of the \$25.00 license fee, then it became a criminal matter.

Under the facts in your request if the drawer paid the drawee the check within five days there could be no criminal prosecution.

You also ask in your request if the notice set out in Section 4696, supra, restricted the serving of the same to a sheriff or constable. In reading this section we see no such restriction as it merely says, "within five days after receiving notice that such check, draft or order has not been paid by the drawee." Under this clause said notice could be served by an individual or in any other man-

ner and becomes a question of fact in the prosecution as to the prima facie evidence of the intent and should be proven as any other ordinary fact.

The fees allowed a sheriff are set out in Section 13413, R. S. Missouri 1939. Section 13415, R. S. Missouri 1939, provides as follows:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

In an examination of Sections 13413 and 13414, supra, we find no fees allowed for the serving of a notice such as described under Section 4696, supra. Since under Sections 13413 and 13399, R. S. Missouri 1939, it does not specifically state that a sheriff is entitled to fees under Section 4696, supra, then he cannot collect either a fee or mileage. In the case of *State ex rel. v. Brown*, 146 Mo. 401, 1. c. 406, the court said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. *State ex rel. v. Wofford*, 116 Mo. 220; *Shed v. Railroad*, 67 Mo. 687; *Gannon v. Lafayette Co.*, 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' *Williams v. Chariton Co.*, 85 Mo. 645."

Also, in the case of *Nodaway County v. Kidder*, 129

October 3, 1941

S. W. (2d) 857, l. c. 860, paragraph 8, the court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

In view of the above authorities it is the opinion of this department that the serving of the notice as set out in Section 4696, R. S. Missouri 1939, does not restrict the service to a sheriff, constable or any other officer, and does not set out the procedure of such service, and for that reason it may be served in any manner and becomes a question of fact to be proven in the trial of the criminal case as to the intent to defraud on the part of the drawer of the instrument.

It is further the opinion of this department that if a sheriff or constable or any other officer serves such notice, the fee for his services is not a statutory fee, and he serves the same under a private contract for the one who employs him. Of course, if a complaint is issued under Section 4695, R. S. Missouri 1939, and a notice has been served as under Section 4696, supra, the sheriff, if he serves the warrant, is entitled to his fee and mileage upon the warrant but not upon the notice.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

TAXATION:
ASSESSOR:

Assessor is entitled to compensation for list for each joint owner of real estate in tenancy in common, joint tenancy or separate real estate of husband and wife.

February 19, 1941

Mr. W. A. Holloway, Chief Clerk
State Auditor's Office
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of February 15, 1941, which reads as follows:

"Subsequent to statutory revisions made by the 59th General Assembly defining an assessment list, several questions have arisen concerning a specific definition of an assessment list, particularly as pertaining to compensation. We would, therefore, appreciate your opinion of the following questions: .

"1. Is the Assessor entitled to the compensation prescribed for an assessment list for each joint owner, if the assessment list is signed by said joint owner?

"2. Is the Assessor entitled to compensation for such list if such list is made by the Assessor, presuming in each case that such joint owner has no other assessment?

"3. Is the Assessor entitled to the thirty-five cents per entry for entering the interest of each joint owner on the tax book as described?

"4. What is the effect of Section 9793, R. S. Missouri 1929, toward the definition of an assessment list, particularly dealing with the question

of joint ownership of real estate?"

All of the above four questions in your opinion request can be answered under one heading.

Section 10950, R. S. Missouri 1939, which was enacted as Section 9756, Laws of Missouri, 1937, page 570, partially reads as follows:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. * * * *"

It will be noticed under the above partial section that it applies to personal property and real estate and requires the person who has an interest in both the personal property and real estate to make a return upon the blank furnished him by the county assessor. This section does not say that the assessor shall make the return, but if the person does not make a return the assessor, by other sections, is authorized to make a return both as to personal property and real estate. This partial section further requires that any person having charge or management of property in the county shall make a return. All through the section it is the intention of the Legislature that the person owning or having management of the different kinds of property shall make a return.

Section 10996, R. S. Missouri 1939, which was the amended laws of Section 9806, R. S. Missouri 1929, as amended by the Laws of Missouri 1931, page 358, partially reads as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, thirty cents per list in counties having a population of more than forty thousand, and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury: * * * * *

Under the above section the payment for the preparation of the list in different counties varies in accordance with the population of the county. Under your ques-

tion number 3, which will be answered later on, the amount in some counties may be thirty-five cents, thirty cents or different amounts.

In the case of joint tenants in common, which would happen in case of a partnership owning real estate and personal property, and where the question of survivorship is not involved, each of the owners of the undivided interest in the real estate should make a return as to the amount of interest he owns in the real estate. In the case of a partnership consisting of three members, sharing and sharing alike, the three members of the partnership should make a return to the assessor as to his interest in the real estate. This would require the making up of three lists by the county assessor.

In your request you refer each time to the words "joint owner." The above example is the case of one class of joint ownership. Another class of joint ownership is that of joint tenancy. Of course, in the case of joint tenancy the grantees of a deed in that nature must receive a deed which refers to the question of survivorship or they would still be considered the same as joint owners in common. In the case of a joint tenancy, which means that the real estate is owned by two or more joint owners with the right of survivorship involved, either of the joint owners may sell his interest in the real estate which would automatically destroy the question of joint tenancy in the property, and since under a joint tenancy one of the owners can sell his interest, it is such an interest that he must personally make a return to the county assessor. In such tenancies, that is, joint tenancy, each of the joint owners must make a return to the county assessor and the county assessor must prepare a list showing the interest and the value of each of the joint owners under the joint tenancy.

Under Section 10950, R. S. Missouri 1939, it will be noticed the following appears, "to make a correct statement of all taxable property owned by such person, * * * ." In construing the statutes the word "person" shall also be considered singular and plural. All statutes concerning taxes must be strictly construed. Statutes authorizing collection of taxes must be strictly

construed, as was held in the case of State ex rel. Western Union v. Markway, 110 S. W. (2d) 1118, 341 Mo. 976.

Collection of taxes can only be made in accordance with tax books as actually made and furnished to collector. State ex rel. and to the use of Parrish v. Young, 38 S. W. (2d) 1021, 327 Mo. 909.

Sections 9915 and 9916, R. S. Missouri 1929, provide for the method of collection of personal taxes. If suits are filed for personal taxes they should be filed against the proper parties who are owing the taxes. If the personal property is owned jointly by entirety it would be impossible for the two owners of the property individually and singularly to return an assessment list to the county assessor for his, or her, interests in the jointly owned property. If it were possible to so return an assessment list by stating that they are the owners of the undivided half it would not be the proper procedure for the assessment on account of the fact that owners of property by entirety are not the owners of an undivided one-half interest in the property. Owners of property by entirety are by a fiction of law treated as one person. In the case of Greene v. Spitzer, 123 S. W. (2d) 57, par. 2, 3, the court said:

"An estate by the entirety is created by a conveyance to the husband and wife by a deed in the usual form. It is one estate vested in two individuals who are by a fiction of law treated as one person, each being vested with entire estate. Neither can dispose of it or any part of it without the concurrence of the other, and in case of the death of either the other retains the estate. It differs from a joint tenancy where the survivor succeeds to the whole estate by right of the survivorship; in an estate by entirety the whole estate continues in the survivor. The estate remains the same as it was

in the first place, except that there is only one tenant of the whole estate whereas before the death there were two.' Ashbaugh v. Ashbaugh et al., 273 Mo. 353, 201 S. W. 72, loc. cit. 73."

The above case applies to real estate. The same laws apply to personal property, and, in the case of Ambruster v. Ambruster, 31 S. W. (2d) 28, par. 6, the court said:

"That a husband and wife can own a bank account as tenants by the entirety may be conceded, Craig v. Bradley, 153 Mo. App. 586, 134 S. W. 1081; and that they or two or more other persons may hold such an account as joint tenants has been declared by statute as well as the decisions of our courts of last resort. Sections 11779, 11840, Rev. St. Mo. 1919; Mississippi Valley Trust Co. v. Smith, 320 Mo. 989, 9 S. W. (2d) 58 and cases cited. * * * * *

Under the holding in the above cases the owners by entirety are considered the same as one person, and where property is jointly owned by husband and wife it would necessarily mean that a separate return be made upon an assessment of property owned by entirety. Also, if either one of them owned either real estate or personal property in their own right a separate return must be made by each of them singularly as well as the return made by them by entirety.

The fourth question asked in your request, which reads as follows:

"What is the effect of Section 9793, R. S. Missouri, 1929, toward the definition of an assessment list, particularly dealing with the question of joint ownership of real es-

tate?"

is not applicable to the question of joint ownership of real estate but is merely a "cure all" section to make the real estate responsible for the taxes even though there is a mistake made in the name of the owner or possibly the wrong owner.

CONCLUSION

In view of the above authorities it is the opinion of this department that where several persons own real estate and personal property in common each owner has such an interest in the property that he must make a personal return of his property owned by him in common with others as set out in Section 10950, R. S. Missouri 1939, and the assessor must prepare a list from his turn in showing the valuation and interest of each joint owner in common in the property turned in by the respective joint owners in common.

It is further the opinion of this department that joint owners of real estate and personal property, by joint tenancy, which involves the question of survivorship, shall separately make a return of their real estate and personal property which is involved in the joint tenancy and the question of survivorship does not prevent them from making a separate return as to their interest in the personal property or real estate for the reason that under the law they are permitted to sell their interest in the joint tenancy which automatically destroys the question of survivorship under the joint tenancy.

It is further the opinion of this department that in case property is owned by a husband and wife as tenants by entirety there should only be one turn in to the assessor as to the property owned by the husband and wife for the reason that under the law in an estate by entirety the husband and wife are considered one person and neither of them could dispose of their separate interests in the real estate owned by them by entirety but to dispose of the same both of them must sell at the same time.

Mr. W. A. Holloway

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February 19, 1941

It is further the opinion of this department that where persons are required to turn in their property, both personal and real estate, which is held either in a tenancy in common or by joint tenancy, they should include in their turn in other property held by them. In the case of a turn in on real estate by entirety, if the husband and wife own other real estate which is in their name other than by entirety, or if they own personal property individually they should make a separate return as to the real estate and personal property owned by them as individuals, and the assessor should be required to make a list for not only the real estate held by entirety but also to make a separate list of their individual property not held by entirety, and he should be allowed the fee allowed in that county for making the list. There may be, for a husband and wife, as many as three lists, as for example: A husband and wife own a piece of real estate by entirety. This would be a separate list. The husband may own a piece of property in his own name. This would be a second list, and the wife may own a piece of property in her own name. This would be a third list.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

BANKS AND BANKING: Banks are not authorized under their
SMALL LOAN BUSINESS: charter to do a banking business to
exercise the powers of the Small Loan
Act, nor act as a corporation author-
ized to subscribe for majority stock
of Small Loan Corporations.

April 3, 1941

Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein
you submit a request for an opinion from this department
on the following questions:

- "a. Can a state bank or a national bank under its general powers as enumerated in Section 7749 or the Revised Statutes of Missouri, 1939, exercise the powers of the small loan act and the loan and investment act without incorporating under said acts?
- "b. Or, must it, under your practice and decision, incorporate a separate entity and thus run it as an affiliate of the bank?
- "c. Can a bank, as a corporation, subscribe for the majority stock of such corporations under your rulings or must it directly do, through its individual officers and stockholders, that task?"

Section 7 of Article XII of the Constitution of Missouri, which relates to corporations, provides as follows:

"No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business."

The question here submitted is: does the authority granted by the Small Loan Act so resemble the banking business that it could be said that the bank, in addition to its express power to do a banking business under its charter, would have the implied power to carry on the business of a small loan and investment company. Our Supreme Court in the case of *Hunter v. Garanfio*, 246 Mo. 131, 1. c. 132, in discussing the object and effect of the foregoing provision of the Constitution said:

"The object and effect of the Constitution and laws of this State with reference to corporations seem to be to permit and encourage the investment of the money of the people in business enterprises under corporate management, without the incurring of any personal liability beyond the full payment for the stock subscribed or otherwise owned by the members of the association. That this plan has been of great benefit to the State, permitting as it does the free employment of the private means of all, including the helpless classes, in active business operations, without the danger of other loss than of the capital invested, will be disputed by none. That the State should carefully safe-

guard such investments made with its encouragement, so that the fund which it permits to be substituted for personal liability will be carefully preserved and scrupulously devoted to that purpose, is equally evident. To this end it is provided by the Constitution that, 'No corporation shall issue stock or bonds, except for money paid, labor done or property actually received' (Art. 12, Sec. 8), and that 'No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized' (Id., Sec. 7). It is futile to say that these provisions are for the benefit of stockholders exclusively.

"They are both directed against the stockholders and are primarily intended for the benefit of the public, by securing, as far as possible, the integrity of the fund for the protection of those who may deal with it, as well as those who may become the purchasers of its stock upon the faith of the representations made in the act of its incorporation. The withdrawal of this fund, or any part of it, by the stockholders, otherwise than under the sanction of the law in conformity with which it is created, or its application to other uses than those authorized by the laws under which the corporation exists, is a clear violation of the policy of the State as expressed in its Constitution."

We also think the rule which should be applied in a case like the one here under consideration is stated in *Downey v. City of Yonkers*, 23 Federal Supplement 1018, wherein the Federal District Court, S. D. New York, said (l. c. 1021):

"Banks are the creation of statute. Their authority is necessarily limited strictly by statute. Pledge of deposits may lead to serious injury to unsecured depositors. Authority based on implied power must be clearly established."

The term "bank" is defined in Section 7998, R. S. Mo. 1939, as follows:

"The term 'bank' shall include any person, firm, association or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing."

Our Supreme Court in *State ex rel. Compton v. Euder*, 308 Mo. 253, l. c. 260, in discussing the subjects of banking and doing a banking business, said:

"We have found only two sections of our statutes which attempt to define what is meant by 'banking business' and they are not found in the chapter on taxation. Section 11781 defines private bankers as 'those who carry on the business of banking by receiving money on deposit, with or without interest, by buying or selling bills of exchange, promissory notes, gold or

silver coin, bullion, uncurrent money, bonds or stocks, or other securities, and of loaning money, without being incorporated.'

"It will be noted that such persons must be engaged in three lines of business activity, to-wit, accepting deposits, buying and selling various securities and loaning money. The land bank is actually engaged in a restricted way in the loaning of money, but admittedly not in the business of receiving deposits. It is not doing a banking business under the definition contained in said Section 11781.

"The other statutory definition is found in Laws of 1923, page 223, which enacted a new section known as Section 11780a, Revised Statutes 1919. We note the contention of the assessor that the 1923 act did not take effect until after the date of the assessment under consideration here, but will quote said section for what it is worth. It provides that 'the term "bank" shall include any person, firm, association or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt or other writing.'

* * * * *

In the Buder case, supra, the court held, l. c. 261, that a Federal Land Bank which neither received deposits nor cashed checks was not doing a banking business. The Federal Land Bank only made loans on improved farm lands.

The case of State ex rel. Hadley v. Bank, 157 Mo. App. 557, was one in which a trust company was attempting to en-

gage in banking business. At l. c. 564 the court, in speaking of the powers of the trust company to engage in banking business, said:

"The ninth clause of section 1124, Revised Statutes 1909, authorizes trust companies 'to buy and sell all kinds of government, state, municipal and other bonds, and all kinds of negotiable and non-negotiable paper, stocks, and other investment securities.' The grant of authority to buy and sell stocks and other investment securities as commercial commodities carries with it neither the express nor implied authority to purchase the stock of other corporations for the purpose of controlling their management, (DeLaverne Co. v. German Savings Inst., 175 U. S. 40.) Nor to use the power conferred by law for the purpose of indirectly engaging in business activities forbidden to the corporation by the express provisions of the statute. The act of the Bankers Trust Company in controlling the management of the Kansas bank through the ownership of a large majority of the stock of the bank was not buying and selling stocks within the meaning of the statute, but was a clear and flagrant evasion and violation of the law. * * * * *

The rule on the power to do certain things under the authority of a banking corporation is stated in Volume 7 C. J., page 585, at Section 213, as follows:

"In the case of an incorporated bank, the charter is a contract and furnishes the measure of the powers of the corporation, such powers being limited to those

which are expressly granted by the charter and such incidental powers as are essential to the exercise of those expressly granted. A banking corporation or association formed under a general banking act possesses authority to carry on the business of banking only in the manner and with the powers specified in such act,

"A grant of some banking powers to a corporation does not authorize it to exercise other banking powers not expressly granted or necessary to the exercise of those which are granted."

And, in the same Volume (7 C. J.) at page 590, Section 227, the authority of a banking corporation to acquire stocks of other corporations is stated as follows:

"As a general rule, banks are denied the power to purchase, acquire, or deal in the stock of other corporations, except where such stock is acquired for a past debt, or where the power is given by special enactment. * * * * *

By an examination of the Loan and Investment Company Act, which is found in Article 8 of Chapter 33, Sections 5418 to 5425, inclusive, it will be seen that such companies are organized and operate entirely on a different plan to that of the banking business. The Loan and Investment Companies are authorized to loan money and to sell evidences or certificates of indebtedness and to receive from purchasers security therefor. Further examining this act it will be seen that such companies are not authorized to accept deposits, in fact, Section 5424 of the act prohibits such companies from accepting deposits or engaging in banking business. Clearly, by this section the lawmakers considered that the loan and investment business was entirely a different business to that of banking. These Loan and Investment

April 3, 1941

Companies are not under the supervision and jurisdiction of the Finance Department. If banks were permitted to carry on the business authorized by the Loan and Investment Acts then the depositors' money could be invested under the Loan and Investment Act without any protection from the Finance Department. The money used by the Loan and Investment Companies to carry on that business belongs to the stockholders of the company, while if the banks were authorized to carry on such a business they could use the money of the depositors. We do not think that the banks either by expressed power or by implication would be authorized to assume the duties of the Small Loan Act and the Loan and Investment Act.

CONCLUSION.

From the foregoing, it is the opinion of this Department:

(a) That a state bank or a national bank under its general powers or under the powers granted by the Constitution, is not authorized to exercise the powers of the Small Loan Act and the Loan and Investment Act without incorporating under said acts.

(b) That such banks should, if permitted, incorporate as a separate entity to operate such loan and investment companies.

(c) That such a bank as a corporation shall not subscribe for the majority stock of corporations to operate under the Small Loan Act and the Loan and Investment Act.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

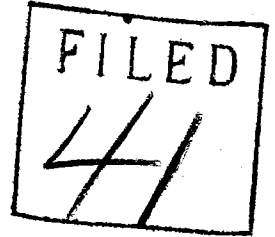
VANE C. THURLO
(Acting) Attorney-General

TWB:CP

TRUST COMPANIES: Trust companies are not authorized
INVESTING IN STOCK: to invest in the stock of small loan
OF SMALL LOAN : companies.
COMPANIES. :

May 16, 1941.

Mr. R. W. Holt
Commissioner of Finance
Jefferson City, Mo.



Dear Mr. Holt:

This in reply to yours of recent date, wherein you request an opinion from this department on the following question which was submitted to you by Mr. Joseph Boxerman of St. Louis, Missouri. Mr. Boxerman's statement and request is as follows:

"I represent a bank which has under consideration to change to a Trust Company, and would like to have the interpretation of your department of Section 5429 R. S. Mo. 1929, Paragraph 9, which provides that a Trust Company shall not invest or keep invested in stock of any private corporation an amount in excess of 15% of the capital and surplus fund of such Trust Company, but, that this limitation shall not apply among other things to the ownership by such Trust Company of a part or all of the capital stock of a corporation, organized under the laws of this State, for the principal purpose of issuing debentures or loaning money on real estate or dealing in or guaranteeing the payment of real estate securities, or investing in other securities in which Trust Companies may invest under the Chapter pertaining to Trust Companies.

"Particularly, I am interested to know whether a Trust Company can own a part or all of the capital of a loan company, organized under the Loan and Investment Act. I believe that the Industrial Loan Company and the Industrial Bank and Trust Company, located at 901 Washington Avenue, this City, has a somewhat similar arrangement to which I make reference."

The answer to your request will depend on the statutes under which trust companies act in this state. Section 8024, Article 3, Chapter 39, R. S. Mo. 1939, states the powers and purposes of trust companies organized in this state.

Subsection 1 of this section, authorizes such companies to receive money in trust and to pay interest thereon.

Subsection 2, authorizes them to receive for and hold on deposit personal property for safekeeping.

Subsection 3, authorizes them to execute trusts.

Subsection 4, authorizes them to accept and hold, by order, judgment or decree of any court gifts, grants, assignments, transfers, devises or bequests and to execute trust agreements.

Subsection 5, authorizes them to execute bonds.

Subsection 6, authorizes them to act as agencies and authorities for persons or corporations in the management, or control of real or personal property.

Subsection 7, authorizes them to act as fiscal or transfer agent of the United States, or any state or subdivision thereof to receive and disburse money, to transfer, register and countersign certificates of stock, etc.

Subsection 8, authorizes them to execute trusts for married women in respect to their separate property, and to act as agent.

Hon. R. W. Holt

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-4-

May 16, 1941.

Subsection 9, authorizes them to act as executor and trustee under a will, or as administrator with or without the will annexed, of the estate of deceased persons, or as guardians or curators of disabled persons.

Subsection 10, authorizes them to discount and negotiate promissory notes, drafts, etc; to buy and sell coin and bullion; to loan money on real estate and personal property; to execute and issue its notes; to pledge its mortgages on real estate held on its real estate subject to certain limitations.

Subsection 11, authorizes them to buy, invest in and sell bonds, and all kinds of negotiable paper issued by governmental agencies.

Subsection 12, authorizes them to accept for payment, at future dates, drafts drawn upon them by customers and to issue letters of credit subject to certain limitations.

Subsection 13, authorizes them to purchase and hold, for the purpose of becoming members of federal reserve banks, so much of the capital stock thereof as will qualify them for membership in such bank.

Subsection 14, authorizes them to purchase and hold real estate for certain purposes therein mentioned.

Subsection 15, authorizes them to purchase and subscribe for stock in the Federal Deposit Insurance Corporation.

Subsection 16, provides for the rights and liabilities of such trust companies, in case they do hold stock in a Federal Deposit Insurance Corporation.

We have particularly set out the provisions of said Section 8024, supra, and from these provisions it will be seen that the trust company does not have authority to invest in the stock of a small loan company. Section 8032 of Article 3 of Chapter 39, R. S. No. 1939, sets out the restrictions, on loans, purchases of securities and

May 16, 1941

liabilities to trust companies, of any persons. The only portion of this section, under which a trust company might make the investments inquired about in your request, is set out in Subsection 9 of said section. This reads as follows:

"Shall not invest or keep invested in the stock of any private corporation an amount in excess of fifteen per centum of the capital and surplus fund of such trust company; nor shall it purchase or continue to hold stock of another bank or trust company if by such purchase or continued investment the total stock of such other bank or trust company owned and held by it as collateral will exceed fifteen per centum of the stock of such other bank or trust company: Provided, however, that this limitation shall not apply to the ownership of the capital stock of a safe deposit company, the vaults of which are connected with or adjacent to an office of such trust company, nor to the ownership by such trust company or its stockholders of a part or all of the capital stock of one bank organized under the laws of the United States or of this state, nor to the ownership of a part or all of the capital of one corporation, organized under the laws of this state, for the principal purpose of receiving savings deposits or issuing debentures or loaning money on real estate or dealing in or guaranteeing the payment of real estate securities, or investing in other securities in which trust companies may invest under this chapter, nor to the continued ownership of stocks lawfully acquired prior to the first day of January, A. D. 1915."

May 16, 1941.

The first part of this subdivision prohibits the trust company from owning stock of any private corporation in excess of fifteen (15%) per cent of the capital and surplus fund of such trust company. The proviso clause, at the end of Subsection 9 provides that the limitation in said Subsection 9 shall not prevent such trust company "from investing in other securities in which trust companies may invest under this chapter" (Chapter 39).

The only securities which trust companies may invest in under Chapter 39 are those mentioned in Section 8024, hereinbefore cited, and in Section 8032. Reviewing the provisions of Section 8032, we fail to find where a trust company would be authorized to invest in the capital stock of a small loan.

We refer you to our opinion, dated April 3rd, on the question of banks and banking and small loan business. In that opinion we refer to the Hadley case cited in 157 Mo. App. 557. That was a case in which a trust company was attempting to engage in the banking business. At l. c. 564 the court, in speaking of the powers of the trust company to engage in banking business, said:

"The ninth clause of section 1124, Revised Statutes 1909, authorizes trust companies 'to buy and sell all kinds of government, state, municipal and other bonds, and all kinds of negotiable and non-negotiable paper, stocks, and other investment securities.' The grant of authority to buy and sell stocks and other investment securities as commercial commodities carries with it neither the express nor implied authority to purchase the stock of other corporations for the purpose of controlling their management. (DeLaverne Co. v. German Savings Inst., 175 U. S. 40.) Nor to use the power conferred by law for the

Mr. R. W. Holt

- 6 -

May 16, 1941.

purpose of indirectly engaging in business activities forbidden to the corporation by the express provisions of the statute. The act of the Bankers Trust Company in controlling the management of the Kansas bank through the ownership of a large majority of the stock of the bank was not buying and selling stocks within the meaning of the statute, but was a clear and flagrant evasion and violation of the law. * * * * *

We think the authorities and reasoning used in the opinion, dated April 3rd, are applicable here and especially that portion of the opinion appearing on page 5, 6 and 7 thereof, and we respectfully refer you thereto. We are enclosing a copy of the opinion of April 3rd, with this opinion, in order that you may forward a copy of it to the attorney who made the request for this opinion.

CONCLUSION

From the foregoing, it is the opinion of this department that trust companies are not authorized to invest in and own any part of the capital stock of a loan company organized under the Loan and Investment Act of this state.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TWB:LB
Encl.

FINANCE DEPARTMENT:
COOPERATIVE COMPANIES:
BOND:

Concerns issuing coupon books for
trade do not come under the pro-
visions of Section 5426, R. S. Mo.
1939.

May 24, 1941

Department of Finance
State of Missouri
Jefferson City, Missouri



Attention: Mr. R. W. Holt, Commissioner.

Gentlemen:

This will acknowledge receipt of your recent communication enclosing a copy of a letter from Mr. Kenneth W. Hood, Manager of Better Business Bureau of St. Louis, Missouri, requesting an opinion as follows:

"A local concern proposes the following:

"To print a booklet containing coupons good for a total of \$5 in lieu of money on purchases. This booklet is to be sold by solicitors for \$1. The \$1 will be kept by the solicitors as a commission. The holder of a book who makes a purchase will use coupons in lieu of 20% of the cash price.

"From time to time other promoters get out booklets with coupons good for purchases or discounts at various business institutions.

"We are wondering if there is any way in which you can force a promoter of this type to deposit a bond with the State to protect the holders of the books. In many instances holders of similar books

May 24, 1941

have discovered that some of the merchants were forced to discontinue the offer in the book because of hindrance to their regular trade or because they found it too expensive.

"Please refer to Article 9, Sec.-5426 of the Revised Statutes 1939. This act requiring co-operative companies to make deposit with the state treasurer, contains the following language:

'*** providing for the payment of moneys or the granting or giving of any consideration, of any money or property, personal, real or mixed, greater in value, or represented to be greater in value, than the amount paid in upon such contracts or agreements, together with the actual net earnings accrued and accumulated thereon;'

"Can this language be construed to cover the situation outlined above?"

Section 5426 R. S. Mo. 1939, reads as follows:

"Any person, copartnership, association, organization or corporation which is now engaged in or shall hereafter engage in issuing contracts or agreements, whether in the nature of a bond, debenture, certificate or otherwise, providing for the redemption, or the fulfilling of such contracts or agreements by the accumulation of a fund or funds from the contributions made by the subscribers to, or the holders of such contracts or agreements; or providing for the maturing or fulfilling of such contracts or

agreements in the order of their issue or in some other fixed or arbitrarily determined order or manner; or providing for the payment of moneys or the granting or giving of any consideration, of any money or property, personal, real or mixed, greater in value, or represented to be greater in value, than the amount paid in upon such contracts or agreements, together with the actual net earnings accrued and accumulated thereon; or providing for the loaning of the funds contributed by the subscribers to or the holders of such contracts or agreements to such subscribers or holders in any fixed or arbitrarily determined order or manner; or for the making of loans or advances from such funds to or for such subscribers or holders to be repaid in installments; except such persons, copartnerships, associations, organizations or corporations as are organized or doing business under the statutes now in existence or which hereafter may be enacted as excepted in section 5435 of this article, shall, and the same are required, for the protection of the subscribers to, or the holders of its contracts or agreements, to deposit with the state treasurer in cash, United States bonds, or bonds of any county, or municipal township, or such parts of each of the above mentioned securities so that the whole deposit shall be equal in cash value to the sum of twenty-five thousand dollars, and whenever the liability of such contracts or agreements, as hereinafter determined, shall exceed the amount of such deposit, there shall be made an additional deposit on the first days of January and July of each year, in a sum sufficient to cover the excess liabilities accrued during the last preceding six months; and provided further, that no part of such original deposit of twenty-five thousand dollars shall be derived from or consist of any funds contributed by the subscribers to, or the holders of, any such contracts or agreements."

May 24, 1941

This provision is applicable to cooperative companies and comes under Article 9, R. S. Mo. 1939, which deals exclusively with cooperative companies. Therefore, it is necessary to determine what a cooperative company is before we can determine if Section 5426, supra, is applicable in the instant case.

Webster's New International Dictionary defines "cooperative" as follows:

"A store established by a consumers' cooperative system, where the members make their purchases and share in the profits and losses."

In State ex rel. Cantley, State Commissioner of Finance v. Meyer Tailoring Co., 25 S. W. (2d) 98, 1. c. 99, 100, the court held that the tailoring company, the defendant in this case, was operating as a cooperative company and had failed to comply with the law regulating such cooperative companies and in so holding the court said:

"The affirmative allegations of the petition are that the respondent has engaged in the issue of more than 3,000 contracts providing for the fulfilling of same from the accumulation of funds, the maturing of contracts in an arbitrarily determined manner, and a consideration in personal property greater in value than the amount paid in upon said contracts, together with the net earnings accumulated thereon. These acts and others set forth at more detail in the petition are sufficient to bring the respondent within the regulator provisions of the Co-operative Companies Act, Sec. 10237, R. S. 1919. * * * *"

However, in that case people were making a specified number of monthly payments and from such accumulations of these payments and funds often times their contracts would mature before all such payments were made. All suits

May 24, 1941.

were purchased at less than same could be purchased elsewhere. It can be seen from the above statement of facts that this defendant was operating a cooperative company as provided in Section 5426, supra.

The fundamental principle of a cooperative company is for the subscriber to receive some benefit from an accumulation of money paid into the company by themselves, we fail to see wherein such a concern issuing these books which may be used as 20% of the total price of each purchase would come within the purview of Section 5426 R. S. Mo. 1939.

Therefore, the opinion of this department is that Section 5426, supra, is not applicable in this case, but only applies to cooperative agencies or companies.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney-General

APPROVED:

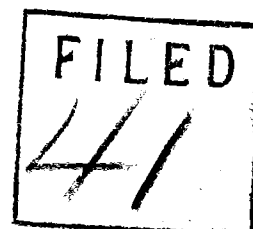
VANE C. THURLO
(Acting) Attorney-General

ARH:LB

JUDGMENTS: Section 3228, R. S. 1939, authorizes payment
INTEREST: of interest on judgments.

June 13, 1941

6-14



Mr. W. A. Holloway
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Mr. Holloway:

We are in receipt of your request for an
opinion under date of June 13th, wherein you state as
follows:

"We are in receipt of a requisition from the Missouri State Highway Department requesting payment to James R. Hancock in the amount of \$14,820.25. This requisition is supported by a judgment certified by the Clerk of the Circuit Court of Osage County. However, the requisition includes a request for the payment of interest in the amount of \$1,679.60 which makes the total of the request in the requisition \$16,499.65, whereas the judgment as rendered by the Court recites the sum of \$14,820.05 'together with his costs' and does not make any provision for interest.

"We would like to have your opinion concerning the payment of this interest."

June 13, 1941

33 C. J., pp. 213-214, in discussing the question of whether judgments bear interest, states that:

"While there is some authority to the contrary it is stated in most decisions that judgments do not bear interest as a matter of legal right, or by the common law, so that interest may be collected by an execution thereon; * * * * *

but that,

"At the present time, by force of statute in most jurisdictions, interest on judgments as a matter of right is allowed, and may be collected on execution."

And further, on page 1204, we find the following statement:

"By statute, judgments now bear interest, although no provision for interest thereon is made in the judgment."

Section 3228, R. S. Mo. 1939, provides for interest on judgments:

"Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than six per cent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear six per cent per annum until satisfaction made, as aforesaid."

In the case of The State v. Vogel, 14 Mo. App. 187, 1. c. 189-190, the court, in referring to the above statute, said:

"In order that the judgment should bear interest, it was not necessary that the court delivering the judgment should say so and make this statement a part of the judgment, because the statute expressly provides that every judgment shall bear interest."

Among the more recent decisions construing Section 3228, supra, is the case of State v. City of St. Louis, 115 S. W. (2d) 513, l. c. 515, wherein the St. Louis Court of Appeals said:

"Indeed the fact is that even were the charter silent with respect to the allowance of interest, the judgment in such a case would nevertheless bear interest in view of the fact that it is in all respects a final judgment as that term is used in statutes requiring interest to be paid on judgments, and therefore within the application of the general statute, section 2841, R. S. Mo. 192, Mo. St. Ann. Sec. 2841, p. 4628, which provides that 'interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property.' Plum v. City of Kansas, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371; Martin v. City of St. Louis, 139 Mo. 246, 41 S. W. 231."

And in discussing the theory upon which interest is allowed, the court said (l. c. 515):

"The underlying theory upon which interest is allowed on money judgments is that from the moment of the entry of the judgment the amount thereof is due from the judgment debtor

June 13, 1941

with the necessary consequence that the latter is thereafter in default until the judgment is satisfied, and is therefore required to pay interest on his debt as compensation for his further retention and use of the judgment creditor's money. * * * * "

For further authority as to the right to collect interest on judgments by virtue of Section 3228, supra, see the case of City of St. Louis v. Senter Commission Co., 124 S. W. (2d) (Mo. Sup.) 1180, 1. c. 1182; Bridges Asphalt Co. v. Jacobsmeier, 142 S. W. (2d) (Mo. Sup.) 641, 1. c. 644.

From the foregoing we are of the opinion that it is not necessary that the judgment expressly state that it bears interest for the reason that Section 3228, R. S. Mo. 1939, allows interest on judgments as a matter of right.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

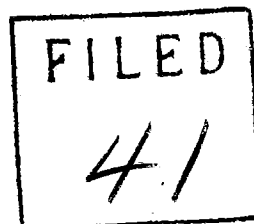
VANE C. THURLO
(Acting) Attorney-General

MW:EG

COUNTY BUDGET ACT: Warrants should not be issued in excess of the estimate of budget; warrants issued in excess of the anticipated revenue are illegal and void.

July 21, 1941

Hon. W. H. Holmes
Prosecuting Attorney
Vienna, Missouri



Dear Mr. Holmes:

This department is in receipt of your letter of July 12th, 1941, wherein you make the following request:

"Our County Treasurer wants an opinion from your office on the following situation: He has paid when he had the funds on hand, and protested warrants when he did not have funds available, on classes four and five for the year 1940, until the full amount of anticipated revenue has been taken up. Other parties now present warrants on these two classes and issued by the County Court for the year 1940 in excess of the budget estimate. The holders of the warrants insist on them being protested on the back thereof by the County Treasurer so that they would be interest bearing.

"Section 13801 R. S. 1939 covers the entering of warrants and 13833 the protest thereof, while Section 10917 places an apparent liability on County Officers issuing or paying warrants contrary to the provisions of the County budget law.

"Please favor me with an opinion in order that the County Treasurer may know what his duties and liabilities are in this connection, and oblige."

July 21, 1941

The question which you present involves the authority of the county court to issue warrants in excess of the anticipated revenue and of the budget estimate as approved by the county court, and the validity of the warrants now in the hands of the parties. In the first instance, Article X, Section 12 of the Constitution of Missouri is a direct prohibition against, in effect, spending more money than received by the county, or can be reasonably and honestly anticipated as revenue. The first sentence of said section being as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof * * * * *."

The County budget act, passed by the Legislature in 1933, now Sections 10910 to 10935, R. S. Mo. 1939, inclusive, placed counties more or less on a cash basis in that the anticipated revenue for a current year must be classified in five main classes and based on a budget approved by the county court with a strict injunction to all parties participating in the paying out of funds to sacredly preserve priorities.

In Section 10917 R. S. Mo. 1939 the last paragraph is known as the penalty provision and subjects any official participating in the issuance or payment of a warrant contrary to the budget act to a suit on his official bond. It further contains the provision that any warrant issued contrary to the provisions of the act shall be void and of no binding force or effect. There is a further provision in the act to the effect that the amount budgeted shall not exceed ninety per cent of the anticipated revenue.

In view of the provisions of the statute it is our opinion that the action of the county court, or any other officer participating in the issuance of warrants in excess of the anticipated revenue for 1940 and of the budget estimate, is void and of no binding effect.

July 21, 1941

As to the holders of the warrants, we refer you to the decision of State ex rel. National Bank v. Johnson, 162 Mo. 621, 1. c. 630, 631, as to the manner in which the warrants should be paid provided they were valid. In the decision of Book v. Earl, 87 Mo. 246, and referred to in the decision of Andrew County ex rel. v. Schell, 135 Mo. 31, 1. c. 38, the holding is to the effect that warrants are valid when issued within the anticipated revenue but invalid when in excess of it.

We think it needless to cite further authorities in view of the plain provisions of Article X, Section 12 of the Constitution, which prohibits a county from exceeding its anticipated revenue.

We therefore hold that the warrants in question which were issued in excess of the anticipated revenue for the year 1940 are illegal and void.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

OWN:CP

CIRCUIT CLERKS: Compensation of deputy circuit clerks is fixed by circuit court, and county court may not alter.

✓ ✓ 2
August 25, 1941
8-26

Honorable Andrew Howard
Prosecuting Attorney
Christian County
Ozark, Missouri



Dear Sir:

We are in receipt of your request for an opinion dated February 12, 1941, which is as follows:

"On December 17, 1940, you rendered an opinion over the signatures of Hon. W. J. Burke and Hon. Covell R. Hewitt to the Hon. Tom R. Moore, Judge of the 31st. Judicial District, in regard to the appointment and compensation of deputy circuit clerks in Christian County, Missouri.

"The Christian County Court in balancing the budget made an order reducing the salary of the deputy circuit clerks from one hundred dollars to ninety dollars a month without any objection on the part of the Circuit Judge and also without the Circuit Judge making any written recommendation on it or changing the order appointing the deputy clerks. I am enclosing a certified copy of the County Court's order and also a certified copy of the appointment of the deputies.

"The deputies question the authority of the County Court to reduce their salaries in such a manner under the circumstances and in view of the provisions of Section 18 of the 1933 Budget Law.

"The County Court takes the position that they do have this authority under Section 8 of the 1933 Budget Law and the opinion that you gave Hon. Tom R. Moore on the matter.

"We would very much appreciate your opinion as to whether or not the Christian County Court acted within its authority in reducing the salaries of the deputies in the manner above stated."

Submitted with the request are certified copies of the order of the circuit clerk appointing a deputy, the order fixing the salary and a certified copy of the order of the county court made at the February Term, 1941, purporting to reduce the salary of the deputy circuit clerks from \$100.00 per month to \$90.00 per month.

Section 13434, Revised Statutes of Missouri, 1939, provides for the appointment of deputy circuit clerks and their compensation as follows:

"Every clerk of a circuit court shall be entitled to such number of deputies and assistants to be appointed by such official, with the approval of the judge or judges of the circuit courts, as such judge or judges shall deem necessary for the prompt and proper discharge of the duties of his office. The judge or judges of the circuit court in its order permitting the clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any

deputy or assistant, and may regulate the time of his or her employment, and the circuit court may, at any time, modify or rescind its order permitting an appointment to be made."

This section was enacted by the 59th General Assembly in Laws of 1937, at page 446, and was a reenactment of Section 11812, Revised Statutes of Missouri, 1929. The 1929 statute was amended in Laws of 1933, at page 369, which amendment provided that deputy circuit clerks were appointed by the circuit clerk with the approval of the county court, and they fixed the compensation.

While the 1933 amendment was in existence, a question as to its proper interpretation arose in St. Louis County, and was subsequently decided by the St. Louis Court of Appeals in State ex rel. Hill v. Thatcher, 94 S. W. (2d) 1053. The court pointed out the change made by the Legislature and its effect in the following language, l. c. 1056:

"In this connection we call attention to the fact that when the Legislature in 1933 repealed the then existing section 11812, Rev. St. of Mo. 1929 (Mo. St. Ann., sec. 11812, p. 7031), and enacted a new section of the statute under the same number, a comparison of the new with the old section will disclose that the only change accomplished was to take the approval of the selection of deputies and assistants of the clerk of the circuit court and the fixing of the compensation of such deputies and assistant clerks from the circuit court and place it in the hands of the county court."

This case was, of course, decided prior to the enactment in 1937 of the section above quoted, and it restores the former authority of the circuit court to approve the selection of deputy circuit clerks and to fix their compensation.

The census figures for the 1940 decennial census are not immediately available, but the 1930 census discloses that Christian County had a population at that time of 13,169, and we may safely assume that the present population is less than 50,000, which bring it within the operation of Sections 10910 to 10917, inclusive of the Revised Statutes of Missouri, 1939, which are a portion of the "County Budget Act." We will not set out these sections of the Budget Law in full because both yourself and the court are familiar with them, and they are readily available to you.

We think the precise question here presented was decided by the Missouri Supreme Court in *Gill v. Buchanan County*, 142 S. W. 2d 665. In that case, a county judge in Buchanan County brought suit to recover a portion of his salary, and the county presented the defense that there was not a sufficient amount provided in the budget to pay the additional salary which the plaintiff claimed. We find the following in the opinion of the court, 1. c. 668:

"The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature

has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S. W. 2d 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."
(Italics ours)

While Buchanan County has a population of more than 50,000, the duties of the county court under Section 10917 to revise and amend the estimates in counties of less than 50,000 are the same as the powers vested in the county court in Section 10927, Revised Statutes of Missouri, 1939, which applies to counties of more than 50,000. Since the salary

August 25, 1941

of a deputy circuit clerk is fixed by the circuit court under authority of the statutes and the county court has no statutory authority to alter the salaries when fixed, it must be considered that the salary of deputy circuit clerks is fixed by the Legislature, and the above case is directly applicable.

Furthermore, the statutes make provision for the method of procedure when sufficient funds are not available for the payment of the salaries of the county officers. Section 10912, Revised Statutes of Missouri, 1939, is in part as follows:

" * * * If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

This section provides that if insufficient funds are available to pay each county office in full for all salaries and supplies, the available funds must be apportioned to each office, and certainly the order of the county court, a certified copy of which accompanies your request, does not purport to follow this statutory mandate. We do not say that if the above statute had been followed that any officer whose annual salary is fixed could not recover his full salary from the county by appropriate action since that question is not here presented.

CONCLUSION

In view of the foregoing, it is the conclusion of this department that the order of the county court of Christian County, made on the 8th day of February, 1941,

Hon. Andrew Howard

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August 25, 1941

which purported to reduce the salaries of two deputy circuit clerks from \$100.00 per month to \$90.00 per month each, is void, and that the circuit court has the sole power to fix the compensation of deputies to the circuit clerk in Christian County.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

RLH:VC

TAXATION: Surplus from general county and state tax sales should be paid to party or parties having the title or interest in and to the realty sold.

November 18, 1941

Mr. W. A. Holloway
Chief Clerk
State Auditor's Office
Jefferson City, Mo.



11-19

Dear Mr. Holloway:

This is an acknowledgement of your request for an opinion relating to the Jones-Munger Law, on November 14, 1941, wherein you enclosed a request from Mr. Ben W. Gallup, County Treasurer of Grundy County, which is as follows:

"We had several properties located in the City of Trenton that were being offered for a third time at our recent sale; some of these properties brought more than the amount of taxes, penalties and costs thereby creating an overplus.

"The City was also offering these properties in the City sale which was held immediately after ours but received no bids on the ones we had sold. I am under the impression that the City would have prior claim on this over-plus up to the amount of their taxes before the owner or any other claimant would be entitled to any part of it.

"Would you please advise me whether or not this assumption is correct."

Section 11109 R.S. Mo. 1939 is as follows:

"The taxes due and unpaid on any real estate which has heretofore been returned delinquent, and which has not been forfeited to the state, and the taxes due and unpaid on any real estate which has been forfeited to the state for the nonpayment of such taxes, shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained on on each such tracts and lots of real estate to the

amount of the taxes due thereon, and also the interest and costs accruing under this chapter."

The lien for county and state taxes is a paramount lien. Little River Dr. West v. Sheppard 7 S. W. (2d) 1013. Dyer v. Harper 77 S. W. (2d) 106.

Section 11130 thereunder, is in part as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchases at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. * * *"

In the case of Jaicks v. Oppenheimer 264 Mo. 693, 698, the court held:

"As a prelude to what we shall say in this case, and because we concur in the conclusion of the Kansas City Court of Appeals as to the relative priority of the liens of tax bills for special assessments for public work in cities and towns, we herein copy the discussion of the Kansas City Court of Appeals, speaking through Judge Trimble:

"With regard to all ordinary liens arising out of private contract and not imposed solely by governmental power, priority in time creates priority in force and effect, the first in order of time being, prima facie, superior to those of a later date. But the priority of the liens of general taxes is in the reverse of this order, the last is first and the first last. (2 Cooley on Taxation (5Ed.) 875; Anderson v. Rider, 46 Cal. 134; Bayles v. Davis, 22 Wis. 225; Wass v. Smith, 34 Minn. 304.) This rule is well settled and is not disputed. * * * (underscoring ours.)"

Therefore, general taxes, constituting a prior lien to other taxes on real estate and the last year thereof being

prior to other years, a foreclosure of the general tax lien under such third sale for particular years would foreclose the rights of junior lienors against the res, not only for such particular years, but for all former years.

Section 11132 thereunder is in part as follows:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto."

Section 11133 thereunder is in part as follows:

"* * * If the purchaser bid for any tract or lot of land a sum in excess of the delinquent tax, penalty, interest and costs for which said tract or lot of land was sold, such excess sum shall also be noted in the certificate of purchase, in a separate column to be provided therefor.* * *"

The back tax lien in favor of the state, which is provided in section 11109 supra, is a lien against realty and must be enforced under the provisions of what is commonly known as the Jones-Munger law, which provides for the foreclosure of such lien by summary action.

The surplus in such foreclosure proceedings must, under the provision of section 11132 supra, be paid to the person entitled thereto; or if the collector has doubt, or a dispute arises as to the proper person, he shall pay the same into the county treasury to be held for the use and benefit of the person entitled thereto.

In the case of *Holly v. Holwing* 250 Mo. App. 33, a controversy arose as to who was entitled to a surplus in the hands of the sheriff. A drainage and levee district claimed the surplus as junior lienors. The sheriff filed a suit in the nature of interpleader asking the court to determine to whom such surplus should be paid.

On page 38 of said decision the court said:

"The appellants have dividdd their brief into several heads, but really there is only one point before us for consideration, and that is, who, under the facts agreed on, is entitled to this surplus fund? The districts contend that the surplus should be considered as realty, and that their liens which they admittedly had upon the land, should be construed by the courts to be upon the surplus.

"There is no question here as to the proper organization of the two districts, nor is there any contention but that the liens of the two districts were subject to and inferior to the lien for the State and county taxes."

On page 42 thereto the court held:

"As we read the statute with reference to collection of delinquent levee taxes we find no provision that would authorize such an action as herein brought that would establish a lien upon the surplus money left after a sale by the State for the collection of general taxes. Nor do we find any authority by the courts of this State that would authorize our so holding.

"Since there is no provision in the statute giving the drainage or levee districts the right to follow the surplus derived from a sale under a procedure to collect general taxes, and since the statutes do give to drainage and levee districts sufficient methods of procedure to protect their interest, if followed, it is our conclusion that the finding of the trial court was proper, and that this judgment should be affirmed."

Mr. W. A. Holloway

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November 18, 1941

Therefore, it is the opinion of this office that, a surplus arising from a general tax sale of lands in foreclosure of the state's lien for delinquent taxes for certain years, cannot be applied to the payment of delinquent taxes due a city for such years nor for any year or years prior thereto. Such surplus must be paid to the person or persons entitled thereto by reason of some interest or ownership in and to the realty sold under said procedure; or if the collector has doubt as to who is entitled thereto or a dispute arises as to the proper person, "the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto."

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

SVH/aw

APPROVED:

Vane C. Thurlo
(Acting) Attorney General

COUNTY COURTS:
AGRICULTURAL CONSERVATION
COMMISSION FURNISHING
OFFICE SPACE FOR:

County Courts may provide an office
in the courthouse or may pay for
office rent for Agricultural
Conservation Administration offices.

January 20, 1941

Honorable Walter C. Hotaling
Prosecuting Attorney
Linn County
Linneus, Missouri



Dear Sir:

This is in reply to yours of recent date wherein
you submitted the following questions:

"The local office of the Agricultural Conservation Administration (formerly the A. A. A.) of the United States Department of Agriculture, until recently maintained an office in the Linn County Court House, rent free and with light, heat and janitor service furnished by the County Court. Recently the local office decided that it was necessary to move into larger quarters, and no additional space being available in the Court House, the local office contracted with an individual for the renting of a private office building here in Linneus, into which they have now moved. The local office now insists that the County Court pay their rent, lights, heat and janitor service. From this situation these two questions arise:

"1. May the County Court legally either provide an office in the Court House rent free, or pay the office expense outside the Court House for this, or any similar organization?

"2. Must the County Court either provide an office in the Court House rent free, or pay the office expense outside

the Court House for this, or any similar organization?"

As a premise to the answer to your question, we find the following rule which applies to the powers and duties of the county courts applicable here:

In the case of State ex rel. Chadwick Consolidated School District v. Jackson et al. 84 S. W. (2d) 988, the Springfield Court of Appeals, in speaking of the powers and duties of the county court, said, l. c. 989:

"Such court is a creature of the Constitution, and its powers are limited by the terms of the various statutes defining its powers. It has no common law or equitable jurisdiction."

The provisions of the statutes authorizing county courts to make appropriations for agricultural purposes may be found in Article XVII of Chapter 87, R. S. Mo. 1929. Section 12616 of this article provides as follows:

"For the purpose of promoting the public welfare by assisting in the general betterment of farm and home practices and conditions, the county court of any county is hereby authorized and empowered to appropriate out of the general funds of the county such sums as it may deem proper for the support of county farm organizations and to pay out such moneys under the conditions hereinafter specified."

It will be noted that this section authorizes the county court to appropriate funds for the purposes mentioned in the above article, but it is not mandatory on the court to make such appropriations. The farm organizations referred to in said Section 12616 are defined in Section 12617 in the following language:

"A county farm organization is hereby defined as a county organization, willing to co-operate with the university of Missouri college of agriculture in carrying out the provisions of the Smith-Lever act of congress approved May 8, 1914, composed of not less than 250 bona fide farmers, farm women or tenants, with an annual membership fee of not less than fifty cents per member fully paid up, its constitution and by-laws formally adopted and its officers elected and installed. Provided that for the purposes of carrying out the provisions of the Smith-Lever act the term 'farm bureau' wherever used in this article shall be deemed and construed to mean any county farm organization."

Section 12618 of the same article sets out the objects and purposes of the farm bureau as follows:

"The objects of a county farm bureau shall be:

- (a) To promote the development of profitable and permanent systems of agriculture.
- (b) To assist in securing wholesome and satisfactory living conditions in the country.
- (c) To encourage the development and successful growth of all rural social and educational institutions.
- (d) To assist in safeguarding rural public health through community co-operation.
- (e) To develop better economic and business methods and practices in farm and home life.

(f) To co-operate with all individuals, groups, institutions and organizations whose purposes are in accord with the objects set forth in this section."

Section 12619 of this article states the purposes for which the funds appropriated by the county court may be used. This section provides as follows:

"For the purpose of carrying out the provisions of this article, all funds appropriated by any county court to a county farm bureau shall be used to pay the salaries and necessary expenses of men and women, either or both trained in agriculture and home economics, respectively, to serve as county agricultural agents, county home demonstration agents and county boys' and girls' club agents, and to provide such clerical assistance and office equipment as may be necessary to the effective conduct, through these agents, of such educational activities are specifically authorized by state and federal legislation providing for co-operative extension work in agriculture and home economics as defined by the Smith-Lever act of congress."

This section does not specifically provide for payment of rents of office space. However, on account of a later legislative provision, which will be hereinafter referred to, we think that the county court, under the provisions of both acts, might be authorized to either furnish office space or to pay rent for office space for farm organizations. By a reading of this entire Farm Bureau and Organization Act, under said Article XVII, it seems that the county courts are given broad discretion in exercising its powers in appropriating moneys to such organizations.

The Supreme Court of Missouri, in the case of Jasper County Farm Bureau v. Jasper County, 286 S. W. 381, held that the Farm Bureau Act was constitutional, and that county courts were authorized to make appropriations therefor.

The Smith-Lever Act, referred to in Section 12617, supra, of the Farm Bureau Act was passed by Congress in 1914. U. S. C. A., Title 7, Section 341, et seq., page 166. The general purpose of the Act was for agricultural extension work.

The Agricultural Conservation Administration operates by virtue of the provisions of Chapter 3b of the Conservation Act of Congress, Title 16, U. S. C. A., page 200, Section 590a et seq. Section 590 of this Act, page 212, Title 16, U. S. C. A., provides that 5% of the available funds may be spent for administration of the Conservation Act.

Subsection 3 of Section 590d, Title 16, page 202, of said Soil Conservation Act authorizes the Commissioner of Agriculture to make expenditures for personal services and for rents, and to prescribe such regulations as the Commissioner of Agriculture may deem proper to carry out the provisions of the Soil Conservation Act.

Your request indicates that the local officer of the Agricultural Conservation Administration office insists that the county court pay the rent, light, heat and janitor service for that office. Under said Subsection 3 of said Section 590d, supra, it would seem that this official would be authorized to make such a demand. However, it seems, from a reading of this subsection, that Congress provided that rents might be paid out of the appropriation.

The Missouri General Assembly, Laws of Missouri, 1937, at page 175, by Senate Bill 41, in Section 1 thereof, accepted the provisions and requirements of the Federal Conservation Act. This section provides as follows:

"In order to cooperate with the Federal Government in bringing to the farm people of Missouri the full benefits of an Act by the Congress of the United States,

approved February 29, 1936, and generally known as the Soil Conservation and Domestic Allotment Act the policy and purposes of which are set forth in Section 7 (a) of the Act as follows: '(1) Preservation and improvement of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wasteful and unscientific use of national soil resources; (4) the protection of rivers and harbors against the results of soil erosion in aid of maintaining the navigability of waters and water courses and in aid of flood control; and (5) reestablishment, at as rapid a rate as the Secretary of Agriculture determines to be practicable and in the general public interest, of the ratio between the purchasing power of the net income per person on farms and that of the income per person not on farms that prevailed during the five year period, August 1909 - July 1914, inclusive, as determined from statistics available in the United States Department of Agriculture, and the maintenance of such ratio'; the State of Missouri through its Legislature hereby accepts the provisions and requirements of said Act."

While by this section, the Legislature has accepted the provisions and requirements of the Conservation Act, it cannot be said that it has directed county courts to appropriate money for the purpose of paying the expense of administering the Act.

We fail to find any cases in point on these questions. However, from a reading of both the Federal and state provisions, we think that county courts may appropriate money for such expenses, including rent, as are set out in Section 121^{1/2}, supra, but we do not think that they are compelled by any statute to make any such appropriations.

January 20, 1941

CONCLUSION

From the foregoing, it is the opinion of this department that a county court, subject to the provisions of the County Budget Act, may either provide an office in the courthouse, rent free, or pay the office expenditure outside the courthouse, for Agricultural Conservation Commission offices or any other similar agricultural organization.

We are further of the opinion that the county court is not compelled to make appropriations for the aforesaid purposes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:VC

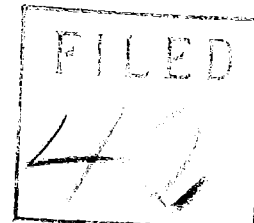
TAXATION:

SALE OF DELINQUENT LANDS FOR
TAXES BY CITIES:

All cities are not within the provisions of Section 9970, as amended by Laws of 1933 pertaining to the returning of lists of delinquent city taxes to the county collector.

January 23, 1941

Honorable Walter C. Hotaling
Prosecuting Attorney
Linn County
Linneus, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the following questions:

- "1. Does a sale of lands by the County Treasurer and ex-officio collector, under Section 9952a, et seq., as added, Laws of 1933, for delinquent State and County taxes, extinguish the lien of delinquent City taxes for the same years?
- "2. Has the above mentioned section been construed so as to authorize a City of about 4000 population to sell lands for the enforcement of the lien of delinquent City taxes?
- "3. Is there any statutory provision exempting a City of about 4000 population from returning a list of delinquent City taxes to the County Treasurer, as provided by Section 9970, as amended, Laws of 1933?"

On the first question which you have submitted, I find that this department, by an opinion dated September 28, 1938, and written to Honorable Oscar T. Honey, Mayor, Chaffee, Missouri, covered this question. We are enclosing copy of this opinion for your information.

Hon. Walter C. Hotaling

(2)

January 23, 1941

We are also enclosing copy of an opinion to Hon. O. L. Robuck, City Collector, LaPlata, Missouri, dated October 31, 1934, and an opinion to Honorable C. D. Bray, City Attorney, Campbell, Missouri, dated September 28, 1939, pertaining to the same subject. These may shed some light on your questions.

In answer to your third question, will say that there seems to be some confusion with the city authorities as to whether or not they should collect delinquent taxes or whether the delinquent taxes should be certified to the county collector for collection. For instance, Section 6995, R. S. Missouri 1929, pertaining to cities of the fourth class, directs that the city collectors of such cities shall collect the delinquent taxes. By an examination of the tax statutes referring to other classes of cities you may be able to find that a similar section will be found referring to such cities.

In 1933, Laws of Missouri 1933 at page 450, Section 9970, as amended, it will be seen that it is the duty of the collectors of all cities and incorporated towns to return to the county collector their delinquent lists for collection. Apparently there is conflict in the statutes as to who should collect delinquent city taxes. However, we think that the Supreme Court, in the case of State ex rel. Steed et al. v. Nolte, 138 S. W. (2d) 1016, has explained these statutes and settled this controversy. In that case the delinquent taxes of a city of the fourth class were before the court and the court held that the city collector was the proper one to collect these delinquent taxes. At l. c. 1019 the court, in discussing these contradictory statutes, said:

"Relators contend that not only must the taxes of respondent city be collected by advertisement and sale as outlined in the original Jones-Munger law, but also that they must be collected by county and not city officers. Relators base this claim on sections 9970 and 9971, R. S. Mo. 1929, Mo. St. Ann. sections 9970,

9971, pp. 8012, 8013; and on certain sections of the Jones-Munger law. Section 9970 provides that the collectors of all cities having authority to levy and collect taxes shall annually return to the county collector all unpaid real estate assessments and section 9971 provides that the county collector shall have power to collect such assessments. These sections were first enacted in 1872, Laws of 1871-72, page 118, at a time when no city had a lien for, or the power to collect, city taxes. In 1879 and later, as we have already pointed out, various classes of cities were granted a lien for and the power to collect their own taxes. Notwithstanding this, sections 9970 and 9971 have been retained in the statutes and section 9970 was repealed and reenacted in substantially the same form in 1933, the only change being to substitute the words 'first Monday in March' for the words 'first day in May.' Laws of 1933, page 450. The apparent conflict between the statutes, now numbered 6995 and 9970, 9971, respectively, was considered by this court in the case of City of Aurora ex rel. v. Lindsay, 146 Mo. 509, 48 S. W. 642, decided in 1898. It was there held that the city collector, not the county collector, was the proper officer to collect taxes due a city of the fourth class. That ruling has not since been departed from; so, when the General Assembly repealed and reenacted section 9970 in 1933, in the same form, they are presumed to have adopted the construction so placed on the statutes by this court. State ex inf. Gentry v. Meeker, 317 Mo. 719, 296 S. W. 411. In other words, said

section 9970, both before and after its reenactment in 1933, was and is applicable only to the limited number of cities above mentioned, which still return their delinquent taxes to county instead of city officers. The expression 'such cities', appearing in sections 9949, 9950, and other sections of the Jones-Munger law and of the Revised Statutes, Mo. St. Ann. sections 9949, 9950, p. 7991, refers to such cities as from time to time have been granted the power to collect their own taxes, and those sections vest in city officers the same duties as to city taxes as are exercised by county officers as to other taxes. Section 9963c makes this clearer by requiring us to read the word 'city' into the various sections where the word 'county' appears.

"Our conclusions in this case apply only to the collection of city taxes in cities of the fourth class. Other cities are governed by different statutes which may or may not compel a different result."

It will be noted from the foregoing opinion that said section 9970, supra, has been brought down through the statutes as an amendment to laws which were enacted in 1872 (Laws of 1871-72, page 118), and that this original act applied to cities which had no lien for or power to collect city taxes. The court, in the Nolte case, supra, in discussing the history of these conflicting sections, finally held that the provisions of said Section 9970 only apply to cities which do not have a lien for or power to collect city taxes. So, if under a statute any city, regardless of its class, has a lien for and power to collect city taxes, then the provisions of Section 9970, supra, do not apply, and that city collects its city taxes through its proper

Hon. Walter C. Hotaling

(5)

January 23, 1941

official as outlined in the Jones-Munger law.

CONCLUSION

From the foregoing it is the opinion of this department that if a city has a lien for and power to collect its own taxes, then it is not required to return its list of delinquent city taxes to the county officer for collection but may proceed by its proper officials to collect such delinquent taxes as outlined by the Jones-Munger law, Laws of Missouri 1933 at page 425, and as provided by the taxing statutes of such city as they may be applicable thereto.

Respectfully submitted

TYRE W. BURTON

Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

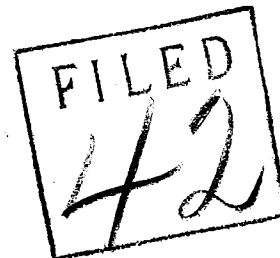
TWB:DA
Encs. (3)

CRIMINAL LAW: Justice of the Peace who collects fines and fails to turn them over is guilty of larceny or embezzlement.

April 9, 1941

4-11

Honorable Walter C. Hotaling
Prosecuting Attorney
Linn County
Linneus, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"I should like the opinion of your department as to the following situation.

"In Linn County it has heretofore been the custom for Justices of the Peace in state cases to collect fines assessed instead of the constables.

"In several instances some of the Justices of the Peace have failed to turn over these fines so collected to the County Treasurer as is required of the constables charged with their collection.

"Inasmuch as these Justices are not legally charged with the collection of fines, I should like your opinion as to just what offense such conduct constitutes."

Section 3846, R. S. Mo. 1939, provides in part as follows:

"It shall be the duty of the justice before whom any conviction may be had under this article, if there be no

appeal, to make out and certify, and, within ten days after the date of the judgment, deliver to the treasurer of the county and clerk of the county court each a statement of the case, the amount of the fine and return day of the execution, and the name of the constable charged with the collection thereof; and the county treasurer shall charge the constable with the amount of such fine, * * *."

In view of the above section, and especially the underlined parts, it will be seen that the duty of collecting the fines is imposed upon the constable and the justice of the peace has no right or authority to collect the same.

Section 4456, R. S. Mo. 1939, provides as follows:

"Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

Embezzlement by an agent is provided for in Section 4471, R. S. Mo. 1939, and reads:

"If any agent, clerk, apprentice, servant or collector of any private person, or of any copartnership, except persons so employed under the age of sixteen years, or if any officer, agent, clerk, servant or collector of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or convert to his own use,

without the assent of his master or employer, any money, goods, rights in action, or valuable security or effects whatsoever, belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for stealing property of the kind or the value of the articles so embezzled, taken or secreted."

In Section 4473, R. S. Mo. 1939, embezzlement by a bailee is made a crime, and Section 4478, R. S. Mo. 1939, prohibits embezzlement by a public officer.

Larceny at common law was defined as a taking, stealing and asportation of the goods of another (9 Laws of England 628-636). In Missouri the statute dealing with this crime is but declaratory of the common law. *State v. Loeb*, 190 S. W. 299. Our courts have defined larceny as "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convert them to his own use and make them his own property without the consent of the owner." *State v. Stark*, 249 S. W. 57; *State v. Weatherman*, 202 Mo. 6, 100 S. W. 482. At common law the courts held that every larceny includes a trespass and that no taking is felonious unless possession is taken without the consent of the owner. *Bracton* 150B; *Rex v. Raven* (1663), *Kelyng* 24. However, in 1779 the decision in *Rex v. Pear*, 2 East P. C. 685, introduced the doctrine of larceny by trick. That case held that where a person hired a horse, his pretext being that he wished to use the horse in taking a journey, but his actual intent being to steal the horse, that such an action constituted larceny. The court held that although the possession was voluntarily given to the owner, that inasmuch as the intention of the defendant was fraudulent the nature of the possession had not changed but remained in the owner even after the bailment. This being so, there was trespass and larceny (for identical set of facts see *State v. Williams*, 35 Mo. 229, in which the *Pear* Case is cited.).

Embezzlement is purely a statutory offense and it did not exist at the common law. *State v. Wilcox*, 179 S. W. 482;

State v. Harman, 106 Mo. 635, 18 S. W. 128. It has been defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. State v. Burgess, 268 Mo. 407, 188 S. W. 135; State v. McWilliams, 267 Mo. 437.

The crime of obtaining money under false pretenses is closely allied to that of larceny. The distinction between the two crimes lies in the intention in which the owner parts with the property. If the owner in parting with the property intends to invest the accused with the title as well as the possession, the latter has committed the crime of obtaining the property by false pretense. But, if the intention of the owner is to invest the accused with the mere possession of the property and the latter with the requisite intent receives it and converts it to his own use, it is larceny. 25 C. J. 657; State v. Kosky, 191 Mo. 1, 90 S. W. 454; State v. Mintz, 189 Mo. 268, 88 S. W. 12.

Therefore, under the facts in the instant case, since the person paying the fine did not intend to pass title to the justice of the peace but merely to invest him with the mere possession of the property to turn it over to the proper person, the crime of obtaining money under false pretenses was not present.

There is still another reason why the justice of the peace in question would not be guilty of obtaining money under false pretenses. In civil actions the rule is that a misrepresentation as to a matter of law cannot constitute fraud. Security Savings Bank v. Kellems, 9 S. W. (2d) 967, Easton-Taylor Trust Co., v. Loker, 205 S. W. 87; Gilmore v. Ozark Mutual Ass'n., 21 S. W. (2d) 633. The foundation for this rule is that everyone is presumed to know the law and that for that reason any misrepresentation as to a matter of law would not be fraud because a person to whom it is made is presumed to know that it was untrue.

In State v. Edwards, 227 N. W. 495, the Supreme Court of Minnesota held that criminal prosecution for false pretenses could not be based upon a fraudulent misrepresentation as to a matter of law. Thus, if the justice of the peace conveyed, either by action or words, to the person who paid the fine that he was the person who was to

collect such fine, this was a misrepresentation as to the law, because, as a matter of law, he had no right to collect the same and, therefore, there was no fraud present.

However, we do believe that the justice is guilty of either larceny by trick or embezzlement, depending upon the time when the intent to deprive the owner of his property was formed. The traditional distinction as to time of intent in embezzlement on one hand, and larceny on the other, has been that intent to deprive the owner of his property must be formed after a lawful possession, to constitute embezzlement, whereas, intent must exist at the time of the taking, to constitute larceny. *State v. Gould*, 329 Mo. 828, 46 S. W. (2d) 886. Keeping this distinction in mind, we turn to the crime of larceny by trick.

In *Farmers Loan & Trust Co., v. Southern Surety Co.*, 226 S. W. 926, 285 Mo. 621, our Supreme Court said (1. c. 641):

"Although the rule is that there must, to constitute larceny, be a taking against the will of the owner, still an actual trespass is not necessary. If a person, with a preconceived design to appropriate property to his own use, obtain possession of it by means of fraud or trickery, the taking amounts to larceny, because the fraud vitiates the transaction and the possession of the wrongdoer is still presumed to be the possession of the owner (*Frazier v. State*, 85 Ala. 17; *Grunson v. State*, 89 Ind. 533; *Commonwealth v. Lannan*, 153 Mass. 287; *Defrese v. State*, 3 Heisk, 53), or, as, is sometimes said, the fraud or trick is equivalent to a trespass (*Commonwealth v. Flynn*, 167 Mass. 460; *People v. Shaw*, 57 Mich. 403). In this State it has been settled that where both the possession and title to property has been obtained from the true owner by fraud and falsehood there is no larceny, because the crime is characterized by the terms of Section 4565,

supra, as obtaining it by false pretenses (State v. Anderson, 186 Mo. 25); but that the crime is larceny where possession of the property is obtained by fraud and trickery with intent to convert it to the use of the wrongdoer, which is afterward accomplished. (State v. Mintz, 189 Mo. 268.) It is by this rule that the present transaction must be judged."

In the early case of State v. Hall, 85 Mo. 669, Judge Sherwood said (l. c. 672):

"And if defendant obtained possession of the deed of release under the pretense that it was only for a temporary purpose, and, thus securing possession of it, had it placed upon record, this was such a trick or artifice as amounted to a constructive taking and was evidence of an original felonious intent. 3 Greenleaf on Evidence, sec. 160; 1 Bishop Crim. Law, sec. 583; Roscoe's Crim. Evid., 623, 626; 2 Arch. Crim. Pl. & Prac., 1201."

In the case of State v. Scott, 256 S. W. 745, 301 Mo. 409, the defendant told another he could procure for him a suit of clothes at half price. The defendant took the money, returned, gave the purchaser a box and disappeared. When the purchaser reached home and opened the box he found it contained only rags. The court said (l. c. 412):

"The distinction between the two offenses (larceny and false pretenses) has been very clearly and very definitely defined by this court in several cases. The character of the crime depends upon the intention of the parties. Where by fraud or by artifice, possession of personal property is obtained with a felonious intent to convert it and to deprive the owner of it, and where the title to the property remains in the owner, the offense is larceny. If the owner is induced by

artifice or fraud to part with the title, then the offense is false pretense. If the owner is induced to part with possession by means of artifice or fraud he is deprived of his property without his consent, the same as if he had been secretly deprived of possession. * * *

* * * * *

"It is not contended that the evidence in this case would show embezzlement, or that the action of the court in taking that charge away from the jury's consideration was improper. If, after receiving the money, the defendant had conceived the idea of converting it to his own use, it would have been embezzlement. The evidence shows that when he received the money he intended to convert it to his own use."

The court held these acts constituted larceny by trick because the purchaser intended only to give possession of the money to the defendant for a certain purpose, that is, to buy a suit of clothes, and also that the defendant at the time he received the money intended to convert it to his own use. They, however, pointed out that if the intent to convert had arisen after the money had been given, then the crime would be that of embezzlement because the possession then would have been lawful.

It must be noted that the fraud or trick present in the instant case is not the fraudulent misrepresentation that the Justice of the Peace had the authority to collect the fines, since this was merely a misrepresentation as to law. But, the fraud was that the person paying over the money was induced so to do upon the fact that the justice of the peace would pay over this money to the proper authorities.

We direct your attention to the case of *Domer v. State*, 199 N. E. 237, decided by the Supreme Court of Indiana. In that case the defendant was Secretary of the Police Department to whom one Goe paid a judgment of fine and cost totaling \$40.00. Under the laws of Indiana the secretary of the police department had no authority or right to collect such fines.

The court held that this was larceny by trick, as the Judge pointed out (l. c. 238):

"* * * In such case the trick or fraud avoids the legal effect of the owner's consent, and the taking is the same as though it had been without the consent of the owner."

However, the court pointed out (l. c. 238):

"So, in the instant case, if Gee's consent to the taking of the money by Domer had been secured through any trick, fraud, misrepresentation, or deception of the latter, express or implied, as to his authority to receive the money to be applied on the judgment, the effect of Gee's consent to the taking would have been avoided, and Domer's taking would have been unlawful and larcenous."

It will be seen that this court ignores or fails to recognize the doctrine of fraud as to a matter of law. The conclusion of the court seems to be correct but the reasoning we do not believe would be sustained in the State of Missouri.

If the evidence shows that the intent to convert the money arose after the money had been paid, the Justice of the Peace in question would then be guilty of embezzlement. The question then arises as to under what statute he should be charged.

As noted above, Section 4478, R. S. Mo. 1939, provides that if any officer of any municipal township shall convert to his own use any moneys "which may be in his possession, or over which he may have the supervision, care or control by virtue of his office, agency or service, or under color or pretense thereof," shall be guilty of embezzlement.

In State v. Bolin, 110 Mo. 209, 19 S. W. 650, it was held that an officer who collects moneys which he has no authority to do cannot be convicted under this section, because such moneys did not come into his possession by virtue of his office. This holding seems to be in accordance

with the weight of authority. *Hartnett v. Texas*, 119 S. W. 855; *Moore v. State*, 53 Neb. 831, 74 N. W. 319; and cases collected in 23 L. R. A. (N. S.) 761. The court further held that this money did not come into the possession of the officer under color or pretense of the office. While this seems to be contrary to the general rule (See 99 A. L. R. 647), still under such a ruling the Justice of the Peace in question could not be charged under Section 4473, *supra*.

Section 4473, R. S. Mo. 1939, provides for embezzlement by bailee and states, "If any carrier, bailee or other person who shall embezzle or convert" then he shall be punished in the same manner described by law for stealing of property of the nature or value of the article so embezzled. It would seem that when the Justice of the Peace in question received the money that he thereupon became the bailee for the person who so paid him for the purpose of paying such money over to the proper authorities. As was said in *Moore v. State*, *supra* "that where an officer receives money which he is not by law authorized to receive, such money is not received by him in his official capacity, and that any duty which he may owe of paying the money is only that which rests upon any debtor or bailee." However, our Supreme Court in *State v. Grisham*, 90 Mo. 163, 2 S. W. 223, held that a person given a mortgage to be taken to the office of the recorder of deeds and recorded, who converted said mortgage was not guilty under Section 4473 because that section referred to carriers and other bailees, and the court applied the rule of *ejusdem generis* and held that such a bailee was not included within the scope of the statute. This case has never been overruled. We cannot presume that it will be and therefore under the law at the present time we do not see how the Justice of the Peace in question would be liable under this section.

Section 4471, R. S. Mo. 1939, which is quoted in full at the beginning of this opinion, is the statute relating to embezzlement by an agent. In 2 C. J. 438, it is said:

"The inference of an agency may be drawn from the facts, together with other circumstances that one is given money to invest or pay over to another."

To the same effect is the Restatement of the Law of Agency, Paragraph 15. Therefore, when the person paid the fine to

the Justice of the Peace he is presumed to know that under the law such Justice of the Peace had no authority to collect the same and that therefore he made him his agent to pay said money over to the proper authorities. So the Justice of the Peace became his agent and would be guilty, under Section 4471, of embezzlement.

We would like to note, in passing, the case of *Hamuel v. State*, 5 Mo. 260, in which it was held that a person charged as an agent, when in fact he was a bailee, could not be convicted. But, in view of the *Grisham Case*, supra, we cannot see any other statute under which the Justice of the Peace in question may be convicted but that of embezzlement by an agent.

We suggest that the Justice in question be charged with larceny and if the facts show that he is guilty of embezzlement then the jury can return a verdict that such person is not guilty of larceny but is guilty of embezzlement. *State v. Thompson*, 144 Mo. 314, 46 S. W. 191; *State v. Burgess*, 268 Mo. 407, 188 S. W. 135. This procedure is provided for in Section 4842, R. S. Mo. 1939, which provides as follows:

"If, upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not, by reason thereof, be entitled to be acquitted, but the jury shall return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts."

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Conclusion.

It is, therefore, the opinion of this Department that a justice of the peace who collects fines and converts them unto his own use is guilty of larceny by trick if the intent to convert existed at the time of the taking of possession. However, if the intent arose subsequently, then such person is guilty of embezzlement by an agent.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

COUNTY CLERKS AND DEPUTIES: TERMS OF APPOINTMENT: The county clerk may revoke appointment of deputy county clerk.

November 26, 1941



Mr. Walter C. Hotaling
Attorney at Law
Linneus, Missouri

Dear Mr. Hotaling:

This is in reply to your letter of recent date wherein you request an opinion from this department based on the following statement of facts:

"I should like the opinion of your Department on the following situation.

"A County Clerk appoints a deputy, which appointment is approved by the County Court, by an order which recites that said appointment is to continue during the term of the County Clerk.

"Subsequently, the County Clerk wishes to discharge this deputy. However the deputy contends that his appointment is coextensive with the term of the County Clerk.

"The question is, is such an appointment at the pleasure of the County Clerk or is it irrevocable."

Under the provisions of 13299, R. S. Mo. 1939, county clerks are authorized to appoint deputies. This section provides as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the Court, who shall be at least 17 years of age and have all the other qualifications of their principals and take the like oath, and may in the name of their principals, perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their duties."

This section of the Statutes does not define the term or length of time for which a deputy may be appointed. But in the case of Horstman v. Adamson, 101 Mo. App. 119, the Court held that a contract between a clerk of a County Court and his deputy, that the latter was to remain as deputy for the entire period that the clerk held the office, was void as against public policy. In that case the Court said:

"The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority under which the appointment is made is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment, to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principles have been frequently recognized in numerous decisions, alike by the Federal Courts, as well as by the courts of many states including our own. (Citing cases)"

This rule is also announced in the case of State ex rel Mincke et al vs. Sartorius, 95 S. W. (2d), 1. c. 875.

The fact that the deputy was appointed in this case "during the term of the County Clerk" would lead one to believe that there was a contract entered into between the clerk and his deputy. However, public office and compensation therefor are not matters of contract, and even though they meant to enter into one, it would be void, being against public policy.

In the case of Motley v. Callaway County, 149 S. W. (2d) 875, 1. c. 876 the Missouri Supreme Court announced the rule on this question as follows:

"* * * * It is true that under the monarchical form of government, in the early development of the common law in England, 'public offices were regarded as incorporeal hereditaments and subjects of private property.' 46 C. J. 932, sec. 28; see also 22 R. C. L. 376, sec. 7. But under our form of government an office is 'a privilege in the gift of the state and depends upon the favor of the people'; and it 'is a public trust' because 'it is created in the interest and for the benefit of the public.' 22 R.C.L. 376-378, secs. 8-10. It is not (or the compensation thereof) a subject of grant or contract of any person or officer. * * * "

In Vol. 11, C. J., p. 972 the rule as to the term of office is stated as follows:

"If a statute providing for the appointment for deputy or assistant clerks of courts fails to define the period for which they shall hold office, they hold only during good behavior."

This rule we think would apply to deputy county clerks.

In the case of *State ex rel Mincke et al vs. Sartorius* 95 S. W. (2d) 1. c. 875, the court in speaking of the right of a circuit judge to remove a deputy probation officer and answering the contention that they could only be removed by proceeding under the statute, said:

"We think relators clearly misconceive the applicability of such Statutes to their case. Conceding that, because of the functions they serve within restricted territorial limits, they are to be classed as 'public officers' and as 'county officers' within the meaning of the law (*Hastings vs. Jasper County*, 314 Mo. 144; 282 S. W. 700), yet it does not follow that the matter of their removal from office is necessarily to be governed by Sections 11202, and 11203 (R. S. 1929, now sections 12, 828, and 12,829, *supra*.) This for the reason that those sections of the Statutes are purely general in their nature, and have to do with the subject of

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removal from office of the several classes of officers specified therein serving terms of office which are definitely defined by law. * * * where the law conferring the authority under which the appointment is made is silent as to any limitation upon the right of removal and the duration of the official term is thus left unlimited except by the will and pleasure of the appointing power, then under such circumstances, the unqualified power of removal is incident to the very power of appointment itself, which may be invoked and applied at pleasure without notice, the making of charges or a hearing thereon. (Citing cases)"

CONCLUSION

From the foregoing, it is the opinion of this department that the term of an appointment of a deputy county clerk is at the discretion of the county clerk and such deputy may be discharged at any time during that term.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

FISCAL YEAR: Change in the fiscal year would require enactment of Constitutional Amendment and cannot be changed by statute.

May 22, 1941

Honorable John T. Hughes
House of Representatives
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of April 28th, 1941, as follows:

"Will you kindly advise me on a very important constitutional question which effects the State of Missouri.

"This question pertains to 'a change in the date of the fiscal year of the State of Missouri.'

"For your information a 'House Joint and Concurrent Resolution' along with a 'House Bill' are now pending and under consideration before the Judiciary Committee of the General Assembly.

"A sub-committee of the Judiciary committee has been appointed, of which I am chairman, to go into the constitutionality of this question.

"If your office will give me a written opinion as to the possibility of this proposed change I would appreciate it immensely."

Your letter enclosed a copy of House Bill No. 30, which is an act to repeal Section 13020 of Article 1,

Chapter 87 of the Revised Statutes of Missouri, 1939, and to enact a new section, changing the fiscal year to a period beginning July 1st and ending June 30 in the next succeeding year.

Your question relates to the constitutionality of the change contemplated by House Bill No. 30 and, we will, therefore, set out the sections of the Missouri Constitution which appear to bear on the question.

Section 43 of Article IV of the Missouri Constitution is in part as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

"First, For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.

"* * * * *

Section 19, Article X of the Constitution of Missouri is as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless

such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The latter section is in harmony with Section 36 of Article IV, which provides that no law passed by the General Assembly, except the general appropriation act, shall take effect until ninety days after adjournment, except those bearing emergency clauses.

Section 12, of Article X of the Constitution of Missouri also provides in part:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; * * * * *

Taking up the above constitutional provisions in order, Section 43 of Article IV, *supra*, specifically limits appropriations for the bonded indebtedness of the State to the term for which each General Assembly is elected, that term being a period of two years beginning with January of

the odd numbered years and ending with January in the successive odd numbered years. This provision renders it impossible for any General Assembly to appropriate money for the bonded debt of the State for the first six months of the period for which a succeeding General Assembly is to be elected, and would, therefore prevent a change in the fiscal year to run from July 1st to June 30th in the succeeding year, so far as payment of the State indebtedness is concerned.

Section 19 of Article X, above set out, contains this clause: "nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act;". This portion presents unsurmountable difficulties. In many instances the General Assembly adjourns prior to July 1st in legislative years and, in nearly all instances, the general appropriation acts have been passed long prior to July 1st in such years. To comply with the above provision the Legislature would be required to remain in session until July 1st to pass an appropriation which might be approved by the Governor and become effective on July 1st, in order that warrants could be drawn on the funds thereby provided until July 1st two years later. This provision of the Constitution has been construed in *State ex rel. v. Holladay*, 64 Mo. 526, 1. c. 527, 528, in the following language:

"From a consideration of these two sections, it seems quite obvious that no appropriations of money find recognition in the constitution except 'regular appropriations,' and that such cannot be made except at regular legislative sessions, occurring biennially. This view of the matter receives abundant confirmation in the prohibitions of section 19 of article X, that 'no moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless

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such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act, and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object,' etc.

"The act of March, 1870, is clearly inconsistent with the provisions of the constitution above quoted, and in consequence thereof, and in conformity with what the schedule ordains, the provisions of that act ceased when the constitution was adopted. For although the sections of the constitution just cited, do not in express and direct terms inhibit the auditor from drawing his warrant in favor of a claimant who relies on an appropriation more than two years old, yet those sections, by necessary and inevitable implication, accomplish the same result; for it cannot, with any show of reason, be claimed that a warrant can be drawn without an appropriation; but as just seen, no appropriation possesses any validity, force, or even existence, after the lapse of two years.

"These provisions of the organic law are self-executive, and consequently need no legislation in their aid. (St. Joe Board Pub. Schools vs. Patton, 62 Mo. 444.)

"Immediately upon their adoption they became operative and effective, not only prospectively, but as to all

existing appropriations. Any other construction than this would only partially abolish the evils and eradicate the mischiefs these constitutional provisions were designed to remedy. Because heretofore, owing to the number and variety of special appropriations hidden in numerous and disconnected session acts, and extending during a long series of years, it was next to impossible, even after exhaustive care and research, to ascertain the precise financial status of the State. This shows very pointedly, as we think, the error of the idea which seeks to limit to future appropriations alone the operation of the constitutional provisions under discussion, the evident purpose of which was to show once every two years, by a general appropriation act and at one connected view, all sums for which the auditor during the next ensuing biennial period could be lawfully called upon to issue his warrant."

It would appear to be impractical for the State and the various counties to employ different fiscal years. Section 12 of Article X, supra, has been interpreted by the Supreme Court to refer to calendar years. We find the following in the decisions of that court in *Union Trust & Savings Bank v. City of Sedalia*, 300 Mo. 399, 1. c. 412:

"The constitutional provision, supra, covers both counties and cities. If the word 'year' as therein used means a calendar year as to counties, why should it mean a different thing as to cities? As to both it refers to and limits the debt-making power during the period of twelve months. The particular twelve months, we say, as to counties, is the twelve months beginning January 1st and ending December 31st. Not only so, but

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we have so said, where the matters at issue were the fiscal transactions of the counties. The fiscal year of the county by our ruling has been established as a calendar year. * * *

A still further obstruction to a change in the fiscal year presents itself. Our State elective officials assume office in January after their election and hold their respective offices for a term of four years and their successors would assume their offices for the last six months of the period for which an appropriation would be made, if the fiscal year were changed. Under these circumstances, it would be possible for an elective official to exhaust the appropriation for his office before his successor assumed the position. While it is to be assumed that no officer would maliciously do this, yet the requirements of his office might be such that he would be legally justified in expending his entire appropriation.

CONCLUSION.

In view of the foregoing authorities and constitutional provisions, it is the conclusion of this office that a proper change in the fiscal year of the State may be brought about only through the adoption of a proper amendment to the Constitution, and that House Bill No. 30, introduced in the 61st General Assembly, is in conflict with the Constitution of Missouri to such extent, as outlined above, that, if passed, it would be ineffective.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

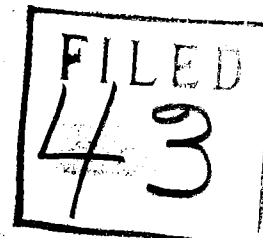
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

RLH:CP

TAXATION AND REVENUE: City collectors in cities of the fourth class cannot proceed under Section 11086, but must follow the provisions of the Jones-Munger Act.

June 17, 1941



Mr. Frank I.S. Huffhines
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This department is in receipt of your letter of June 12th wherein you make the following inquiry:

"I would appreciate an opinion in regard to the above section as to whether or not said section applies to city collectors of the fourth class. If not please advise the proper procedure as to same. (Section 11086, Revised Statutes 1939)."

The question of the procedure with reference to the collection of delinquent taxes in cities of the fourth class was under consideration by the Court in the decision of State vs. Nolte 138 S. W. (2nd) 1016. We think this decision answers your question and we quote the following excerpts from the same, l.c. 1017, 1018, 1019:

"The two questions confronting us are so closely related that we will consider them together. Those questions are: What is the proper method of collecting delinquent real estate taxes due a city of the fourth class in St. Louis County? What officer should collect such taxes? * * * *

"Now, since the enactment of House Bill 677 and similar measures at the 1939 session, we have two methods for the collection of state and county taxes; in St. Louis County, Jackson County, and the City of St. Louis, by suit; in all the remainder of the state, by advertisement and sale. In giving effect to section 6995, shall we say that city taxes due a city located in St. Louis County shall be collected in the same manner as provided for the collection of state and county taxes in St. Louis County, or in the same manner provided for the collection of state and county taxes in the state at large? Respondents say that the method in force for collecting state and county taxes in St. Louis county should apply to the collection of taxes due to cities in the same county, and to hold otherwise would result in confusion. The argument that taxes due cities of the fourth class should be collected by one method in two counties and taxes due cities of the same class should be collected by a different method in the other one hundred and twelve counties, is not very convincing. The constitutional question as to whether the same method must prevail in all cities of the same class has not been raised and, of course, we do not decide it. As to possible confusion which may ensue from the collection of city taxes by one method and the collection of state and county taxes in the same county by a different method, we call attention to the fact that prior to the Jones-Munger law the statutes provided for the collection of city taxes in first class cities by sale without suit, sections 6207-6240, R. S. 1929,

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Mo. St. Ann. Sections 6207-6240, pp. 5330-5345, while in the same counties state and county taxes were collected by suit. We find nothing in House Bill 677 to indicate a legislative intention to remove cities of the fourth class from the operation of the Jones-Munger law. That the General Assembly did not so intend, we think is made clear by section 9952a-6 of House Bill 677, Mo. St. Ann. Section 9952A-6. That section provides for the enforcement of the 'lien of the state,' which must mean the lien for state and county taxes. House Bill 677 makes no provision for the enforcement of a lien for taxes due a city of the fourth class which, as already pointed out, is vested in the city.

Relators contend that not only must the taxes of respondent city be collected by advertisement and sale as outlined in the original Jones-Munger law, but also that they must be collected by county and not city officers. Relators base this claim on sections 9970 and 9971, R. S. Mo. 1929, Mo. St. Ann. Sections 9970, 9971, pp. 8012, 8013; and on certain sections of the Jones-Munger law. Section 9970 provides that the collectors of all cities having authority to levy and collect taxes shall annually return to the county collector all unpaid real estate assessments and section 9971 provides that the county collector shall have power to collect such assessments. These sections were first enacted in 1872, Laws of 1871-72, page 118, at a time when no city had a lien for, or the power to collect, city taxes. In 1879 and later, as we have already pointed out, various classes of cities were granted a lien for and the power to collect their own taxes. Notwithstanding this, sections 9970 and 9971 have been retained in the statutes and section 9970 was repealed and reenacted in substantially the same form in 1933, the only change being to substitute the words 'first Monday

in March' for the words 'first day in May.' Laws of 1933, page 450. The apparent conflict between the statutes, now numbered 6995 and 9970, 9971, respectively, was considered by this court in the case of City of Aurora ex rel, v. Lindsay, 146 Mo. 509, 48 S. W. 642, decided in 1898. It was there held that the city collector, not the county collector, was the proper officer to collect taxes due a city of the fourth class. That ruling has not since been departed from; so, when the General Assembly repealed and reenacted section 9970 in 1933, in the same form, they are presumed to have adopted the construction so placed on the statutes by this court. State ex inf. Gentry v. Meeker, 317 Mo. 719, 296 S. W. 411. In other words, said section 9970, both before and after its reenactment in 1933, was and is applicable only to the limited number of cities above mentioned, which still return their delinquent taxes to county instead of city officers. The expression 'such cities', appearing in sections 9949, 9950, and other sections of the Jones-Munger law and of the Revised Statutes, Mo. St. Ann. Sections 9949, 9950, p. 7991, refers to such cities as from time to time have been granted the power to collect their own taxes, and those sections vest in city officers the same duties as to city taxes as are exercised by county officers as to other taxes. Section 9963c makes this clearer by requiring us to read the word 'city' into the various sections where the word 'county' appears.

Our conclusions in this case apply only to the collection of city taxes in cities

June 17, 1941

of the fourth class. Other cities are governed by different statutes which may or may not compel a different result.

We hold that the taxes of respondent city should be collected by its proper city officers, but in the manner provided by the Jones-Munger law and not by suit as attempted in the instant case. Accordingly, our provisional rule should be and is hereby made absolute."

CONCLUSION

In view of the above decision, we are of the opinion that Section 11086 does not apply to city collectors of cities of the fourth class with respect to real taxes and the procedure, as outlined in the decision quoted supra, should be followed. The Jones-Munger Act does not appear to have affected the collection of personal taxes in cities of the fourth class. Therefore, in so far as applicable, the provisions of Section 11086, as said Section may apply to the collection of personal taxes, would still be effective.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General
OWN:RT

APPROPRIATION: Balance of appropriation must be transferred to the ordinary revenue fund to the credit of the state treasurer at the end of each biennium.

July 31, 1941

Mr. Dyas B. Hulse
Chief Clerk
State Treasurer's Office
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of July 28, 1941, which reads as follows:

"By Section 13051, R. S. Mo. 1939, the State Treasurer is authorized to transfer certain funds to the ordinary revenue fund.

"On our books we find deposited by the State Auditor \$40,000.00 in the Tax-Token Fund, which was created for the redemption of tax tokens when and as the same are presented to the State Auditor for redemption.

"Inasmuch as this fund has been created by the sale of tax tokens we are asking your opinion as to whether or not we may leave this fund intact and used for the specific purpose for which same was created."

Article X, Section 19 of the Constitution of Missouri reads as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every

such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

In view of the above constitutional provisions, the Legislature, in 1933, enacted what is now Section 13051, R. S. Missouri 1939. As to the construction of Article X, Section 19 of the Constitution of Missouri the Supreme Court, in the case of State ex rel. Missouri State Board, etc. v. Holladay, 64 Mo. 526, 1. c. 528, said:

"Whether, then, we consider the plain language of the fundamental law or, resorting to a very familiar rule of construction, reflect on 'the old law, the mischief and the remedy,' it seems plain, beyond question, that the auditor did but obey the constitutional mandate when refusing to issue his warrant. And if any doubt should still linger in the mind on this subject, that doubt will be quickly resolved in favor of the position we have assumed by examination of the debates in the convention which framed the constitution. When speaking of section 19, supra, Mr. Letcher observed: 'In regard to the section, I desire to say that if I understand the object to it, it is to keep the matter of appropriations close up together. An appropriation made at one time, made we will say to-day, by law, and no warrant, for instance, issued for that appropriation until two years hence, we find that the State finances would be in such a condition that, unless we put some limit upon this thing, it will be almost impossible to know how the treasury does

stand.'

"And commenting on the same section, Mr. Mudd said: 'Now, the object of the committee was to restore to the general revenue the balances of the appropriations not applied at the end of every two years, so that each session of the General Assembly should make appropriations for the term during which they were elected, and not leave those appropriations open to be drawn upon at any time, which have been made by preceding General Assemblies. It was to close up the books at least once every two years, and then if any appropriation be made, let it be made by the General Assembly then in session.'

Also, in the case of State ex rel. v. Gordon, 236 Mo. 142, 1. c. 157, the court said:

"It is contended by relator that: 'Article II of Chapter 49, Revised Statutes 1909, contains the law of this State in reference to the preservation of fish and game, specifies the salary of the game warden, and provides that it shall be paid out of the game protection fund by warrant drawn by the State Auditor on said fund in the hands of the State Treasurer. When the above act became effective, August 16, 1909, it required no further appropriation by the Legislature, or any other body, to pay the salary and expenses incurred by the State Game and Fish Commissioner.'

"In support of the foregoing proposition relator maintains that the provisions of the game law referred to constitute a continuing appropriation, under which respondent was authorized and it was his

duty to issue warrants for such salary and expenses as were properly chargeable to the game protection fund, without any further appropriation for that purpose by the General Assembly as made in section 62 of said House Bill No. 1200.

"We cannot agree to that contention. It is provided by section 43, article 4 of the Constitution of this State that: 'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit any money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' And by section 19, article 10, that: 'No moneys shall ever be paid out of the treasury of this State, or of any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object.'

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence

of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department, nor would re-lator be entitled to the audit and allowance of his accounts for salary and expenses. (See Secs. 11828 and 11836, R. S. 1909; State v. Holladay, 65 Mo. 77; State ex rel. v. Holladay, 66 Mo. 1. c. 389; Fusz v. Spaunhorst, 67 Mo. 1. c. 268; State ex rel. v. Henderson, 160 Mo. 1. c. 213, 214.) In addition to the foregoing citations it should be added that the General Assembly which enacted the game and fish law appropriated out of the State treasury the sum of two hundred thousand dollars, or so much thereof as should be necessary, from the game protection fund, to meet the expenses of the department for the biennial period therein named, and by so doing gave a legislative construction to the law and the Constitution as to the necessity of a biennial appropriation."

Also, in the case of Nacy v. Le Page, 111 S. W. (2d) 25, 1. c. 26, said:

"* * * The state treasurer, in his official capacity and in the funds of the state treasury, has no goods, moneys, or effects of any private citizen in his custody, nor does he owe a debt from the treasury to any one. He is a custodian of public funds, raised by taxation, which belong to the state. His duty is to pay out these funds only 'in pursuance of an appropriation by law' which 'shall distinctly specify the sum appropriated, and the object to which it is to be applied.' Section 19, article 10, Constitution. * * "

Also, in the case of State v. Hackmann, 282 S. W. 1007, par. 10, the court said:

"It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of section 19, article 10, of the Constitution, no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. * * * * *

The appropriation act of 1939, as set out in Laws of 1939, page 173, Section 132, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Twenty-five Thousand Dollars (\$25,000.00) or such part thereof as may be necessary, to enable the State Auditor to put into effect the provisions of Section 35 of the Sales Tax Act of 1939, providing for refunds required by this Act or by final judgment of Court, of taxes collected under this Act, the Missouri Retailers Occupation Tax Act of 1933, the Emergency Revenue Act of 1935, or the Sales Tax Act of 1937."

It will be noticed that this appropriation is for the purpose of enabling the state auditor to put into effect the provisions of Section 35, the Sales Tax Act of 1939 and other tax acts. Section 35, Laws of 1939, page 869, reads as follows:

"It shall be the duty of the General Assembly to appropriate and set aside funds sufficient for the use of the State Auditor to make any refund of taxes required by this Act or by final judgment of Court."

Mr. Dyas B. Hulse

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July 31, 1941

Under the above section it does not state specifically that the appropriation should be for the refund of tax tokens but the appropriation is set aside to make any refund of taxes required under the Sales Tax Act.

CONCLUSION

In view of the above authorities it is the opinion of this department that the Forty Thousand Dollars in the Tax Token Fund deposited by the state auditor, which was created for the redemption of tax tokens when the same are presented to the state auditor for redemption, should be, at the end of the biennium after all warrants on the same have been discharged, transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer.

It is further the opinion of this department that refunds under the Sales Tax Act can only be made out of funds created by an appropriation by the Legislature of 1941.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

ROADS AND BRIDGES:
CONSTRUCTION OF BRIDGES
IN COUNTY COURT DRAINAGE
DISTRICTS:

When a new road is established through or into a county court drainage district, the special road district comprising such drainage district shall pay for the construction of such bridges that are made necessary on account of the road crossing one of such drainage ditches.

August 27, 1941

Mr. E. S. Huffman, Clerk
County Court of Pemiscot County
Caruthersville, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department upon the following statement of facts:

"The County Court of this county has made an order directing and authorizing me to submit to you for an opinion the following question of law:

"A new public road has been opened and established through court orders of the County Court and this road intersects and crosses a drainage ditch in one of the drainage districts organized many years ago as a county drainage district. The drainage district, of course, is controlled and its ditches maintained by the County Court, and the ditch in question was constructed many years before the present public road was opened across the ditch. The location of a proposed bridge across this ditch is in one of the special road districts of the county.

"I particularly call your attention to Section 12,427 R. S. of Mo., 1939, and request you to give me an opinion as to whose obligation it is to construct a bridge across this ditch, that is, is it the obligation of the special road district, the county, or the drainage district?"

August 27, 1941

Under Article 3 of Chapter 79, R. S. Missouri 1939, drainage districts may be constructed and improved by county courts. This is a special act and the powers and duties of the county court acting for such districts are derived solely therefrom. Under Section 12398 of said article the following provision is made:

"When it shall be conducive to the public health, convenience or public welfare, or when it will be of public utility or benefit, the county court of any county in this state shall have the authority to organize, incorporate and establish drainage districts and to cause to be constructed, straightened, widened, altered or deepened, any ditch, drain, natural stream--* * * * *

Under Section 12403 of said article such a district, after being duly formed, becomes a body corporate and a political subdivision of the state, capable of suing and liable to be sued. In such districts the county court acts as the board of commissioners for the district. Section 12427 of said article, to which you refer in your request, provides as follows:

"The county court may, when the same is necessary for the public health, convenience or welfare, cause to be constructed or enlarged any bridge or culvert made necessary by the crossing of any ditch constructed by a district organized under the provisions of this article: Provided, however, that if such bridge or culvert shall belong to any corporation other than the county, the county clerk shall give such corporation notice by delivering to its agent the order of the court declaring the necessity for constructing or enlarging such bridge or culvert. A failure to construct or enlarge such bridge or culvert within the time specified shall be taken as a refusal to do said work, and thereupon the county court shall

August 27, 1941

proceed to let the work of constructing or enlarging the same, and assess the corporation with the cost thereof, and the county clerk shall place such assessment on the tax book against said corporation, and it shall be a lien upon the property of the corporation, to be collected as taxes. But before the county court shall let such work, they shall give to the agent of such corporation at least twenty days' actual notice of the time and place of letting such work. When a bridge has been constructed across a drainage ditch that crosses any public highway in this state, that shall be adjudged sufficiently by the county court of the county in which said drainage district is organized, such bridge shall become a part of such highway and shall thereafterwards be maintained, repaired or replaced by the authority authorized by law to maintain the road of which it becomes a part."

This is the section of this article which refers to the construction of bridges in such districts. So if the burden has been placed on the district to construct a bridge under conditions as related in your request, we must find that duty in this section. The first sentence of this section provides that when the county court finds that it is necessary for the public health, convenience or welfare to construct or enlarge such a bridge, it may cause the same to be done. The bridge referred to here, however, is the one which is made necessary by the crossing of any ditch of the district which is constructed across a public road. The county court, when acting under this section, is acting as a board for the district. It might be argued that the language of this section, which reads that "The county court * * cause to be constructed or enlarged any bridge * *, would require the county to bear the expense of the bridge. Such a construction would not be in harmony with Article 10, Chapter 46, R. S. Missouri 1939, and especially Sections 8682 and 8688 of said article which are as follows:

"Sec. 8682. Said board shall have sole, exclusive and entire control and jurisdiction over all public highways with-

in its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensation, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

"Sec. 8688. Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district: Provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

We make reference to this act because by your request you indicate that the new road is in a special road district. The proviso clause of said Section 8688 makes it discretionary

with the county court whether or not it will expend any of the available public funds on such a bridge.

Under Section 8691, R. S. Missouri 1939, all road taxes collected on lands within the bounds of a special road district must, on application of the commissioners of such district, be turned over to the commissioners of the district for road and bridge purposes in that district. This has been so ruled by the appellate courts in State ex rel. v. Barry County, 320 Mo. 280, 258 S. W. 710; State ex rel. v. Burton, 283 Mo. 44, 222 S. W. 844.

Section 12434, R. S. Missouri 1939, provides in part as follows:

"The county courts shall have power and it shall be its duty at the May term of court of each year to levy a tax upon each tract of land or other property within each district sufficient to maintain, reserve, restore, repair, strengthen and replace the drains, ditches, levees and other works of the district for whose benefits such tax is levied. Said tax shall be known as a 'maintenance tax' and shall be apportioned upon the basis of benefits assessed for the original construction and shall be limited in any one year to ten per cent of the original cost of construction. * * * * *

If the drainage districts are liable for the expense of constructing such bridge, the same would have to be paid out of the tax authorized under the foregoing section.

The last sentence in Section 12427, supra, was placed in there as an amendment by the General Assembly in 1937. Clearly, by that amendment the lawmakers have placed the burden of maintenance of such bridges on the body authorized by law to maintain the roads and bridges in that district, which in this case is a special road district under Section 8682, supra.

Referring again to said Section 12427, it appears that when the bridge is made necessary because a ditch is

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dug across a highway, then the county court, acting for the district, may cause the bridge to be constructed if it finds that it is necessary for the public health, convenience or welfare. That condition does not exist in your request, because the road was not in existence when the ditch was dug and the bridge is not made necessary because of the fact that it was dug across the road but is made necessary because of the fact that the new road extends across the ditch.

We fail to find where our courts have had a question exactly like this before them, but in *State ex rel. Walker, Prosecuting Attorney, v. Locust Creek Drainage District et al.*, 67 S. W. (2d) 840, the court has made some rules which may be applicable here. In that case the court was dealing with a circuit court drainage district. However, the language of the circuit court drainage district section and of the county court drainage district section, with reference to a bridge or culvert being made necessary by the crossing of any ditch constructed by a district, is similar. In speaking of the statutory duties of the district to build bridges, in that case the court said, l. c. 847:

"* * * While by said article respondent district is empowered to construct, enlarge, and maintain bridges, or cause the same to be constructed, enlarged, or maintained where made necessary by its improvements, it nowhere imposes a requirement for a bridge to be built by it, except at a point where it has dug its ditch across the public highway, * * * * *

As stated above, similar language is used in the county court drainage district sections which only authorize the county court to build a bridge at a point where the ditch crosses the highway. Again at l. c. 847, the court, in discussing this question, further said:

"It was not by such article intended that the district should be required to build bridges except at points where it disturbed the highway and made bridges necessary; and the bridges required by said article are based up-

on the consideration that the district having by its act disturbed the highway so that such bridges become necessary should be required to build them. * *"

In your case the highway, where the new road crosses the ditch, could not have been disturbed by the county court when this ditch was dug.

Again at l. c. 848, in said case the court said:

"No requirement having been imposed upon respondent district by the statute to build a bridge at its own expense at any other point than where its ditch intersects a public highway, no requirement can be successfully made of it to build one at some point where its ditch does not cut across the highway or at some point where the highway crosses the channel of Locust creek; * * * *"

The court, quoting from an Illinois case, stated as follows, l. c. 849:

"In the case of People ex rel. Speck v. Peeler, 290 Ill. 451, 125 N. E. 306, loc. cit. 309, the Supreme Court of Illinois said: 'While a road district may not be required to build bridges over artificial channels cut through its roadway by a drainage district, there can be no question that its duty to build bridges on the highways across water courses is continuous, even though such water courses are used by the drainage district as part of its ditches.'

"The plain inference from such language is that the drainage district, from the mere fact that it utilizes such water courses, is not required to bridge them, but such duty remains where it was in the first instance, unless otherwise required by law. "

Mr. E. S. Huffman

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August 27, 1941

By these authorities we think the statute imposes on the drainage district the duty to erect a bridge only in cases where the ditch is dug across the road and as a result thereof it is made necessary for someone to build a bridge.

CONCLUSION

From the foregoing it is the opinion of this department that in cases where a new road is established in or through a special road district which contains territory in a county court drainage district, and where such road crosses one of such ditches, and where it is necessary to erect a bridge thereat, it is the duty of the special road district, in which the bridge is located, to bear the expense of such bridge, and that county court has the discretionary power to pay a part of such expense out of authorized and available public funds.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:DA

SCHOOLS: Time for opening and closing polls in bond elections should be considered from the standpoint of convenience of the voters and opportunity for all the voters to vote.

September 24, 1941

Mr. James P. Hull
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

This department is in receipt of your letter of September 16, 1941, wherein you make the following inquiry and desire an opinion on the question propounded.

"Is it necessary when calling a special election for the purpose of voting bonds to build and repair a school building to specify a closing hour? We are familiar with Sec. 10418 R. S. 1939 with respect to the hour of beginning, but the question has arisen in the minds of some who think perhaps there should be a time to close all special elections. This is a common school district with control vested in three directors.

"And further, what is your opinion as to the validity of any of the proceedings at a special election of this kind if no hour is specified when to close."

We assume that you propose to hold an election for the purpose of voting bonds under Section 10328, R. S. Missouri, 1939. The section requires notices of election fifteen days before the same shall be held, but does not specify the hours during which the voting shall take place. In General Elections the hours are usually from sunup to sundown, or from 7:00 o'clock in the morning until 7:00 o'clock in the evening.

Mr., James P. Hull

(2)

September 24, 1941

The annual school meeting, by Section 10418, R. S. Missouri, 1939, is required to commence at 2:00 o'clock in the afternoon, it being generally understood that the meeting is to continue until all of the questions under Section 10419, R. S. Missouri, 1939, are finally determined or voted upon. In cities, towns and consolidated schools, school election hours are fixed under Section 10483, R. S. Missouri, 1939, at 7:00 o'clock in the morning and closing at 6:00 o'clock in the evening. However, the above sections have been held specifically not to apply to other elections which are held under a specific statute.

We think that the rule with reference to the time of opening and closing the election should be for the board to prescribe such reasonable time for the opening and closing of the polls as might best suit the convenience of the voters of the district.

A further test as to the time should be as to whether or not all voters of the district have an opportunity to express their sentiment regarding the question of bonds at the polls. It was held in the decision of *Akerman v. Haenck*, 147 Ill. 514, that the Board of Education might, in its discretion, fix the time for the opening of the polls at 1:00 P. M., and close the same at 7:00 P. M.

We are therefore of the opinion that the board can fix any reasonable hour for the opening and closing of the polls which is best suited for the convenience and opportunity of the voters to cast their votes.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

OWN/rv

MOTOR VEHICLES: May occasionally operate beyond suburban
PUBLIC SERVICE COMMISSION: territory.
TAXICABS:

November 21, 1941

Honorable James P. Hull
Ass't Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Mr. Hull:

This will acknowledge receipt of your request,
for an official opinion, which reads as follows:

"Can a taxicab make an occasional
trip beyond the suburban limits
of a city in which it operates as
defined in (e) of Section 5720 R. S.
1939 to haul passengers for hire
without obtaining a P. S. C. permit."

Section 5721, R. S. Missouri 1939, provides
that the provisions of Article 8, Chapter 35, R. S.
Missouri 1939, shall not apply to taxicabs as herein de-
fined.

"The provisions of this article
shall not apply to any motor
vehicle of a carrying capacity
of not to exceed five persons, or
one ton of freight, when operated
under contract with the federal
government for carrying the United
States mail and when on the trip
provided in said contract; nor to
any motor vehicle owned, controlled
or operated as a school bus; nor

nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this article shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This article shall not apply to trucks used in work for the state or any civil subdivision thereof."

Article 8, Chapter 35, hereinabove referred to requires certain motor carriers to be requested by the Public Service Commission to obtain permits, etc. Taxicabs as used in this article is defined in Section 5720, subdivision (d) and reads:

"The term 'taxicab', when used in this article, shall mean every motor vehicle designated and/or constructed to accommodate and transport passengers, not more than five in number, exclusive of the driver, and fitted with taximeters and/ or using or having some other device, method or system, to indicate and determine the passenger fare charged for distance traveled, and the principal operations of which taxicabs are confined to the

area within the corporate limits of cities of the state and suburban territory as herein defined."

"Suburban territory" as used in subsection (d), hereinabove quoted, is defined in Section 5720, subsection (e), and reads:

"The term 'suburban territory', when used in this article, means that territory extending one mile beyond the corporate limits of any municipality in this state and one mile additional for each 50,000 population or portion thereof: Provided that when more than one municipality is contained within the limits of any such territory so described, motor carriers operating in and out of any such municipalities within said territory shall be permitted to operate anywhere within the limits of the larger territory so described."

A cardinal rule of statutory construction is to determine the intention of the legislature. (Tooker v. Missouri Power & Light Company, 80 S. W. (2d) 691.)

In view of the foregoing statutory provisions, as a general rule a taxicab operating in the city of St. Joseph, whose population exceeds 80,000 inhabitants, would be permitted to operate outside the corporate limits of St. Joseph at no greater distance than three miles. However, the legislature in using the following words found in Section 5720, subsection (d) defining taxicab; " * * * and the principal operations of which taxicabs are confined to the area within the corporate limits of cities of the state and suburban territory as herein defined.", apparently intended to permit such taxicabs

November 21, 1941

to make an occasional trip beyond the suburban territory as herein defined. Obviously, the reason for restricting the operations of taxicabs to the various cities and the suburban territory adjoining said cities with the exception of an occasional trip is to eliminate competition with busses and motor carriers, which are required under Article 8, Chapter 35, R. S. Missouri 1939, to obtain permits and to come within the rules and regulations of the Public Service Commission. An occasional trip beyond the limits would not be of sufficient consequences to be considered as competition to such motor carriers.

Therefore, it is the opinion of this Department that taxicabs in St. Joseph may make an occasional trip beyond the suburban limits of said city.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

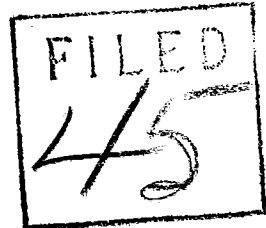
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APPROPRIATIONS Repair of operative equipment can not be
IN ELEEMOSYNARY paid out of appropriation for operation.
INSTITUTIONS:

February 28, 1941

Honorable W. Ed Jameson
President
Board of Managers
Eleemosynary Institutions of Missouri
Jefferson City, Missouri



Dear Mr. Jameson:

This Department has received your request for an official opinion which reads as follows:

"During the month of December, 1940, a breakdown occurred in the pasteurizing plant at State Hospital No. 1, Fulton, and at about the same time the old pump in our deep well, which furnished the water for the institution, became worn out and completely unuseable, making it absolutely necessary that this material be replaced.

"Under the appropriation made by the 60th General Assembly there was appropriated out of General Revenue under 'D-Operations' for general expenditures, material and supplies the sum of \$399,481.80, out of which there remains at this time an unexpended balance.

"Our Board seeks your opinion as to the authority of the State Auditor to approve this expenditure and expenditures of similar nature in other eleemosynary institutions where there is an unexpended balance in 'D-operations' at these institutions."

The appropriation for State Hospital No. 1 for the years 1939-1940 is found in Laws of Missouri, 1939, page 20, and is as follows:

"For Hospital No. 1 --

"Payable out of General Revenue fund,
as follows:

A. Personal Service:

"The salaries of the superintendent,
assistant physicians, dentist, steward,
and other employees \$250,000.00

C. Repairs and Replacements:

"Labor, material and supplies for re-
pairing buildings, building equipment,
operative equipment and structures
other than buildings 20,000.00

D. Operation:

"General expense, material and supplies.399,481.80
Purchase of equipment for criminal
insane building 24,888.65

TOTAL out of General Revenue fund . \$ 694,370.45

"For Hospital No. 1 --

"Payable out of Hospital No. 1 fund,
as follows:

A. Personal Service:

"The salaries of the superintendent,
assistant physicians, dentist, steward,
and other employees \$351,359.92

B. Additions:

"Building equipment, operative
equipment, labor and materials for
construction and installation
thereof 1,250.00

"C. Repairs and Replacements:

"Labor, material and supplies for
repairing buildings, building
equipment, operative equipment and
structures other than buildings . . 6,555.00

"D. Operation:

"General expense, material and
supplies 352,853.28

TOTAL out of Hospital No. 1
fund \$712,018.20 "

The question asked in your opinion is whether the repair or replacement of the pasteurizing plant and the well pump at State Hospital No. 1 can be paid out of Section D relating to "Operation." It will be noted that Section C of the appropriation is explicitly for repairing operative equipment.

It is a well-settled rule that "an appropriation law is to be construed under and by the same rules as other legislation." 59 C. J. 262. See State ex rel. McKinley Publishing Co. v. Hackmann, 282 S. W. 1007, 314 Mo. 33.

It is equally well settled that a special statute dealing with a subject in a definite way takes precedence over a general statute dealing with the subject in general terms. Collins v. Twellman, 126 S. W. (2d) 231, 344 Mo. 330; State ex rel. Sav. & Bldg. Ass'n. v. Brown, 68 S. W. (2d) 55, 234 Mo. 781, Tevins v. Foley, 30 S. W. (2d) 68, 325 Mo. 1050.

While it is true that if Section D stood alone without Section C, then such section would be broad enough

February 28, 1941

under the term "Operation" to include repair or replacement work on operative equipment. (See State Bd. of Health v. Frohmler, 29 P. (2d) 941, in which the appropriation for operation was held to include traveling expenses and postage). However, when the Legislature has specifically, and by a special section, provided a fund for the repairing or replacement of operative equipment, then that section takes precedence and the general section on operation does not apply.

CONCLUSION

It is, therefore, the opinion of this Department that the repair or replacement work on the pasteurizing plant and the well pump at State Hospital No. 1 cannot be paid out of the appropriation for "Operation" found in the Appropriation Act for State Hospital No. 1, Laws of Missouri, 1939, page 20.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

AO'K:EG

INSANE PERSONS: Probate Court may make order recommitting person to State Hospital on original judgment of insanity if original judgment has not been vacated.

May 2, 1941

Honorable W. Ed Jameson
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Mr. Jameson:

This will acknowledge receipt of your letter of April 29, 1941, enclosing letter from Dr. Ralf Hanks, Superintendent, State Hospital No. 1, and asking for an opinion upon the following question contained in the letter of Dr. Hanks. The question is as follows:

"Occasionally the question has arisen as to whether or not the Probate Judge has the right to order the commitment to the State Hospital without a new hearing on a person who has previously been declared insane and sent to the Hospital and later discharged by the Hospital. I shall be grateful to you if you can get an opinion from the Attorney General clarifying this point.

"On April 18th the sheriff of Randolph County brought a patient, Aubrey H. Neil, to the hospital with the following order from the Probate Court:

'STATE OF MISSOURI) February 1941 Term
 (SS.
COUNTY OF RANDOLPH)

In the Probate Court at Moberly, in said county on the 16th day of April, 1941, the following, among other proceedings, were had and placed on the Court Record.

May 2, 1941

IN RE: THE ESTATE OF AUBREY H.
NEIL, A PERSON OF UNSOUND
MIND, ORDER TO RE-COMMIT
TO STATE HOSPITAL.

Now on this day, on the application of J. W. Tate, Guardian of the person and estate of said Aubrey H. Neil, a person of unsound mind, it is shown to the Court that said Aubrey H. Neil is a person liable to do damage to himself or to others, it is ordered that said Guardian have said Ward re-committed to State Hospital No. 1 at Fulton, Missouri, for safe keeping and treatment, until further orders of this Court.

W. O. Doyle,
Judge of Probate."

"Our records show that he was first admitted March 28, 1935, by order of the Probate Court of Randolph County. He was discharged from the institution on December 17, 1938.

"The Judge of the Probate Court took the position that since he had once been declared insane, regardless of the fact that the Hospital had discharged him, he was still legally insane and under the jurisdiction of the Court, and that he could return him to the Hospital without new commitment papers. I was of the opinion that since the Hospital had discharged him the Court should have a new sanity hearing on the patient before he was brought to the Hospital."

The sections of the statutes relating to insanity inquiries in the Probate Court which apply to the foregoing question are found in Article 18, Chapter 1, R. S. Missouri, 1939. Section 447 of this article and chapter confers upon the Probate Court jurisdiction to inquire into the sanity of persons. This section is as follows:

"If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury: Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

Section 451 authorizes the Probate Court to appoint a guardian of the person and estate of the person whose sanity is being inquired into, if it be found that such person is of unsound mind.

Section 474 authorizes the restraint of the person, and is as follows:

"Every probate court, by whom any insane person is committed to guardianship, may make an order for the restraint, support and safekeeping of such person, for the management of his estate, and for the support and maintenance of his family, and education of his children,

out of his proceeds of such estate; to set apart and reserve for the payment of debts, and to let, sell or mortgage any part of such estate, real or personal, when necessary for any of the purposes above specified."

The procedure to be followed upon the recovery of a person previously found to be of unsound mind by the Probate Court is set out in Sections 492 and 493. These sections are as follows:

Section 492:

"If any person shall file in the probate court of any county in this state an allegation in writing, verified by oath or affirmation, that any person who has heretofore been declared by such court to be of unsound mind, or insane, has been restored to his right mind, the court shall hold an inquiry as to the insanity of such person: Provided, that if the court, upon such inquiry, shall find that such person is not restored to his right mind, and such person, or any one for him, shall, within ten days after such finding, file with the court an allegation in writing, verified by oath or affirmation, that such person is of sound mind and is aggrieved by the action and finding of the court, the court shall then cause the facts to be inquired into by a jury."

Section 493

"If it be found that such person has been restored to his right mind, he shall be discharged from care and custody, and the guardian shall immediately settle his ac-

counts, and restore to such person all things remaining in his hands belonging or appertaining to him; and if it be found that such person has not been restored to his right mind, the person at whose instance the inquiry was had, may, in the discretion of the court, be required to pay the costs of the proceeding."

There are other sections of the statutes relating to setting aside the judgment and appeal which, for the purpose of brevity, we are not setting out or mentioning by number.

In connection with the adjudication of insanity by the Probate Court and its force and effect, attention is called to the case of *Hamilton v. Henderson*, 117 S. W. (2d) p. 379, a case in which petitioner who had been adjudged of unsound mind, was seeking release from restraint by a Writ of Habeas Corpus. The Kansas City Court of Appeals, in which court the case was decided, in discussing the effect of a judgment of insanity by a probate court, used the following language at l. c. 381:

"As to the first ground the facts show that the petitioner was a resident of Jackson County, owning valuable property and living therein at the time that she was adjudicated an insane person by the Probate Court of Jackson County, Missouri, on May 7th, 1936. Under section 448, R.S. 1929, Mo. St. Ann. Sec. 448, p. 281, the Probate Court of the County of the residence of the person whose sanity is inquired into has exclusive jurisdiction of the proceedings and the fact that such a party is confined in an institution without the county does not change his residence and does not deprive the court of that jurisdiction. *Ex parte Zorn*, 241 Mo. 267, 145 S.W. 62; *State ex rel. v. Mills*, 231 Mo. 493, 133 S.W. 22; *State ex rel. v. Wurde-*

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man, 129 Mo.App. 263, 108 S.W. 144; Baker v. Estate of Smith, 223 Mo.App. 1234, 18 S.W. 2d 147. Consequently, petitioner was a resident of Jackson County on February 2nd, 1937. Moreover, this is a collateral attack upon the judgment of the probate court. 'If jurisdiction of the subject matter and of the person of the alleged lunatic attached in lunacy proceedings, the inquisition cannot be attacked collaterally for errors or irregularities in the proceedings; it remains valid until reversed or set aside. But if lunacy proceedings are void on their face, they are subject to collateral attack.' 32 C.J. p. 648; 29 C.J. pp.25-29; State ex rel. v. Brasher, 200 Mo.App. 117, 126, 201 S.W. 1150; Hartman v. Henry, 280 Mo. 478, 217 S.W. 987; Ex parte Dixon, 330 Mo. 652, 52 S.W. 2d 181. Though probate courts are of limited jurisdiction, yet, in matters where their original jurisdiction is exclusive, their judgments are entitled to all the presumptions which protect the judgments of courts of general jurisdiction. Crohn v. Modern Woodmen of America, 145 Mo.App. 158, 129 S.W. 1069." (Underscoring ours).

And further, at l. c. 382, is the following discussion:

"Our statutes provide ample relief in the probate court to persons who have been adjudged insane and under guardianship, upon their restoration to sanity. Section 452, Mo.St.Ann. sec.452, p.285, provides for a guardian of persons adjudged insane by the probate court who, by section 461, Mo.St.Ann. Sec. 461, p. 288, is given charge of his person and is required to provide support and maintenance for the ward. Section 498, Mo.St.Ann. Sec. 498,

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p. 301, provides for the confinement of his ward by the guardian and section 496, Mo.St.Ann. Sec. 496, p.300, for the removal of the guardian. To safeguard the rights of any person who may claim to have been improperly adjudged insane, provision is made by section 456, Mo.St.Ann. Sec.456, p.286, whereby the court may, at any time during the term in which an inquisition is had, set same aside and cause a new inquiry into the facts. Sections 493 and 494, Mo.St. Ann. Secs. 493, 494, pp.298, 299, provide that any person may file in the probate court an allegation that a person, who has theretofore been declared by such court to have been of unsound mind, has recovered and, thereupon, the court shall hold an inquiry as to the sanity of such person and, upon such inquiry, if such person is found to be not restored to his right mind, such person, or any one for him may, within 10 days after such finding, file an allegation, in writing, that such person is of unsound mind and is aggrieved by the action and finding of the court, whereupon, the court shall cause the facts to be inquired into by a jury. Section 494 provides for the discharge of a person found to be sane, from the care and custody of his guardian, and that the latter shall immediately settle his accounts and turn over all property and accounts to him. Sections 1938, 285 and 292, Mo.St.Ann. Secs. 1938, 285, 292, pp. 2605, 181, 184, provide for appeals from judgments of probate courts against a finding of restoration, as well as from the original adjudication of insanity, and that a trial de novo of his sanity shall be held in the appellate (circuit) court. Baker v. Estate of Smith, supra, loc. cit. 1241, 18 S.W. 2d 147.

Hon. W. Ed. Jameson

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May 2, 1941

"Section 486, Mo. St. Ann. sec. 486, p. 296, provides: 'No contract of any person found to be of unsound mind, as hereinbefore specified, which shall be made without the consent of his guardian, shall be valid or binding, and such guardian may sue for and recover any money or property which may have been sold or disposed of by his ward without his consent.' Under this section it is held that an adjudication of insanity is conclusive on the question until set aside and cannot be questioned in a collateral proceeding on the ground that restoration of sanity has taken place. Kiehne v. Wessell, 53 Mo. App. 667; Herman v. St. Francois County Bank, supra; Cockrill v. Cockrill, C.C., 79 F. 143; Wadsorth v. Sharpsteen et al., 8 N.Y. 388, 59 Am. Dec. 499; Imhoff v. Witmer's Adm'r, 31 Pa. 243."

From a reading of the above cited sections of the statutes and considering them in connection with the above case, it is apparent that when a judgment of insanity is rendered by a Probate Court it is a valid and enforceable judgment until vacated or set aside in the manner prescribed by statute.

The law pertaining to the discharge of persons from State hospitals for mental patients who have been lawfully committed is found in Section 9321, Article 2, Chapter 51, R. S. Missouri, 1939. This section is as follows:

"Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matters

Hon. W. Ed Jameson

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May 2, 1941

shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."

In order to answer the question contained in the letter of Dr. Hanks, it is necessary for us to assume that the original judgment of the Probate Court of Randolph County had never been vacated by appropriate legal steps, and this is indicated by the doctor's letter. This places the matter in the position of apparently having a later dated order of the court based on an existing, enforceable judgment coming into conflict with an order of the Superintendent of the State Hospital, who had full authority to make the order, discharging such person from the Hospital. After careful consideration of the matter we do not believe there is any conflict. The judgment of the probate court never having been vacated, the court may make all necessary orders based on it. Attention is called to the date of the discharge from the Hospital, as set out in the letter of Dr. Hanks, December 17, 1938, and the date of the present order of the Probate Court, April 16, 1941. It is quite well known that the condition of persons who are mentally ill does change. If, as we assumed, the original judgment has not been vacated, then upon a proper showing to the court that the condition of the person had changed between December 17, 1938 and April 16, 1941, so that it was found by the probate court the person again needed to be restrained, the court could make the present order based on its original judgment.

CONCLUSION.

It is our opinion that under the present order, as set out in the letter of Dr. Hanks, the patient should be received.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

WOJ/rv

COUNTY COURTS: Do not have exclusive control over the purchase of incidental expenses or supplies for the proper conduct of a county office.

May 9, 1941

Honorable Gus James
Clerk of the County Court
Bollinger County
Zalma, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated April 25, 1941, which reads as follows:

"Section 2509 of the revised statutes apparently applies only to counties having a population of more than 70,000. There does not seem to be any law giving the county court in small counties exclusive control over the purchases of supplies. Please give me the opinion of your office on this matter."

Section 2509, Revised Statutes of Missouri, 1939, is a part of Article XIV, Chapter 10, and is only applicable to counties now having, or hereafter having, a population of not less than 70,000 inhabitants nor more than 90,000 inhabitants. Section 2509 is not applicable to the smaller counties under 70,000. As to the question whether or not the county court in small counties have exclusive control over the purchase of supplies, we are quoting from the case of Hammond & Stephens v. Christian County, 62 S. W. (2d) 844, 1. c. 845, which reads as follows:

"Our courts have interpreted and construed statutes relating to various county offices and officers so as to hold the county liable for the payment

of necessary incidental expenses incurred by such officer in the proper equipment and conduct of his office and the performance of his official duties, such expenses being reasonable in cost. In *Ewing v. Vernon County*, 216 Mo. 681, 116 S. W. 518, the county court refused to supply janitor service for the office of the recorder of deeds and to reimburse the recorder for stamps used in returning deeds, after they had been recorded, to the parties who had filed them for record. Construing the statute (Rev. St. 1899, Section 9055 (Mo. St. Ann., Section 11527)), requiring that the recorder 'shall keep his office at the seat of justice in each county' (*italics ours*), the court held it was the duty of the county to pay for necessary janitor services for the office of the county recorder and for stamps used as aforesaid. Reaffirming the interpretation of statutes made in the *Ewing Case*, it was held in *Harkreader v. Vernon County*, 216 Mo. 696, 116 S. W. 523, that the office of sheriff of that county was entitled to janitor service at the expense of the county, and that the county was liable for postage used by the sheriff in his official correspondence. Further, it was shown in that case that the county jail was connected with water mains, and that the sanitary needs of the jail were dependent upon water service supplied by a public service corporation engaged in the distribution and sale of water. The county court ordered such water service discontinued, but the sheriff, who by virtue of his office had charge of the jail, disregarded such order and continued the service. Construing a statute requiring that county jails be kept and maintained in a good and sufficient condition, the court held, in the light of

the facts of that case, that, the charges for water being reasonable, the county was liable for such service. The statute relied upon in *Motley v. Pike County*, 233 Mo. 42, 135 S. W. 39, 40, provides: 'Every probate court shall have a seal of office, of some suitable device, the expense of which, and the necessary expense incurred by said court for books, stationery, furniture, fuel and other necessities shall be paid by the county.' Rev. St. 1909, Section 4065 (Mo. St. Ann., Section 2056). It was held that, under this statute, the county court having refused to provide janitor service for the probate courtroom, the probate judge was entitled to be reimbursed by the county for reasonable expenditures made by him for such janitor service and also to be reimbursed by the county for telephone rent paid by him for a telephone in his office. It was said: 'The term "other necessities" as used in the statute is sufficiently broad to cover this item (telephone service). * * * We are of opinion that the plaintiff (the probate judge) with the power to furnish his offices with "other necessities" had the right to engage telephone service to facilitate the business of his office with the general public.' In *Kansas City Sanitary Company v. Laclede County*, 307 Mo. 10, 269 S. W. 395, 398, the sheriff of Laclede County purchased supplies of soaps and insecticides from plaintiff company for use in maintaining the county jail in a sanitary condition. It was pointed out that, under one section of our statute (section 8526, R. S. 1929 (Mo. St. Ann., Section 8526)), 'the sheriff of the county has the custody, keeping, and charge of the jail,' and that another section of the statute

(section 8524, R. S. 1929 (Mo. St. Ann., Section 8524)) requires the jail 'to be kept in good and sufficient condition.' The court then said: 'He (the sheriff) therefore has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose.' In each of the foregoing cases, cited by appellant, the expense incurred by the county official for which the county was held liable was in connection with the necessary equipment or care and maintenance of the office room or rooms or county property under his charge, and for the care of which he was responsible, or in the furtherance and performance of official acts and within statutes held to authorize reasonable expenditures for such necessary purposes."

In all of the cases above quoted in the case of Hammond & Stephens v. Christian County it has been held that the county court is liable for all incidental expenses incurred by such county officer in the proper equipment and conduct of his office and the performance of his official duties. All of the above cases were cases involving the smaller counties, but, of course, counties having a population of less than 50,000 inhabitants are governed and limited by Sections 10910 to 10917, inclusive, of the Revised Statutes of Missouri, 1939, which is known as the County Budget Law. In counties having more than 50,000 and less than 80,000 inhabitants, the county and the county officers are limited by Sections 10918 to 10935, inclusive.

Therefore, in view of the above authorities, it is our opinion that the county officers have the authority to purchase the necessary incidental supplies required by such officer in the proper equipment and conduct of

May 9, 1941

his office and the performance of his official duties, such expenses being reasonable in cost. In view of the voluminous sections of the statute providing and allowing the county officer to purchase incidental expenses for the proper conduct of his office, we refer you to the statute concerning each and every county officer.

It is the opinion of this office that the county court in small counties do not have exclusive control over the purchase of supplies for the proper conduct of the offices of the respective county officers.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:VC

*
ELEMOSYNARY INSTITUTIONS:
COUNTY BUDGET ACT:

Care of patients in Missouri State Sanatorium and Missouri State School cannot be paid out of Class 1; must be paid out of Class 5.

May 10, 1941



Honorable W. Ed. Jameson,
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"I quote you from a letter written by Mr. J. R. Oliver, County Clerk of Dunklin County, to the Honorable Wilson Bell on March 20, 1941, which reads in part as follows:

"According to the State Auditor's budget form for 1941 they specify that State Eleemosynary Institutions' accounts be paid out of Class 5 and Dunklin County set the same up in that class this year and I know of no other way these accounts can be paid."

"We have always understood that pauper patients for the four mental hospitals were to be paid out of Class 1 warrants. Heretofore most of the counties have been paying the Missouri State Sanatorium and the Missouri State School out of Class 1 warrants. Some of these counties are now beginning to send in Class 5 warrants for payment of patients in these two institutions. Will you kindly furnish this office with an opinion with reference to this matter?

May 10, 1941

"I will also ask if the state institutions can accept warrants of any class from the counties in payment of the keep of pauper patients?

"The Eleemosynary Board will appreciate an opinion from you with reference to these matters."

The first question presented in your request is, May the expense for the care of patients in the Missouri State Sanatorium and the Missouri State School be paid by the counties out of Class 1 of the county budget?

Section 10911, R. S. Mo. 1939, provides in part as follows:

"The court shall classify proposed expenditures in the following order:

"Class 1: The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.

* * * * *

"Class 5: The county court shall next set aside a fund for the contingent and emergency expense of the county, the county court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expenses. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any

other emoluments of any kind whatever) estimated for in preceding classes."

Section 10914, R. S. Mo. 1939, provides:

"The court shall show the estimated expenditures for the year by classes as follows:

"Class 1: Care of paupers declared by lawful authority to be insane (in state hospitals).

* * * * *

"Class 5: Contingent and emergency expense. -- The County court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the Court proposes the funds in this class shall be used, shall be shown."

It will be noted that the Legislature, by the County Budget Act, has provided that only insane pauper patients in "state hospitals" may be paid for by the county out of Class 1. The "expense of paupers not otherwise classified" shall be taken care of by Class 5.

Section 9258, R. S. Mo. 1939, provides as follows:

"The state hospital No. 1, at Fulton, the state hospital No. 2, at St. Joseph, the state hospital No. 3, at Nevada, the state hospital No. 4, at Farmington, the Missouri state sanatorium, at Mount Vernon, and the Missouri state school at Marshall, are hereby declared to be state eleemosynary institutions of the state of Missouri within the meaning of the provisions of this article."

May 10, 1941

Under the provisions of the above statute, the Legislature has designated four eleemosynary institutions as state hospitals, while those institutions at Mount Vernon and at Marshall are given the appellation of "the Missouri state sanatorium" and "the Missouri state school." By this designation, our General Assembly has provided that those institutions at Fulton, St. Joseph, Nevada and Farmington shall be state hospitals, while the other two eleemosynary institutions are given other designations.

Furthermore, it will be noted that Article II, Chapter 51, of the Revised Statutes of Missouri, 1939, deals specifically with state hospitals, while Article V of Chapter 51 provides for the State Sanatorium at Mount Vernon, and Article VI of Chapter 51 relates to the Missouri State School at Marshall.

In view of what has been said above, when the County Budget Act says that the care for insane pauper patients in "state hospitals" shall be paid out of Class 1, it obviously meant only those institutions specifically designated as state hospitals in the statutes. Therefore, the care of the indigent patients in the Missouri State Sanatorium and the Missouri State School may not be paid for by the counties out of Class 1, but must be paid out of Class 5 of the county budget.

In response to your second question, enclosed find copy of an opinion previously rendered to you, under date of May 19, 1936, which we believe answers this question in full.

Conclusion

It is, therefore, the opinion of this Department that the care of county patients in the Missouri State Sanatorium at Mount Vernon and the Missouri State School

Hon. W. Ed. Jameson

-5-

May 10, 1941

at Marshall must be paid out of Class 5 of the county budget, and cannot be paid out of Class 1 of the same.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG
Enc.

SHERIFFS: Only entitled to ten cents per mile for the arrest of two defendants filed on jointly.

September 4, 1941

Honorable Frank W. Jenny
Prosecuting Attorney
Franklin County
Union, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of August 29, 1941, which reads as follows:

"Early in the morning of August 24, 1941 Fred Hulsey and Gladys Hulsey, husband and wife became engaged in an altercation with other persons at McCurdy's Tavern in New Haven.

"The local Constable arrested them for disturbing the peace and called the Sheriff who proceeded to New Haven and returned Fred Hulsey and Gladys Hulsey to the County Jail.

"On Monday morning, August 25th one Information, charging Fred Hulsey and Gladys Hulsey with disturbing the peace in New Haven Township was prepared and the Sheriff conveyed the defendants and the Information to the Justice of the Peace at New Haven.

"With one Information filed even though there were two defendants and although the Sheriff made but one trip with the two defendants from Union to New Haven he did convey two defendants and might have taken one defendant himself and had a deputy take the other defendant.

"Under these circumstances is the Sheriff entitled to 10¢ per mile for

conveying the two defendants or is he entitled to 20¢ per mile for conveying the two defendants. This question occurs very frequently.

"As I understand the law if two separate Informations charging two defendants with misdemeanors are filed but even though the Sheriff actually only makes one trip he is entitled to charge mileage for each defendant on each information.

"I am interested in knowing whether or not when two defendants are charged in one Information is he entitled to double compensation for his mileage?"

Section 13411, R. S. Missouri 1939, partially reads as follows:

"* * * * *

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip \$0.10"

Section 13414, R. S. Missouri 1939, reads as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in saving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged

Hon. Frank W. Jenny

(3)

September 4, 1941

for more than one witness subpoenaed
or venire summons or other writ served
in the same cause on the same trip."

Since your request states that Fred Hulsey and Gladys
Hulsey were jointly charged on the same information, under the
above authorities the sheriff is only allowed ten cents a
mile as mileage under the arrest in the same cause on the same
trip.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

(11)

DEAD BODIES: Removal or Burial Permits not required to be obtained, when body is removed for the purpose of preparing such body for burial.

October 10, 1941

Hon. Frank W. Jenny
Prosecuting Attorney
Franklin County
Union, Missouri



Dear Sir:

This will acknowledge your letter of recent date, requesting an opinion from this department, which reads as follows:

"Section 9768 R. S. Mo. 1939 reads in part as follows:

"The undertaker or person acting as Undertaker, shall be responsible for obtaining and filing the Certificate of Death with the Local Registrar of the District in which the death occurred, and securing a Burial or Removal Permit prior to any disposition of the body."

"The question of the meaning of the word removal has been raised. Under a strict interpretation of the word any moving of the body from the place of death would be a removal. For Example:

"First:- If death occurred in the home and the Undertaker is called is it necessary to secure a removal permit from the Registrar before the body can be removed to the office of the Undertaker where preparation for burial is ordinarily provided under modern conditions.

"Second:- If a person die in the hospital in

one Township in a County is it necessary to secure a permit from the Local Registrar of that Township before the body can be removed to the office of the Undertaker in another Township for preparation for burial.

"Third:- If a person die in one County and an Undertaker from an adjoining county who might or might not be the Undertaker nearest the place of abode of such deceased person be called is it necessary to secure removal permit from the Local Registrar of the County of residence before removing the body across a county line to the office of the Undertaker.

"Fourth:- After the death of a person by accident and the Coroner has issued a Certificate of Death setting forth the cause of death is it necessary to secure Removal Permit from the Local Registrar before removing the body from a place on the Highway where death occurred to the office of the Undertaker or across a county line to the home of the Deceased.

"In each of the above instances if no apparent criminal responsibility is involved may the body be removed within the State of Missouri from one Township to another or from one county to another or from one Local Registrar's District to another without first securing a Removal or Burial Permit provided that Burial Permit be secured from the proper Local Registrar prior to interment or other disposition of the body."

An analysis of Section 9768 of R. S. Mo., 1939 obviously discloses that it is the duty of the Undertaker, or person acting as Undertaker, to obtain and file a certificate of death with the local Registrar of the District in which the death occurred. Moreover, it is also the Undertaker's duty to secure a Burial or Removal Permit, prior to the disposition of the body. Other parts of that section merely relate to the obtaining of such information as is necessary.

October 10, 1941

While the above observation relates to the duties enjoined upon the Undertaker to secure a Burial or Removal Permit, prior to the disposition of the body, it is not to be construed so as to require the obtaining of a Burial or Removal Permit, under the circumstances which you have set forth. This observation is supported by the provisions of Section 9764 of R. S. Mo., 1939, which reads in part as follows:

"The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district until a permit for burial, removal or other disposition shall have been properly issued by the local registrar of the registration district in which the death occurs: Provided, no such removal permit shall be required when a dead body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs. * * *"

The above section of the statute is plain and unambiguous, and therefore, no room for construction exists. Cummins v. Kansas City Public Service Company, 66 S. W. (2d) 920, 334 Mo. 672. Hence, it is to be seen, from the examples you have set forth in your request, that a Removal Permit is not required when a dead body is removed for the purpose of preparing such body for burial.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

RCS:ww

BUILDING AND LOAN: Possession of stock certificate must be given to association by borrowing member.

October 27, 1941

17-30

Mr. T. Victor Jeffries
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

"I am enclosing a letter and blank share loan note from Mr. Lewis Luster, Attorney and Counselor for the Great Southern Savings and Loan Association, Springfield, Missouri, giving as his opinion that the Stock Certificate held as collateral by the Association does not have to be assigned to the Association, for the reason that the Stock Certificate is embodied in the face of the note.

"You will note that the note reads in part, 'to secure the amount borrowed, as indicated by the foregoing obligation, the undersigned hereby assign _____ and pledge _____ certificate of stock No. _____ for _____ Shares.

"It is the opinion of your examiner that the certificate should be assigned to the Association. I would appreciate it if you would obtain a ruling from the Attorney General on this matter, and send a copy of the ruling to the Great Southern and I too would like to have a copy.

(Signed) F. A. DAVIS
Examiner."

Oct. 27, 1941

The question presented is whether the stock certificate must be handed over to the association by a member when a stock loan is made to such member.

Building and loan associations are purely creatures of statute. 8 Am. Jur. 98. As was said by our Supreme Court in State ex rel. Wagner v. Farm & Home Savings and Loan Ass'n., 90 S. W. (2d) 93,

"Building and loan associations are quasi public financial institutions and for the protection of them the State of Missouri has by the Act of 1931 provided special, inquisitorial, supervisory, and regulating laws which are specific, adequate, complete, and therefore exclusive."

We must therefore look to the statutes of Missouri, which deal with building and loan associations, for the answer to your question.

Section 8216, R. S. Mo. 1939, provides in part as follows:

"For every loan or advance made to a member as aforesaid, a nonnegotiable note or bond secured by first mortgage or deed of trust on real estate shall be given, accompanied by a transfer and pledge of the shares of stock of the member or members so obtaining a loan or advance. Said shares so transferred and pledged shall be held by the corporation as additional or collateral security for the performance of the agreements, covenants and conditions of said note or bond and mortgage or deed of trust. * * * *"

Under the above statute every loan must be accompanied by a "transfer and pledge" of stock. It is the fundamental rule of statutory construction that the court shall

give effect to the intention or purpose of the Legislature as expressed in the statute. *State v. Toombs*, 25 S. W. (2d) 101; *Thompson v. Lamar*, 17 S. W. (2d) 960, 322 Mo. 514. The word "transfer" in Section 8216, supra, is not used in the sense of a "conveyance," because the Legislature in joining it with the word "pledge" did not mean for title to pass because a pledge is merely a transfer of the possession of personal property and not of the title. *A. A. B. v. French*, 279 S. W. 435; *Conway v. Plough*, 231 S. W. 1045. Rather, we think, that the word "transfer" should be used as in *Carter v. Butler*, 264 Mo. 306, in that "the word 'transfer' implies delivery of possession." It is further ruled in Missouri that a pledge of personal property must be accompanied by either the actual or constructive delivery of possession of pledged property to the pledgee. *National Bank of Commerce v. Flannigan Mills Co.*, 268 Mo. 547; *Miners Bank v. Aylor*, 264 S. W. 99.

In view of the above authorities we are of the opinion that when a building and loan association makes a stock loan to a member, that the borrowing member must deliver possession of the stock certificate to the association.

Conclusion

It is, therefore, the opinion of this Department that when a stock loan is made by a building and loan association under Section 8216, R. S. Mo. 1939, that the actual possession of the stock certificate or shares of stock must be given to the association by the borrowing member.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

COUNTY DEPOSITARIES: Bank which is outside of state may be selected as escrow agent.

December 3, 1941

12-23

Honorable Frank W. Jenny
Prosecuting Attorney
Franklin County
Union, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this department. Your letter is as follows:

"The Depositary for the funds of Franklin County is requesting that the Court execute a contract as per sample enclosed under the terms of which the securities pledged by the Depositary Bank will be placed in the custody and the National Stock Yards National Bank of National City, Illinois, for the safe keeping.

"It is my opinion that it is illegal for the Court to enter into a contract with a Depositary designating a bank outside of the State of Missouri as the place of safe keeping of the collateral security pledged by the Bank.

"Will you please advise your opinion of this contract, particularly of the feature making the National City, Illinois bank the Trustee and Depositary of the security."

Your question is: Is it illegal for the county court to enter into a contract with a county depositary to secure the county funds which selects a bank outside

the State of Missouri as trustee for the collateral security pledged by the depositary bank?

Section 13850, Revised Statutes of Missouri, 1939, provides in part as follows:

"Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company authorized by the laws of this state to execute bonds as surety: Provided, that the court may accept in lieu of real estate as security, bonds of such county, or of the State of Missouri, or of the United States, or bonds fully guaranteed by the United States, which such bonds shall be deposited as the court may direct, with a trustee, trust company or other fiduciary designated or approved by it:
* * * * "

It will be noted that the above statute provides that "the court may accept in lieu of real estate as security, bonds of such county, or of the State of Missouri, or of the United States, or bonds fully guaranteed by the United States, which such bonds shall be deposited as the court may direct with a trustee, trust company or other fiduciary designated or approved by it." In the absence of any statute, and we find none, barring a bank outside the State of Missouri from acting as trustee under the provisions of Section 13850, Revised Statutes of Missouri, 1939, we do not think that it is disqualified from so acting. The statute says that such bonds shall be deposited as the court may direct.

The Legislature has seen fit to give to the county court the discretionary power of the selection of the trustee to keep the bonds, or other securities pledged by the depositary, to safeguard the county funds. It is not our province to pass on the advisability of such action by the county court, however, we know of no reason why acceptable trustees, trust companies or other fiduciaries cannot be found in the State of Missouri who are willing to accept the responsibility under the statute.

CONCLUSION

It is therefore our opinion that the bank mentioned in your letter of request, which is located outside of the State of Missouri, is qualified to act as trustee for Franklin County, Missouri, if it meets all the requirements provided by the Revised Statutes of Missouri.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

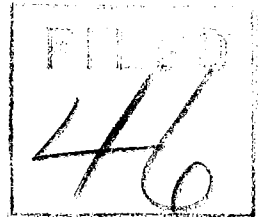
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PARDON AND PAROLE: BOARD OF: Board cannot parole inmate of Intermediate Reformatory until compliance with Section 8477 R. S. 1929. The governor can parole at any time after conviction regardless of Section 8477.

January 13, 1941

Mr. H. S. Johnson, Member
Board of Probation and Parole
Jefferson City, Missouri

1-24



Dear Mr. Johnson:

This is in reply to your request for our opinion,
which is in the following terms:

"I desire an official opinion on the
following:

1. Does the Board of Probation and Parole have authority to parole inmates from the Intermediate Reformatory any time prior to the time they have served seven-twelfths of their sentence?
2. Is the Board of Probation and Parole authorized to parole an inmate from the Intermediate Reformatory without a suitable home, free from criminal influence and without expense to the state, having been offered.

Does the law creating the Board of Probation and Parole, Statute 1937, and giving them certain powers relative to paroles, commutation of sentence from the Intermediate Reformatory, supercede other laws with reference to parole, and particularly Section 8477, R. S. Mo. 1929?"

The Board of Probation and Parole was created by Section 8334-2 R. S. 1929, as amended Laws 1937, page 400, Section 2, Mo. St. Ann. page 6180, where it was given the powers theretofore vested in the commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board.

The present statutes prescribe no duties for the commissioners of the Department of Penal Institutions relative to pardons, paroles, commutations and reprieves. Previous statutes which provide for such duties have been repealed. For example: Section 8330 did provide that said commissioners should perform such duties, theretofore performed by the state prison board. Said Section 8330 was repealed by Laws 1939, page 566, Section 1, Mo. St. Ann. page 6179. Section 8520 was repealed by Laws 1939, page 608, Section 1, Mo. St. Ann. page 6241. Section 8515-8517 were repealed by Laws 1939, page 608, Section 1, Mo. St. Ann. page 6240.

The power to parole inmates of the Intermediate Reformatory was formerly vested in a special parole board for that institution by Section 8478 R. S. 1929, Mo. St. Ann. page 6227, which in part provides that ". . . the commissioner of paroles of the department of penal institutions . . . and . . . shall constitute a parole board for said Intermediate Reformatory and . . . they shall grant paroles * * * ." This power was transferred to the Board of Probation and Parole by said Section 8334-2; and, Section 8478, supra, was repealed by Laws 1939, page 606, Section 1, Mo. St. Ann. page 6227.

When said power of parole was vested in a board created by the legislature in Laws of 1927, at the same time a limitation was placed on said power by what is now Section 8477 R. S. 1929, Mo. St. Ann. page 6227, which in part provides:

"Any inmate who shall be confined in said reformatory, who shall serve seven-twelfths of the time for which he may have been sentenced, in an orderly and peaceable manner without having any in-

fraction of the rules of the reformatory or laws of the same recorded against him, shall be eligible for making application for parole and shall be given a hearing for parole. No inmate shall be paroled from said reformatory until he shall have served seven-twelfths of the time for which he was sentenced, nor until he shall have given evidence that he is fit to be paroled into the life of the community, nor until he shall submit satisfactory evidence that arrangements have been made for his honorable and useful employment for at least six months in some suitable occupation and also for a proper and suitable home free from criminal influences and without expense to the state."

The Board of Probation and Parole has no authority to parole an inmate of the Intermediate Reformatory unless and until the above quoted requirements of Section 8477 have been satisfied. That section has not been superseded by the law creating the said board; the two statutes are not inconsistent.

In addition to the aforesaid power of parole derived from said Section 8478, the board is given the power by Section 8334-5 R. S. 1929, as amended Laws 1937, page 400, Section 5, Mo. St. Ann. page 6180 merely:

"* * * to study prisoners committed to State correctional and penal institutions to select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon; * * * to make recommendations to the Governor relative to paroles, commutations of

sentence, and pardons; * * * * *."

The law does not favor repeals by implication, and if by any fair interpretation all sections of a statute can stand, there is no repeal by implication. State ex rel Karbe vs. Bader 78 S. W. (2nd) 835, 336 Mo. 259.

However, under the above mentioned authority, nothing prevents the board from recommending to the governor for parole by him an inmate of the Intermediate Reformatory who has not complied with Section 8477, supra. The governor's power to pardon and parole is derived from the Constitution itself. Article V, Section 8, 15 Mo. St. Ann. page 526 in part provides:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."

That power to pardon includes the power to issue a conditional pardon (46 C. J., page 1182, Section 3), or a parole which is the same thing. It was so ruled in State v. Asher, (Mo. Sup.) 246 S. W. 911, 1.c. 913, and the following definition of a parole was quoted with approval:

"A form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on the violation of the condition of the parole." See 46 C. J., page 1183, 1184, Section 6.

The legislature has enacted statutes (Section 8518 R. S. 1929 as amended Laws 1933, page 329, Section 1, Mo. St. Ann. page 6240) to the same general effect as Article V, Section 8 of the Constitution, supra, but the governor's power in this respect is not derived from statutes.

The time when the governor may issue a parole was

decided as follows in Ex Parte Collins 94 Mo. 22, 1.c. 24, 6 S. W. 345:

"The constitution of this state authorizes the Governor, after conviction, which means after return of a verdict of guilty (Commonwealth v. Lockwood, 109 Mass. 323, and cas. cit.), to grant commutation for all offences, except, etc. Art. 5, sec. 8."

Under that authority the governor has the power to pardon or parole a person convicted of any felony or misdemeanor except treason, even though such person has served no time in the Intermediate Reformatory. "as stated by the Supreme Court of Missouri in Lime vs. Blagg 131 S. W. (2nd) 583, 1.c. 586 (10) regarding the governor's power to pardon, parole or reprieve, "The Governor's constitutional power in that field is beyond the range of judicial or legislative encroachment. Ex parte Thornberry, 300 Mo. 661, 671, 672, 254 S. W. 1087, 1090(11)."

On that principle, the legislature has no power to limit the exercise by the governor of the power to parole. The only limitation in the Constitution is "subject to such regulations as may be provided by law relative to the manner of applying for pardons," and that does not affect this case. It does not authorize the legislature to determine who shall be eligible for a parole. Section 8477, quoted supra, and providing that inmates of the Intermediate Reformatory shall not be paroled unless they have served seven-twelfths of their sentences and have complied with certain other conditions, does not limit the exercise by the governor of his power to parole; it applies only to the Board of Probation and Parole. Said Section 8477 immediately precedes the section authorizing the original board to issue paroles (Section 8478, supra), and was not intended to apply to the governor.

Mr. H. S. Johnson

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January 13, 1941

CONCLUSION

The Board of Probation and Parole cannot parole an inmate of the Intermediate Reformatory until he has served seven-twelfths of his sentence, and has given evidence of fitness, and of arrangements for an occupation and a home as provided by Section 8477 R. S. 1929. Said Section does not apply to the governor who can parole such an inmate at any time after conviction.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:RT

SHERIFFS: Sheriffs may charge for serving notices
SALARIES AND FEES: and for mileage in such service made by
JURIES: the court pertaining to jurors and their
service.

March 19, 1941.

Mr. Willie C. Jones
Sheriff of Shelby County
Shelbyville, Missouri



Dear Mr. Jones:

This is in reply to yours of recent date wherein you submit the following:

"I would like to have your written opinion on these two questions:
When a jury is called for a trial and a case has been dismissed or settled if the circuit judge orders the sheriff to stop the jury and not have them come in as per scheduled and the sheriff goes out and travels one hundred and fifty or two hundred miles to get them stopped, where the cost would be seventy-two dollars (\$72.00) to the county if they came in whereas by ordered, by the circuit judge the cost would be twenty or twenty-five dollars, or pay for the miles traveled, just to save the county money by stopping the jury.

"I would like to have your opinion on above, if its legal to collect a certain amount of money to stop a jury if ordered by the judge.

"When a jury has been summons when the court is in vacation and a trial is set, if they have been summoned

March 19, 1941.

and dismissed once and the sheriff is ordered by the circuit judge to call them in for an additional trial, is it legal in your opinion to charge for the necessary miles traveled in calling the jury back at this later date for a trial that has been set for a later date?

"I would like an answer as soon as it will be convenient for your."

Your request goes directly to the question of whether or not a sheriff may be paid for his service in notifying the standing jury to attend or not to attend court on certain days. It is generally known that it is the practice of the circuit courts, in order to cut down the expenses of juries, to make orders that such juries will attend only on days when needed. Each day a jury attends court its expenses, without mileage, is \$72.00. It is a well known rule of law that, before an officer is entitled to compensation, he must be able to put his finger on the statute authorizing such compensation. The most recent statement of this rule is stated in Nodaway County vs. Kidder, 129 S. W. (2d) 857, 1. c. 860:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Section 13411 R. S. Mo. 1939, provides for fees for sheriffs, and that part of it which especially pertains to your question is as follows:

"For summoning a standing jury	\$8.40
For serving every notice or rule of court, notice to take depositions or citation50

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip . . . \$0.10 .

The word "notice" may generally be defined as that which imparts information of the fact to the one to be notified, so if the court makes an order for the sheriff to notify a juror concerning his service in that court, then the sheriff by so notifying the juror performs a service which comes within the claims of serving notices.

Under the provisions of Section 13411 cited above, it will be seen that the sheriff is entitled to 50¢ for serving a notice or rule of court. Therefore, if the court makes an order for the sheriff to give jurors certain notices and the clerk furnishes the sheriff with a certified copy of that order and the sheriff then serves this notice on the juror, then it is no question but that he would be entitled to the fees for serving notices and for whatever mileage in excess of five miles from the place of such court he may charge at the rate of 10¢ per mile therefor.

CONCLUSION

We are, therefore, of the opinion that the sheriff, for serving notices on jurors which are in the "standing jury", would be authorized to make a charge of 50¢ for each notice served together with mileage at the rate of 10¢ per mile for each mile traveled in service, more than five miles from the place of the court.

Mr. Willie C. Jones

- 4 -

March 19, 1941.

We are further of the opinion that the sheriff would be authorized to charge, for summoning the standing jury, \$8.40 only for each regular term of such court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TWB:LB

4
ELEMOSYNARY INSTITUTIONS: Superintendent and staff may in their discretion discharge or parole patients from state hospitals.

May 16, 1941

5/17

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Mr. Jones:

We are in receipt of your request for an opinion under date of May 15th, as follows:

"Will you please give me some guidance on this matter? Under the law people are brought before the County Courts, as I understand it. On the certificate of one physician they are confined to our mental hospitals. After they have arrived at our hospitals and have been given a thorough examination, brought before our staff, the Superintendent finds that they are without psychosis. This means that they are not a fit inmate for a mental hospital. In the past it has been very hard to get them out of our hospitals. Can we legally send them back to the counties from which they came, even if they are senile and mental defectives and probably could not take care of themselves?

"In reading of the law I notice a case, Higgins vs. Hector, 332 Missouri 122, 62 S. W. 410. Just what this case is and means, I do not know. I know that this thing is coming up next Monday in Kansas City and I would like to be posted."

Article 2, Chapter 51, Revised Statutes of Missouri, 1939, deals with the admission of patients into the respective state hospitals.

Section 9328, R. S. Mo. 1939, provides that the several county courts have the power to send to a state hospital such of their insane poor as may be entitled to admission thereto.

Section 9335, R. S. Mo. 1939, provides that a citizen residing in the county wherein the alleged insane person is a resident, may file a verified statement in writing that the person is insane, without sufficient estate to support him, and that it can be proved by at least two persons, one of them being a reputable physician.

Section 9338, R. S. Mo. 1939, provides that the county court can cause the witnesses to be examined.

Section 9339, R. S. Mo. 1939, provides that if after such examination the court is satisfied of the truth of the above statement, the court shall enter a suitable order of record, or where the verdict of a jury has been rendered, the verdict. Such order must set forth that the person found insane is a fit subject to be sent to a state hospital for treatment and must require the medical witness forthwith to make out a detailed history of the case. The county court must further require that the clerk of the court forthwith forward a certified copy of the order of the court to the superintendent of the hospital, accompanying the same with a request of admission of the person found to be insane.

Section 9341, R. S. Mo. 1939, provides that upon receipt of the application and the official copy of the order of the court, the superintendent must immediately advise the clerk whether the patient can be received, and, if so, at what time.

The question which you present is - Whether, upon arrival of said patients it be found that they are not fit inmates for a mental hospital, they may be legally sent back to the counties from which they came although senile and mentally defective so that they cannot take care of themselves.

May 16, 1941

Section 9321, R. S. Mo. 1939, provides how persons admitted to state hospitals may be discharged for parole:

"Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."

The above section makes it mandatory that persons afflicted with any form of insanity be admitted to the state hospitals for care and treatment, but places the entire question of when a patient shall be discharged or paroled in the absolute discretion of the superintendent and his staff.

The case of Higgins v. Hoctor, to which you refer, is reported as In Re Moynihan in 332 Mo. 1022, 62 S. W. (2d) 410, 91 A. L. R. 74.

In the above case the Supreme Court of Missouri, in discussing the question as to whether an order for temporary restraint made by the probate court was binding upon the superintendent of a state hospital to keep the person confined until an order was made in that court for release, said (S. W. (2d), 1. c. 419):

"However, such an order for temporary restraint, as made by the probate court here, is not binding upon the superintendent of a state hospital to keep the person confined until an order is made in that court for release. It is in no sense like a commitment in a criminal case for a definite term in jail or in the penitentiary. The person may lawfully be either discharged or paroled

Mr. Ira A. Jones,

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May 16, 1941

and set at liberty by the superintendent of his own motion at any time. Section 8629, R. S. 1929 (Mo. St. Ann. Sec. 8629)."

We find no limitation in the language of Section 9321, supra, that patients must be declared to be sane or capable of taking care of themselves before the superintendent and his staff are authorized to discharge or parole them from state hospitals.

We are, therefore, of the opinion that patients admitted to state hospitals may, in the discretion of the superintendent and his staff, be discharged or paroled and set at liberty at any time by the superintendent on his own motion.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

ROBERT L. HYDER,
(Acting) Attorney-General

MW:EG

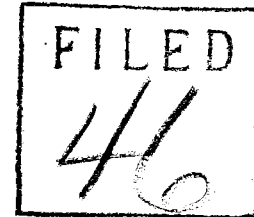
+
APPROPRIATIONS:
ELEEMOSYNARY INSTITUTIONS:)

) House Bill 66. Section 70, reverts
to General Revenue Fund after
expiration of six months.

May 20, 1941

5-20

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Mr. Jones:

We are in receipt of your request for an opinion
under date of May 18th, wherein you state as follows:

"When Mr. Jameson left this office
it seemed to be his opinion that
the \$12,500 that was in the Omnibus
Bill allotted to the Board of Man-
agers of the Eleemosynary Institu-
tions for WPA work had to have
commitments against it before the
six months elapsed or the funds
would revert to the general fund.
Please give us your opinion on this."

The appropriation to which you refer is found in
Section 70 of House Bill 66, as follows:

"Section 70. State Eleemosynary
Institutions -- For Work Projects.
There is hereby appropriated to the
Board of Managers, State Eleemosynary
Institutions, the sum of Twelve
Thousand Five Hundred Dollars (\$12,500)
chargeable to the General Revenue fund,

May 20, 1941

to be released and expended at the direction of the Governor and to be used in connection with Federal Works Progress Administration or other Federal funds to further projects at the State Eleemosynary Institutions."

A great many sections contained in the above House Bill appropriating funds to various departments and boards are for a "period beginning January 1, 1941 to June 30, 1941." However, no such limitation is found in Section 70, supra.

The title to said House Bill provides:

"To appropriate money for the support of the State Government, its elective officers and the payment of certain contingent and incidental expenses of the several departments, bureaus, boards, educational institutions and commissions for the period beginning January 1, 1941 and ending June 30, 1941 and appropriating funds for other purposes for the period between January 1, 1941 and June 30, 1941."

The title is more restrictive than the Act, and the question arises which is to prevail.

In the case of State v. Murphy, 148 S. W. (2d) 527, 1. c. 532, the court said:

"Section 28 of Article IV of our Constitution requires that the subject of a legislative act shall be clearly expressed in the title. The purpose of this requirement is to prevent surprise

May 20, 1941

or fraud upon the legislators by barring from the body of a bill everything not indicated by the title. Williams v. Atchison, etc., Railroad, 233 Mo. 666, 136 S. W. 304. If the title is restrictive, the Act must also be restrictive. Hunt v. Armour & Co., 345 Mo. 677, 136 S. W. 2d. 312; Sherrill v. Brantley, 334 Mo. 497, 66 S. W. (2d) 529."

Since the title to the Act limits the appropriation of funds to a period between January 1, 1941 and June 30, 1941, the Act cannot authorize appropriation of funds for a longer period.

We are, therefore, of the opinion that it is necessary that commitments be made against the funds appropriated under Section 70 of House Bill 66 before the six months have elapsed, in order to prevent it from reverting to the General Revenue Fund.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. FURLO
(Acting) Attorney-General

MW:EG

APPROPRIATIONS: No authority to pay doctor bill of
ELEMOSYNARY INSTITUTIONS: employee injured in course of employment.

June 2, 1941



Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

We are in receipt of your request for an opinion
under date of May 23d, wherein you state as follows:

"About two months ago a patient at
State Hospital No. 1, Fulton, be-
came uncuely excited and attacked a
nurse. The nurse was very badly
injured and later died. The injury
was a head injury and of course we
do not have any brain surgeons on
our staff. A surgeon from Kansas
City was called. He came there and
operated on the nurse, but could not
save her life. Later he sent a bill
for \$500 with a professional discount
of \$250, leaving a balance of \$250.
The member of our Board who is a
physician says that this is not an
excessive charge for such an opera-
tion. Can we legally pay this surgeon
for this operation and out of what
fund may we pay it?"

We find no provision in your appropriation act
or in the statutes governing state eleemosynary institu-
tions which would authorize the Board of Managers to pay
the doctor bills of an employee injured in the course of
employment.

Mr. Ira A. Jones

-2-

June 2, 1941

Section 19, Article X, of the Missouri Constitution, provides in part that:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * * *

It is unnecessary that we determine the question of whether an appropriation allowing the incurring of a debt by the Board of Managers in payment of expenses of an employee injured in the course of employment, would be valid, since we find no appropriation act authorizing same.

We are, therefore, of the opinion that the Board of Managers of state eleemosynary institutions may not legally pay the cost of an operation of an employee injured in the course of employment.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THORLO
(Acting) Attorney-General

MW:EG

ELEEMOSYNARY INSTITUTIONS: Interest received on "patients fund" should be paid to State Treasurer for credit of fund of State Eleemosynary Institutions.

June 17, 1941

673



Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

We are in receipt of your request for an opinion under date of June 16th, wherein you state as follows:

"You gave us an opinion on this matter over the telephone, but we would like a written opinion if possible.

"From the patients fund we have an accumulation of \$412.15 interest. We would be very glad to have the Board's decision on the disposition of same, whether or not this should be turned in as steward's sales or could it be used in amusement fund for the institution? This accumulative interest is from July 1, 1937 up to date."

We have heretofore rendered your Department two opinions under date of December 28, 1933, and December 9, 1934, respectively, with reference to the disposition to be made of moneys accumulated in the "patients fund."

We were advised in a letter from your Department under date of November 9, 1934, that this fund was accumulated from money taken from patients at the time of their admission, and placed to their credit, and by money left

June 17, 1941

by relatives and friends for their spending account. As the years went by patients died leaving balances in their accounts, or left the institution without drawing their balances, and the institution was unable to locate the relatives for the purpose of making refunds. These accumulated funds were then used by the institution for taking patients to circuses, to fairs, and for Christmas fruits and cards.

The gist of the above two opinions were that the funds were to be used by the steward in accordance with the wishes of the donors, but if upon the death of the patient or his release, the relatives could not be located, moneys were to be paid to the State Treasurer to the credit of the State Eleemosynary Institutions in accordance with Sections 9300, 9365 and 9366, R. S. Mo. 1939.

The question now presented is whether interest accumulated from said fund should be turned in as steward's sales or used in an amusement fund for the institution?

In the case of Havender v. Brodbeck, 83 Misc. 9, 1. c. 11, 144 N. Y. S. 418, the court said:

"Ordinarily 'interest follows the principal, as the shadow does the substance.' Hatcher v. Lewis, 4 Rand. (Va.) 152, 157; Woerz v. Schumacher, 161 N. Y. 530, 56 N. E. 72."

And in the case of Board of Education v. City of Racine, 238 N. W. (Wisc.) 413, 1. c. 414, the Supreme Court said:

"Title to the accretions of the fund usually follows title to the fund, the owner of one generally being the owner of the other."

June 17, 1941

Again in the case of United States v. Mosby, 133 U. S. 273, 10 Sup. Ct. 327, 33 L. Ed. 625, 1. c. 630, the Consul of the United States at Hong Kong had deposited certain public moneys as a trustee. The court, in holding that although he was not required to put the funds out at interest, yet if he did the accretion belonged to the government, said:

"The moneys are stated to be 'public moneys,' in respect to which the consul was a trustee, and any interest which he received on the funds belonged to the United States. He was not required to put the funds out at interest, but if he did so the accretion belonged to the government."

Under the above decisions interest is an incident of the principal and title to the same would follow title to the fund. Thus, if the institution must turn over the principal, the conclusion necessarily follows that they must turn over interest as well to the State Treasurer.

From the foregoing we are of the opinion that interest received by the institution on moneys held by it under a "patients fund," should not be turned in as steward's sales or used in an amusement fund for the institution, but should be deposited with the State Treasurer as moneys received by the institution in the manner prescribed for the "patients fund" in the opinion rendered under date of December 19, 1934, to your Department.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

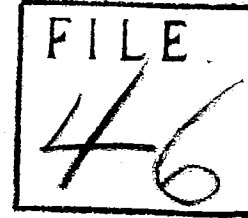
APPROVED:

VANE C. THURLO
(Acting) Attorney-General
MW: EG

BLIND PENSIONS; Construction of appropriation act to
Blind Commission; removal of headquarters
to City of St. Louis.

August 27, 1941

Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Mr. Jones:

We are in receipt of your request for an opinion
wherein you state as follows:

"The recent Legislature made an appropriation to the Commission for the Blind of \$100,000.00. Of said sum \$50,000.00 was appropriated out of the general revenue and \$50,000.00 out of the blind pension fund. The latter \$50,000.00 was vetoed by the Governor.

"We would appreciate an opinion from your office as to whether we may use any of the above funds for the employment of investigators, doctors, a medical director and executive director, stenographers, clerks and a janitor.

"We would also like to know whether we may use any of the above funds to help defray the expenses of the Blind Commission when conducting its meetings.

"We would also like to know whether we would have authority to move the headquarters of the Blind Commission to the City of St. Louis."

We assume that the appropriation act to which you refer is Section 3 of Committee Substitute for House Bill 574. Said act provides as follows:

"Section 3. Commission for the Blind. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund; the sum of Fifty Thousand Dollars (\$50,000.00) for the use and benefit of the Commission for the Blind, to be expended under the direction of said Commission for the investigation of applications for blind pensions and for the investigation of the merits and status of those now on the pension rolls. No part of said appropriation shall be used by said Commission for any purpose not directly connected with or indispensable to the investigation of the applications for blind pensions and the status of present recipients of blind pensions.

"There is hereby appropriated out of the State Treasury, chargeable to the Blind Pension Fund; the sum of Fifty Thousand Dollars (\$50,000.00) for the use and benefit of the Commission for the Blind as follows:

"A. Personal Service:

Salaries of one office secretary, telephone operator, investigators, clerks, stenographers, one executive director, nurses, placement agent, sales agent, accountant, guides, teachers, superintendents, supervisors, temporary help, oculist fees for disallowed pensions, wages for blind trainees

"D. Operation:

General expenses consisting of communication, printing and binding, transportation of things, travel within and without the State, other general expense, hospital expenses incurred for eye operations, material and supplies consisting of clothing and dry goods, educational, scientific and recreational supplies, light, heat, power and water supplies, medical, surgical and hospital supplies, small tools, miscel-

August 27, 1941

laneous supplies, raw materials for industries, and work for prevention of blindness

Total out of Blind Pension Fund \$50,000.00"

It is to be noted that the appropriation chargeable out of the Blind Pension Fund which you state was vetoed by the Governor specifically authorized, in addition to other personnel, the employment of clerks, stenographers, and an executive director.

The only moneys authorized to be paid out of the General Revenue Fund is that needed for (1) investigation of applications for blind pensions, and (2) investigation of the merits and status of those now on the pension rolls.

In making the investigation the Commission for the Blind is not given authority to expend funds that might be indirectly necessary or helpful in determining the facts, but only such funds as are "directly connected with or indispensable" to the investigation.

Webster's New International Dictionary, (2d Ed.), defines the term "indispensable", in part, as follows:

"Impossible to be dispensed with, or done without; absolutely necessary or requisite; as, indispensable clothing."

Certainly the services of a janitor are not necessary in investigating the above facts. The services of a medical director, an executive director, stenographers or clerks would certainly be helpful, but, in our judgment, are not of such character as to make their services indispensable.

The services of an investigator would seem to be essential in investigating applications for blind pensions. This leaves us the question of whether funds may be expended for the employment of doctors or oculists.

Section 9456, R. S. Missouri, 1939, provides, in part, as follows:

"It shall be the duty of the commission for the blind to make such regulations relative to the examination of applicants for pension, including the examination by the oculist and of all matters deemed necessary connected with the administration of this article. The examination and certificate of the oculist shall not exceed \$5.00 for each applicant, together with such expense as may necessarily be incurred in making examination where same is not made in his office; such fee and such expense shall be paid by the commission for the blind, but in the case the applicant, concerning whom the expense was so incurred shall subsequently receive a pension, the amount of such expense and fee for examination shall be deducted from the first pension received by applicant and upon proper voucher and requisition by the commission, the state auditor shall issue a warrant to the commission in reimbursement of same. The examining oculist shall state in his certificate (1) the amount of vision in each eye, (2) the cause of blindness, (3) the possibility of curing same by treatment or operation, (4) the physical and mental condition of applicant and such other matter as may be deemed by the commission of value in dealing with matters coming within its authority. * * *"

By said section it is the duty of the Commission to make such regulations as may be necessary for examination of applicants by oculists, and of all matters necessary to the administration of the article relating to pensions for the deserving blind. Provision is further made by said section for the payment of not to exceed \$5.00 by the Commission for each applicant, and if a pension is granted the expense and fee of the examination is to be deducted from the first pension received by the applicant. No provision is made for the re-examination of pensioners or as to how said examination is to be paid for. The Commission, however, may enact such rules as it deems necessary providing for the re-examination of

August 27, 1941

pensioners and the payment of costs in connection with same. It is apparent that it was the intention of the Legislature that said examinations be paid for out of the funds appropriated for investigation of the status of the present recipients, and no attempt should, therefore, be made to charge the cost of the re-examination to the pensioners.

Webster's New International Dictionary, (2d Ed.), defines the term "status" thus:

"State or condition of a person."

It is obvious that only a doctor or oculist can determine the condition of the pensioner's vision. Consequently, their services would also be indispensable.

We are, therefore, of the opinion that Section 3 of Committee Substitute for House Bill 574 permits the Commission for the Blind to expend only such funds as are needed in the employment and pay of investigators and doctors or oculists.

Your second question is whether you may use any of the above funds to help defray the expenses of the Blind Commission when conducting its meetings.

In connection with same, you have submitted a supplemental letter, wherein you state as follows:

"May I call to your attention in the matter of the Blind Commission that all persons put on the blind pension roll and all persons taken off the blind pension roll must be done by an action of the Board of the Blind Commission. Therefore, it is my opinion that the board members can be paid out of the \$50,000.00 appropriation because this is a direct part of the investigation of the blind."

Section 9446, R. S. Missouri, 1939, provides as follows:

"The Missouri Commission for the Blind shall hereafter consist of the Members of the Board of Managers of the State Eleemosynary Institutions as now or hereafter provided for and constituted by Article 1, Chapter 51, Revised Statutes of 1939, and wherever in any law the Commission for the Blind is referred to it shall, after the taking effect of this act, be construed as referring to the members of the said Board of Managers of the State Eleemosynary Institutions, who are by this act designated and constituted the members of said Commission for the Blind. The officers of the Board of Managers of the State Eleemosynary Institutions shall be the officers of the Commission for the Blind as herein constituted."

Under the above section, the duties of the Commission for the Blind are to be performed by the Members of the Board of Managers of the State Eleemosynary Institutions, and whenever reference is made in the law to the Commission it is to be construed as referring to the Board.

Section 9450, R. S. Missouri, 1939, provides as follows:

"The officers and members of the Commission hereby created shall receive no salary or other compensation for their services as officers or members of the Commission for the Blind, but their traveling expenses and other necessary expense in the performance of their duties as officers and members of the Commission for the Blind may be allowed and paid them out of any funds that may be appropriated by the State for the use of said Commission."

Construing the above two sections together, the Board of Managers would not be entitled to any salary or compensa-

August 27, 1941

tion for their services, but would be entitled to their traveling and other necessary expenses, to be paid out of any funds "that may be appropriated by the State for their use." The above appropriation act did provide for "travel within and without the State," and "other general expenses," but same was vetoed. We do not see how under any construction it can be said that the act of the Commission in adding to or striking from the rolls of pensioners is anything more than an administrative act. Said act of the Commission must be based upon evidence found by investigators, but, in our judgment, it cannot be said to be a part of the investigation within the meaning of the above appropriation act.

We are, therefore, of the opinion that the Commission for the Blind may not expend any of the funds appropriated by Section 3 of Committee Substitute for House Bill 574 to help defray the expenses of its meetings.

Your final question is whether you have authority to move the headquarters of the Blind Commission to the City of St. Louis.

Section 13028, R. S. Missouri, 1939, provides, in part, as follows:

" * * * Provided, that the heads of all departments in charge of statewide activities shall have headquarters at Jefferson City, unless otherwise provided by general laws, or unless, in the opinion of the governor, or the elective officer appointing the official or employee, the public interest will best be served by having the headquarters at some other place, to be designated by the governor, or the elective officer appointing such official or employee: * * *"

Under the above section, the heads of all departments in charge of statewide activities must have their headquarters in Jefferson City, Missouri, unless otherwise provided by law. We find no provision giving the Commission or the Eleemosynary Board authority to remove their headquarters from Jefferson City.

Hon. Ira A. Jones

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August 27, 1941

* We are, therefore, of the opinion that you would have no authority to move the headquarters of the Blind Commission to the City of St. Louis unless the Governor would, in his discretion, so direct you.

Yours very truly

MAX WASSERMAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

MW:HR

ELEEMOSYNARY INSTITUTIONS: State Purchasing agent has power to
PURCHASING AGENT: sell surplus produce of respective
eleemosynary institutions.

September 4, 1941

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Mr. Jones:

This will acknowledge your request for an opinion, wherein you state as follows:

"The question has been raised by the office of the State Purchasing Agent as to whether the stewards of the respective state eleemosynary institutions have the authority to dispose of surplus livestock, produce and other commodities produced by the various eleemosynary institutions.

"We will appreciate your opinion on said question."

Section 9299, R. S. Mo. 1939, provides for the sale of surplus produce of the respective eleemosynary institutions, in part as follows:

"Upon a request from the board, the state auditor is hereby authorized and directed to draw a warrant payable to the steward of each of the institutions herein named, in an amount to be specified by the board, not to exceed, however, the sum of five thousand dollars, and the sum

so specified shall be placed in the hands of the steward as a revolving fund to be used in the payment of the incidental expenses of the institution for which he has been appointed; and all moneys arising from the sale of live stock, produce, or other commodities produced by such institution shall be paid into said revolving fund, and whenever the amount thereof exceeds the sum of five thousand dollars, then such surplus shall be paid into the state treasury to the credit of the fund for the support of eleemosynary institutions. * * *

The above section does not expressly authorize the stewards of the respective eleemosynary institutions to sell the surplus produce. However, when considered in conjunction with Section 9290, R. S. Mo., 1939, their authority to make such sales cannot be readily disputed. Said section provides as follows:

"The steward shall be the custodian of all the property of every kind and description belonging to the institution for which he has been appointed steward."

The 57th General Assembly created the office of State Purchasing Agent and provided that (Laws of Missouri, 1933, Section 7, page 410, now Section 14595, R. S. Mo. 1939):

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the appropriations of the departments concerned. He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property

in his hands or owned by the state or any department thereof. He shall keep currently an inventory of all removable equipment owned by the state."

The above section uses the word "property," which term is defined by Section 655, R. S. Mo. 1939, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute:
* * * * *
eleventh, the word 'property' shall include real and personal property;
* * * * *"

Personal property would obviously be broad enough to include livestock and produce.

There appears then to be a conflict between Section 9299 and Section 14595, supra, as to where the respective authority is lodged for the disposal of surplus produce or property of the respective eleemosynary institutions.

Section 9299, supra, is a special statute relating to the disposal of surplus produce of the respective eleemosynary institutions, whereas, Section 14595, supra, is a general statute relating to the disposal of surplus produce or property owned by the state or any department thereof.

The applicable rules of statutory construction are well stated in the case of State v. Brown, 334 Mo. 781, 68 S. W. (2d) 55, 1. c. 59, wherein the court said:

"In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the

two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Tevis et al. v. Foley, 325 Mo. 1050, 1054, 30 S. W. (2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S. W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S. W. 122."

Section 14602, R. S. Mo. 1939, relating to the State Purchasing Agent, repeals inconsistent or conflicting acts as follows:

"All acts or parts of acts inconsistent or in conflict with this chapter are hereby repealed to the extent of such inconsistency or conflict."

We have not overlooked the rule, "Repeal of a special law by implication, through the enactment of a general law, is not favored" (Collins v. Twellman, 344 Mo. 330, 126 S. W. (2d) 231, 1. c. 233). However, the act containing the general law expressly repeals all acts or parts of acts inconsistent or in conflict "with this chapter."

The legislative policy appears to be that funds received from the sale of surplus products of the respective eleemosynary institutions should be put into a revolving fund, and the two sections can be readily harmonized to accomplish this.

Mr. Ira A. Jones

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Sept. 4, 1941

From the foregoing we are of the opinion that the State Purchasing Agent has the power to sell the surplus livestock, produce and commodities of the respective state eleemosynary institutions but the moneys received from such sales by the State Purchasing Agent must be paid into the respective revolving funds of said institutions.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MM:EG

SHERIFFS:

DEPUTY COLLECTORS:

A sheriff in Reynolds County may also hold the office of deputy collector.

14

October 11, 1941

10-13

Honorable John A. Johnson
Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Mr. Johnson:

This will acknowledge receipt of your request for an official opinion under date of October 8, 1941, which reads as follows:

"Mr. R. L. Parks, County Collector of Reynolds County wishes to know if he can appoint the Sheriff of Reynolds County, Mr. E. F. Buffington as his Deputy Collector to collect delinquent taxes.

"I have been unable to find any statutory provisions governing qualifications of deputy collectors in counties with less than ten thousand (10,000) population."

In an opinion rendered by this Department to Hon. T. W. Davis, Justice of the Peace, Galena, Missouri, under date of January 29, 1937, we held that the Justice of the Peace could not at the same time be a deputy collector. In that opinion a copy of which we are hereto attaching, it was determined a deputy county collector was a public officer.

The determining factor as to whether or not a Justice of the Peace could, at the same time, hold the office of deputy collector was whether the official duties of both offices were incompatible or the duties of one inconsistent with the duties of the other office.

October 11, 1941

Under Section 11067, R. S. Missouri 1939, the deputy collector has practically the same authority as the Collector and is directly responsible to him.

If it were not for a certain statute on the books we would naturally not be contented to pass upon this question without going into the various duties of both of these offices to determine if there is actually any inconsistency in the duties of the two offices. But Section 11055, R. S. Missouri, 1939, clearly recognizes the fact that the sheriff may also hold the office of Collector, and provides as follows:

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

Therefore, it is the opinion of this Department that the sheriff may be appointed as deputy collector in counties the size of Reynolds County, Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARR:EAW

OFFICERS:) Member of Board of Managers
ELEEMOSYNARY INSTITUTIONS:) appointed to fill vacancy serves only
until end of term.

October 21, 1941

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Mr. Jones:

This Department is in receipt of your request for an official opinion, which reads as follows:

"When a member of the Board of Managers, State Eleemosynary Institutions, resigns or dies and someone is appointed in his place does the person appointed in his place hold for four years from the time of appointment or does he hold to the expiration date of the person to whose place he has been appointed?

"We would like this information so that the expiration of term of office can be placed in the Blue Book."

Section 9259, R. S. Mo. 1939, provides that the state eleemosynary institutions shall be under the control of the Board of Managers consisting of six persons appointed by the governor.

Section 9260, R. S. Mo. 1939, provides as follows:

"Immediately after this law shall take effect the governor shall appoint two persons to serve for a term of one year, two persons to

serve for a term of two years, two persons to serve for a term of three years and at the expiration of the term of service of the members of the first board, the governor shall appoint successors to those members whose terms expire, who shall serve for a term of four years, and no two persons who shall have been appointed whose terms expire at the same time shall belong to the same political party."

Section 9262, R. S. No. 1939, reads:

"The governor shall have the power to remove for just cause any member or members of any board of managers, and to appoint others in the place of those removed, and to fill all vacancies that may occur in any such boards by death, resignation or refusal to act. If any member shall refuse to act on any board, or shall fail to attend two successive meetings of such board without a satisfactory reason for such failure, it shall be the duty of the governor to remove such member. All members appointed when the senate is not in session shall hold their offices for the unexpired term, subject to the approval of the senate at its first session after such appointment."

Under the provisions of Section 9260, supra, it will be seen that the Legislature has fixed the duration of the term but leaves the time when the term shall commence to the first appointing officer, which appointment had to be made "immediately" after the law took effect.

The general rule is stated in 46 C. J. 976, as follows:

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct

from being in the office itself, and an appointment to fill such vacancy can be only for the unexpired portion. This rule is particularly applied in the case of appointive offices where the beginning of the term of the first appointee determines the limits of the term of successive appointees, so that one appointed in the middle of the term, because of the vacation of an office during the term of an incumbent, or because of his holding over, is not appointed for longer than the unexpired term. * * *

What was said by our Supreme Court in *State ex rel. Rosenthal v. Smiley*, 304 Mo. 549, 263 S. W. 825, is, we believe, especially applicable to the question presented in your request. The court through Judge Magland said (l. c. 827):

"It will be observed that the statute prescribes only the length of the term of the office it creates; it contains no provisions as to when the term shall commence or when it shall end; nor does it contain any reference to unexpired terms or to the filling of vacancies. Under the rule of construction applicable to such a statute which has long obtained in this state it must be held that it was the legislative intent that the 'term' of the office should consist of consecutive periods of two years, following each other in regular order, the one commencing where the other ends, and that the initial term should commence on the date of the appointment first made by the county court. When the appointing power named the first incumbent, it thereby as effectually fixed the dates of the beginning and termination of the initial term of the office and of the subsequent terms as though they had been expressly prescribed by the Legislature. *State v.*

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Williams, 222 Mo. 268, 121 S. W. 64,
17 Ann. Cas. 1006; State v. Stonestreet,
99 Mo. 361, 12 S. W. 895.

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office itself, and an appointment to fill such vacancy can only be for the unexpired portion. This rule, which makes for uniformity, and is in consonance with the general intent of our Constitution and legislative enactments, has had the repeated sanction of this court. State v. Spitz, 127 Mo. 252, 29 S. W. 1011; State v. Williams and State v. Wilcox, supra. * *"

In the later case of State ex rel. Jones v. Smiley, 317 Mo. 1283, the rule in the Rosenthal case, quoted above, was approved, although the case was overruled upon another ground. However, in so far as the quotation cited above is concerned, it is still the law in this State.

Under the authority of the above quoted case, it will be seen that when the Governor appointed the members of the Board of Managers of the State Eleeosynary Institutions in 1921, when said laws became effective (Laws of Missouri, 1921, p. 380), that the terms of the various members became set and definite and that any vacancy that occurs therein occurs in the term of office, and that a person appointed to fill such vacancy holds only until the end of the term of the person whose office he was appointed to fill.

Conclusion

It is, therefore, the opinion of this Department that the members of the Board of Managers of the State Eleeosynary Institutions have definite and set terms of four

Mr. Ira A. Jones

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Oct. 21, 1941

years and any appointment to fill a vacancy in such terms of office can only be for the unexpired portion of such terms and said appointment does not extend four years from the date of the appointment.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

(Acting) VANE C. THURLO
Attorney-General

AO'K:EG

BLIND PENSION ACT: The word "income" as used in
Section 9451, R. S. Missouri, 1939,
means net income.

October 27, 1941

11-8

Mrs. Lee Johnston, Chief Investigator,
Missouri Commission for the Blind
Jefferson City, Missouri



My Dear Mrs. Johnston:

This will acknowledge receipt of your letter of
October 21, 1941, in which you ask for an opinion as
follows:

"George W. Dieter, Buchanan County,
was stricken from the Blind pension
roll on December 21, 1940, because of
income.

"Mr. Dieter is a piano tuner by trade,
and employs a sighted guide to drive
his car, and has deducted from gross
income all expenses of maintaining auto-
mobile, including gas, oil, tires, and re-
pairs, his guide's salary, and a busi-
ness telephone.

"When Mr. Dieter submitted his report
for the year, 1940, to our investigator,
it showed deductions for expenses for
house rent and all other personal expenses,
in addition to deductions for maintenance
of automobile and guide, and business
phone, from a total income exclusive of
blind pension of \$1200.00.

"The investigator made allowable deduc-
tions, taken from Mr. Dieter's statement
of expenses, for guide, automobile, and
telephone of \$486.00, leaving a net income

October 27, 1941

of \$714.00, exclusive of blind pension for the year, 1940. It was on this basis that Mr. Dieter's name was stricken from the rolls.

"Mr. Dieter's attorney, C. J. Griswold, of St. Joseph, Missouri, has written, asking that Mr. Dieter be re-instated and has submitted reports of income and expenses for the first nine months of 1941 as shown on copy attached.

"Before writing Mr. Griswold that it will be necessary for a report to be submitted of a complete twelve-month period, instead of nine months, showing supposed average for twelve months, we would like to have your opinion as to the legality of allowing maintenance for automobile, sighted guide, and telephone, which are necessary for a blind piano tuner."

The qualifications required to entitle one to be a recipient of the blind pension are set out in Section 9451, Article 1, Chapter 54, R. S. Missouri, 1939, and the portion of that section which is pertinent to your inquiry is herein set out.

"Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight,

shall be entitled to receive, when enrolled under the provisions of this article, an annual pension as provided for therein, payable in equal quarterly installments: Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred (\$600.00) dollars or more per annum from any source whatever, * * * * *."

The word "income" is defined in Webster's New International Dictionary, second edition, as:

1. "A coming in.
2. Something that comes in as addition or increment.
3. That gain or recurrent benefit (usually measured in money) which proceeds from labor, business, or property; commercial receipts or revenue of any kind. The total receipts from any branch of business are known as gross income. That portion of the receipts which is left after paying wages and for materials is known as net income. * * * * *."

In Section 9451, R. S. Missouri, 1939, *supra*, no qualifying or limiting adjective is used with the noun "income," which might indicate that the word is used in its broadest sense which would be gross income.

No appellate court in Missouri has undertaken to define the word "income" as used in Section 9451, *supra*, and a search of the reports from other states fails to reveal where the word has been used in a similar statute and defined. It has been defined when used in taxing statutes and where not limited by the adjective *net*, has been defined to mean gross income. As the word has not been defined by any

court in its use in the above or a similar statute, it is necessary to determine the definition and use the General Assembly intended should be placed upon the word when it enacted the statute, whether it means gross income or net income.

In the case of *Keller v. State Social Security Commission*, 137 S. W. (2d) 989, rules for construing a statute which are here applicable are briefly set out at l. c. 990:

"In construing this statute the following well established rule should be kept in mind: Where the language of a statute is plain and unambiguous nothing contrary to the evident intent can be implied. *State ex rel. Jacobsmeyer v. Thatcher*, 338 Mo. 622, 92 S. W. (2d) 640. A statute should be so construed as to give effect to the legislative intent. *State ex rel. Wabash R. Co. v. Shain*, 341 Mo. 19, 106 S. W. (2d) 898. * * *

* * * * *

If it was the intention of the General Assembly, in enacting what is now Section 9451, R. S. Missouri, 1939, that the word "income" should be used in its broadest sense, that of meaning gross income, which is indicated as mentioned above, this might lead to many deserving blind persons being refused a pension when really entitled to one. A deserving blind person might be attempting to carry on a business and have a gross income of Six Hundred Dollars (\$600.00) or more from the business which might not pay the expense of conducting the business and while nothing would be realized from the business to maintain the blind person, yet the person would be deprived of assistance from the state because the business had a gross income of Six Hundred Dollars (\$600.00) or more. This would be an absurdity. And a statute should not be construed into something unreasonable or absurd. *State v. Irwine*, 72 S. W. (2d) 96, l. c. 100.

"* * * The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation. * * * * *"

The sensible and reasonable construction would seem to be that the word "income" as used in section 9451, supra, should mean net income, if such a construction is possible. This would lead to the reasonable result that all blind persons having the other qualifications who had an income of Six Hundred Dollars (\$600.00) or more, which could be used in maintaining themselves and their dependents, if any, would not be entitled to assistance from the state.

It would hardly seem probable that the General Assembly intended to bar from the benefits of the Blind Pension Act those deserving blind persons who were attempting to support themselves, because they might have a gross income exceeding Six Hundred Dollars (\$600.00), but from which gross income, after deducting business expense, there was not remaining Six Hundred Dollars (\$600.00) to support the blind persons.

On page 787, Section 4 of Volume 48 of Corpus Juris is found the following quotation concerning the construction of pension laws.

"While it has been held that a statute making it a criminal offense to violate a pension law must receive strict construction, it has been uniformly held that laws creating the right to pensions must be liberally construed with the view of promoting the objects of the law-making body; and their force and effect are not to be conformed to the literal terms of the statute."

And, in the case of Dahlin v. Missouri Commission of the Blind, 262 S. W. 420, the Springfield Court of Appeals, in construing and applying the Missouri Blind Pension law said, l. c. 424:

"The blind pension law is remedial, and should therefore be liberally construed; also it should be construed with the object in view that was sought to be accomplished. Straughan v. Meyers, 268 Mo. 580, 187 S. W. 1159; Lusk v. Public Service Com., 277 Mo. 264, 210 S. W. 72.

"Where certain terms of a statute are ambiguous, resort may be had to its title as a clue or a guide to its meaning. Straughan v. Meyers, supra. Looking to the title of both the act of 1921 and the act of 1923, we find that the purpose was to provide pensions for the deserving blind.

"Guided by these rules of construction, we do not think that the Legislature intended to exclude from the blind pension those who can merely distinguish between light and darkness, or motion, or the direction of motion, and no more. 'Light perception,' as used in the act, we construe to mean all that field or scope of vision from the mere ability to distinguish between light and darkness up to the ability to discern form; that is, when one is able to recognize the form of an object, such person has a greater vision than light perception. Such is the scope of light perception as defined by Dr. Schmidtman and Hensel & Sweet, quoted supra, and also by part of the specialists who testified at the trial in the circuit court. Most of the specialists, however, as above stated, who were before

the circuit court, seem to have considered that light perception should be confined to the lowest degree of vision -- that is, the mere ability to distinguish between light and darkness -- and that any greater vision would be greater than light perception. We do not believe that the Legislature intended such a restricted and limited scope. Such a restricted and limited construction would, for all practical purposes, render ineligible all those except the totally blind."

It will be noted in the above quotation from the Dahlin Case that the court permitted a broader definition of the terms "light perception" than was generally accepted, in order to carry out the object sought to be accomplished by the Blind Pension Act. In the light of the Dahlin Case, supra, it would seem that in order to properly carry out the object of what is now Section 9451, R. S. Missouri, 1939, the word "income," as used there should be considered to mean net income, that is, income which would be available for maintaining the blind person and his or her dependents, if any.

CONCLUSION

Applying the above interpretation of the meaning of the word "income" as used in Section 9451, supra, in the conclusion follows that the legitimate expenses incurred in carrying on business may be deducted from the gross income of the blind person to determine whether or not such blind person has an income of Six Hundred Dollars (\$600.00) or more. And, in the specific case which you asked about,

Mrs. Lee Johnston

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October 27, 1941

the expense of guide, transportation, et cetera, would be properly deductible.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

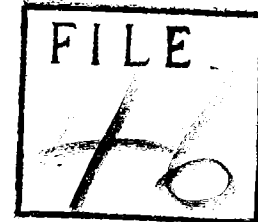
VANE C. THURLO
(Acting) Attorney General

WOJ/rv

BLIND PENSION: Oculist's expense and fee for examining eligible
APPROPRIATION: applicant for blind pension to be paid from the
applicant's first pension check.

October 30, 1941

Mrs. Lee Johnston, Chief Investigator
Missouri Commission for the Blind
103 State Capitol Building
Jefferson City, Missouri



Dear Mrs. Johnston:

This will acknowledge receipt of your request for an official opinion under date of October 27, 1941. You inquire whether the oculist's fee and expense on the examination of new applicants who shall subsequently be granted a pension, shall be deducted from the first pension check received by the applicant according to Section 9456, R. S. Missouri 1939, or whether this expense should come out of the appropriation of Fifty Thousand Dollars (\$50,000.) under Section 3, page 166, Laws 1941.

Section 9456, R. S. Missouri 1939, reads as follows:

"It shall be the duty of the commission for the blind to make such regulations relative to the examination of applicants for pension, including the examination by the oculist and of all matters deemed necessary connected with the administration of this article. The examination and certificate of the oculist shall not exceed \$5.00 for each applicant, together with such expense as may necessarily be incurred in making examination where

same is not made in his office; such fee and such expense shall be paid by the commission for the blind, but in the case the applicant, concerning whom the expense was so incurred shall subsequently receive a pension, the amount of such expense and fee for examination shall be deducted from the first pension received by applicant and upon proper voucher and requisition by the commission, the state auditor shall issue a warrant to the commission in reimbursement of same. The examining oculist shall state in his certificate (1) the amount of vision in each eye, (2) the cause of blindness, (3) the possibility of curing same by treatment or operation, (4) the physical and mental condition of applicant and such other matter as may be deemed by the commission of value in dealing with matters coming within its authority. No person shall be entitled to the benefits of this article who shall refuse to submit to treatment or operation to effect a cure when recommended by the examining oculist and approved by the commission; but upon submission to such treatment or operation the pension of applicant, otherwise entitled thereto, shall be paid as in other cases: Provided further, that no applicant who is more than seventy-five years of age, shall be required to submit to an operation to restore his or her vision in order to come under the provisions of this article, but may voluntarily submit to operation."

The above provision was not amended or repealed by the Sixty-first General Assembly.

Section 3, page 166, Laws 1941, appropriates money, out of the state treasury, chargeable to the general revenue fund, for the use and benefit of the Commission for the Blind investigating applicants for a blind pension.

"Commission for the Blind. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Fifty Thousand Dollars (\$50,000.00) for the use and benefit of the Commission for the Blind, to be expended under the direction of said Commission for the investigation of applications for blind pensions and for the investigation of the merits and status of those now on the pension rolls. No part of said appropriation shall be used by said Commission for any purpose not directly connected with or indispensable to the investigation of the application for blind pensions and the status of present recipients of blind pensions."

The above appropriation specifically states no part of said appropriation shall be used by said Commission for any purpose not directly connected with or indispensable to the investigation of the applications for blind pensions. Certainly, under the blind pension law the examination by an oculist is indispensable. See Section 9456, supra.

Therefore, if an application for a blind pension is rejected the fee of the oculist shall be paid out of Section 3, the appropriation hereinabove referred to, in accordance with Section 9456, supra.

The question, now, is whether or not such fee for examination by an oculist shall be paid from Section 3, page 166, Laws 1941, supra, when an application is approved and the applicant is placed upon the roll. Section 9456, supra, specifically requires such expense to be deducted from the first pension granted the pensioner.

The appellant courts in this state have ruled that an

appropriation act cannot in any manner amend or repeal a legislative enactment for the reason it would be unconstitutional, in that it would violate Section 28, Article 4 of the Constitution of Missouri, which provides that no bill shall contain more than one subject. If an appropriation act should repeal a general law it would be amending a law and at the same time appropriating money, which are two entirely different subjects.

In State vs. Smith, 75 S. W. (2d) 828, 1. c. 830, the court said:

"It cannot be said that the act appropriating \$3,000 from the general revenue fund to the board of barber examiners' fund amounted to an amendment of section 13525, R. S. 1929 (Mo. St. Ann. Sec. 13525, p. 637). It does not attempt to amend that section. Its sole purpose was to appropriate \$3,000 from one fund to another. It reads as follows:

'There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand (\$3,000.00) dollars to the Board of Barber Examiners Fund.' (Laws 1933-34, p. 12, 12B.)

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller v. Thompson, State Auditor, 316 Mo. 272, 289 S.W. 338."

Mrs. Lee Johnston

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October 30, 1941

Therefore, it is the opinion of this Department that when an application is approved for a blind pension, the expense and fee of the oculist in examining said applicant shall be deducted from the applicant's first pension check in accordance with Section 9456, supra.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARR:EAW

BLIND PENSION: Application may be made to probate judge
or to the Commission.

November 5, 1941

Mrs. Lee Johnston
Chief Investigator
Missouri Commission for the Blind
Capitol Building
Jefferson City, Missouri



Dear Mrs. Johnston:

This will acknowledge receipt of your letter of
October 29, 1941, in which you make the following
request for an opinion:

"Please render an opinion on the
following case. An application for
blind pension was received from
Arthur Lee Gadd of Lebanon, Missouri,
which was filed by him before Phil M.
Donnelly, Notary Public. Mr. Donnelly
contends that it is legal for an appli-
cant to appear before a Notary Public
and submit his application direct to
the Commission for the Blind without
having the third page of the applica-
tion filled out--certificate of Probate
Judge, because of the wording of Section
9454, Revised Statutes, 1939, which
states: 'Any person who desires the
benefits of this article shall apply
to the judge of the Probate Court with-
in his or her county or city or to the
Commission for the Blind, who, if satis-
fied that the applicant comes within
the provisions of this article, shall
grant to the applicant a certificate
of such fact and the certificates granted
by the probate judges shall be certified
to the Missouri Commission for the Blind.

"Please advise whether this application received from Notary Public comes within the provisions of the law."

Section 9454, Article I, Chapter 54, R. S. Missouri, 1939, prescribes where application for blind pensions shall be made. This section is as follows:

"Any person who desires the benefits of this article shall apply to the judge of the probate court within his or her county or city or to the commission for the blind, who, if satisfied that the applicant comes within the provisions of this article, shall grant to the applicant a certificate of such fact and the certificates granted by the probate judges shall be certified to the Missouri commission for the blind at its office in St. Louis, Missouri, which shall consider the merits of such application and if approved by the commission, it shall certify same to the state auditor. All pensions payable under this article shall begin on the date of the filing of the application therefor before the probate judge or the commission, as may be. And whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll: Provided further, any person who shall by gifts, secret disposition, or other means dispose

of any property in his or her possession in order to become wholly or in part within the provision of this article, shall be deemed guilty of a misdemeanor." (Underscoring ours)

In reading the above section, it is necessary to ascertain and give effect to the legislative intent. State ex rel. Lentine v. State Board of Health, 65 S. W. (2d) 943, 950.

"It may be considered trite to again observe that the primary and fundamental purpose in statutory construction is to ascertain and give effect to the legislative intent nevertheless such is always the end sought and the numerous rules for the interpretation or construction of statutes are merely aids in the quest. But such rules should not be so applied as to restrict or confine the operation of a statute within narrower limits or bounds than manifestly intended by the Legislature and whether the proper construction of a statute should be strict or liberal it certainly should be such as to effectuate the obvious purpose of its enactment and the evident legislative intent. * * * "

Section 9454, supra, at first reading may not seem quite clear as to whether or not it was the intention of the legislature in enacting the section that applications for blind pensions could be made direct to the Commission for the Blind. Attention is called to the language underscored in the section, as set out herein, and particularly to the last underscored portion. It will be noted that the pension shall begin on the date the application is filed with the probate judge or the Commission.

Mrs. Lee Johnston

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November 5, 1941

To the writer, that seems to indicate clearly the intention of the legislature, that applicants for blind pensions might apply directly to the Commission.

CONCLUSION

It is the conclusion of this department that an application properly sworn to before a Notary Public, when received, may be filed by the Commission and the applicant accorded a hearing before the Commission.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ/rv

ELEEMOSYNARY INSTITUTIONS: County Court can discount warrants to pay for the keep of their inmates in the institutions.

November 10, 1941

Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under September 8, 1941, which is as follows:

"A letter from the County Clerk of Dunklin County advises that the local banks of said county will buy Class 5 warrants at a slight discount and that the Eleemosynary Institutions can in turn bill Dunklin County for this discount.

"Will you please give us an opinion as to whether or not this can be done?"

Section 9328, R. S. Mo. 1939, reads as follows:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem

necessary, not exceeding six dollars (\$6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

It is very noticeable under the above section that it specifically states "the counties thus sending shall pay semi-annually, in cash, in advance, * *". It also further states "* * * and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for." The above wording is unambiguous and does not call for a construction. The court, by this phrase is authorized to sell at a discount their warrants.

In your request you state "* * local banks of said county will buy Class 5 warrants at a slight discount * *." Section 10911, R. S. No. 1939, provides in part as follows:

"The court shall classify proposed expenditures in the following order:

"Class 1: The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes."

Class 5, under the same section, provides for the payment of the expense of paupers not otherwise classified.

Under Section 9258, R. S. Mo. 1939, it provides as follows:

"The state hospital No. 1, at Fulton, the state hospital No. 2, at St. Joseph, the state hospital No. 3, at Nevada, the state hospital No. 4, at Farmington, the Missouri state sanatorium, at Mount Vernon, and the Missouri state school, at Marshall, are hereby declared to be state eleemosynary institutions of the state of Missouri within the meaning of the provisions of this article."

Under the provisions of the above statute the legislature has designated four eleemosynary institutions as state hospitals, while those institutions at Mount Vernon and Marshall are given the names "The Missouri state sanatorium" and "The Missouri state school." By this designation our General Assembly has provided that those institutions at Fulton, St. Joseph, Nevada and Farmington, shall be state hospitals, while the other two eleemosynary institutions are given other designations.

Furthermore, it will be noted that Article 2, Chapter 51, R. S. Mo. 1939, deals specifically with state hospitals, while Article 5, of Chapter 51 provides for the state sanatorium at Mount Vernon and Article 6 of Chapter 51 relates to the Missouri state school at Marshall. On account of the different designations as above set out, when the county budget act says that the care of insane pauper patients in state hospitals shall be paid out of Class 1, it obviously meant only those institutions specifically designated as state hospitals in the statutes. Therefore, the care of the indigent patients in the Missouri state sanatorium and the Missouri state school may not be paid for by the counties out of Class 1, but must be paid out of Class 5 of the county budget.

In view of the above classifications and, since you state that the local banks of said county will buy Class 5 warrants, we are assuming that these warrants are issued only for the support of patients at the Missouri state sanatorium and the Missouri state school and not for the support of patients in hospitals set out in Section 9258, supra.

Under Section 9328, supra, it specifically states that "the counties thus sending shall pay semi-annually in cash, in advance, * * *." Since this section specifically states the mode of the payment by the counties to the Board of Managers of the eleemosynary institutions it cannot be done in any other manner. It was so held in the case of State ex rel. Kansas City Power & Light Co. v. Smith, 111 S. W. (2d) 513, 342 Mo. 75, where the court in its opinion in effect states "that the expression of one thing in a statute is the exclusion of another." In view of the above case, all of the cash should be paid in advance at the time of the entrance of the patient into the institution, but after he is there the county may discount their warrants and pay a part of their debt to the eleemosynary institution and may then be billed as in other cases for the difference, which is the amount of the discount. This deficiency is the same as any other debt and the county can be sued for the deficiency by the eleemosynary institutions.

November 10, 1941

CONCLUSION.

In view of the above authorities it is the opinion of this department that where a patient is now in either the Missouri state sanatorium or the Missouri state school the county may discount its warrants drawn under Class 5 for the payment of the keep of their patients and the eleemosynary institution may bill them for the deficiency which is the amount of the discount of the warrants sold to the local banks of Kennett, in Dunklin County. It is further the opinion of this department that this procedure cannot be followed to obtain entrance of a patient to either of the institutions for the reason that under Section 9328, R. S. Mo. 1939, the amount due from the county court to the Board of Managers of the eleemosynary institutions must be paid six months in advance in cash. It is further the opinion of this department that the same procedure may be followed in the payment of the keep of patients now in State Hospital No. 1 at Fulton, the State Hospital No. 2 at St. Joseph, the State Hospital No. 3 at Nevada and the State Hospital No. 4 at Farmington, providing the warrants discounted are drawn under the County Budget Act under Class 1.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

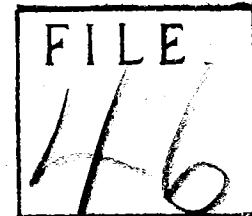
WJB:CP

BLIND PENSIONS: Under Section 9456, R. S. Missouri 1939, treatments
APPROPRIATIONS: or operations recommended by examining oculist
must be furnished by the State.

✓ / ✓ / ✓
November 14, 1941

11-19

Mrs. Lee Johnston
Chief Investigator
Missouri Commission for the Blind
Jefferson City, Missouri



Dear Mrs. Johnston:

This will acknowledge receipt of your request
for an official opinion under date of November 6, 1941,
the pertinent part of which reads:

"Section 9456, Revised Statutes,
1939, reads in part as follows:

"No person shall be entitled to
the benefits of this article who
shall refuse to submit to treat-
ment or operation to effect a
cure when recommended by the exam-
ining oculist and approved by the
Commission."

"Will you please render an official
opinion as to whether or not the
Missouri Commission for the Blind
is justified in placing persons on
the pension roll, whose vision
might be improved by operation or
treatment as recommended by the
examining eye physician, inasmuch
as the Missouri Commission for the
Blind no longer has any funds to
pay for such operation or treat-
ment and indigent applicants have

no means of providing for same themselves, nor is there any other public agency which undertakes this expense.

"This situation is particularly true of elderly persons who have become totally blind through cataracts on both eyes, whose vision might be improved by operation, but who have no means of paying for such operation."

Section 9456, R. S. Missouri 1939, reads as follows:

"It shall be the duty of the commission for the blind to make such regulations relative to the examination of applicants for pension, including the examination by the oculist and of all matters deemed necessary connected with the administration of this article. The examination and certificate of the oculist shall not exceed \$5.00 for each applicant, together with such expense as may necessarily be incurred in making examination where same is not made in his office; such fee and such expense shall be paid by the commission for the blind, but in the case the applicant, concerning whom the expense was so incurred shall subsequently receive a pension, the amount of such expense and fee for examination shall be deducted from the first pension received by applicant and upon proper voucher and requisition by the commission, the state auditor shall issue a warrant to the commission in reimbursement of same. The examining oculist shall state in his certificate (1) the amount of vision in each eye, (2) the cause of blindness, (3) the

possibility of curing same by treatment or operation, (4) the physical and mental condition of applicant and such other matter as may be deemed by the commission of value in dealing with matters coming within its authority. No person shall be entitled to the benefits of this article who shall refuse to submit to treatment or operation to effect a cure when recommended by the examining oculist and approved by the commission; but upon submission to such treatment or operation the pension of applicant, otherwise entitled thereto, shall be paid as in other cases: Provided further, that no applicant who is more than seventy-five years of age, shall be required to submit to an operation to restore his or her vision in order to come under the provisions of this article, but may voluntarily submit to operation."

The above provision, among other things, provides for an examination by an oculist, and one thing the examination must reveal is the possibility of curing said applicant by treatment or by operation. It further provides that no one shall be entitled to benefits who shall refuse to submit to treatment or operation to effect a cure when recommended by the oculist and approved by the commission, and further provides, that if upon submission to such treatment or operation the pension to the applicant, otherwise entitled thereto, shall be paid as in other cases.

One of the cardinal rules of statutory construction is to ascertain and give effect to the lawmakers' intent, considering the language honestly and lawfully to ascertain its plain and rational meaning and to permit its object and manifest purpose. (State v. Pope, 126 S. W. (2d) 1201, 1. c. 1210.)

Another equally well established rule of construction is that words of common usage ought to be construed in their natural and ordinary meaning. (Botz v. Kansas City Southern, 314 Mo., 391, 1. c. 411.)

In Section 9456, supra, we find the words "submit" and "submission". Such words are defined in Funk & Wagnall, New Standard Dictionary in this manner; "submit"--"To give up to or place under the government or treatment of another; yield; subject; surrender; * * *"; "submission"--"The act of submitting; a yielding to the power or authority of another; obedience; hence, action in conformity with the wishes of a superior."

Applying the above rules of construction, in construing Section 9456, supra, we must conclude that if an applicant has consented to treatment or operation as recommended by an oculist upon examination then he has complied with the statutory requirements of 9456, supra.

The Sixty-first General Assembly appropriated \$50,000. for investigating applicants for blind pensions and the investigation of the merits and status of those already upon the pension rolls. This appropriation further provides that no part shall be used for any purpose not directly connected with or indispensable to the investigation of the applications for blind pensions and the status of recipients now on the roll, all of which clearly excludes any possibility of using such appropriation for operation or treatment of applicants for blind pensions for the reason it is not a prerequisite to investigating an applicant. (Section 3, page 166, Laws of 1941.)

"Commission for the Blind. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Fifty Thousand Dollars (\$50,000.00) for the use and benefit of the Commission for the Blind, to be expended under the direction of said Commission for the investigation of

applications for blind pensions and for the investigation of the merits and status of those now on the pension rolls. No part of said appropriation shall be used by said Commission for any purpose not directly connected with or indispensable to the investigation of the applications for blind pensions and the status of present recipients of blind pensions. "

Specific appropriations have heretofore been made for such expenses as treatment and operation of applicants for blind pensions which leads us to believe that the lawmakers were of the opinion that under the law the matter of treatment and operation of the applicants was an obligation upon the State.

The courts in this State have repeatedly held that construction of a statute by those charged with enforcing it, while not binding upon the courts, is entitled to much weight where the meaning is uncertain. (Automobile Gas Company v. City of St. Louis, 32 S. W. (2d) 281; 326 Mo. 435. In re Bernays Estate, 126 S. W. 209; 344 Mo. 135.) Since the blind pension law was not amended by the Sixty-first General Assembly apparently it was an oversight in that body failing to appropriate sufficient funds for treatment and operation of blind pension applicants.

Another fundamental rule of construction is to favor such construction as will not lead to evil, unjust, oppressive or absurd results. (State v. Irvine, 72 S. W. (2d) 96; 335 Mo. 261; Fischbach Brewing Company v. City of St. Louis, 95 S. W. (2d) 335; 231 Mo. App. 793.

Certainly no one will deny that by far the majority of blind pension applicants are persons with little or no means for securing medical services for treatments or operations. To hold the applicant had to pay for such treatment and operation would be placing an unjust and absurd construction on this statute which we think the legislature never contemplated.

Therefore, it is the opinion of this Department that if a person applying for a blind pension is found by the oc-

Mrs. Lee Johnston

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November 14, 1941

ulist examining him to be in need of treatment or an operation and so recommends same, and the applicant indicates he is willing to submit to such treatment or operation, then he has complied with the provisions of Section 9456, supra, and is entitled to a blind pension regardless of whether or not the State is able to furnish him with such treatment or operation.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

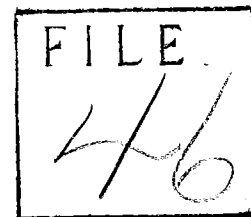
ARR:EAW

TAXATION: Municipal and school bonds are not exempt from taxation.

December 11, 1941

12-12

Honorable Alvin H. Juergensmeyer
Prosecuting Attorney
Warren County
Warrenton, Missouri



Dear Sir:

Your request for an official opinion under date of November 15, 1941, has been received by this office, which request reads as follows:

"1. The town of Wright City, Missouri, has issued water and sewer bonds for the construction of a water and sewer system. Are said bonds exempt from taxation?"

"2. The school district of Wright City, Missouri, has issued school bonds for the erection of a school building. Are said bonds exempt from taxation?"

Wright City, Missouri, is an incorporated town having a population of 436. The water and sewer bonds issued for the construction of a water and sewer system are authorized by the applicable provisions of Articles 10, 11 and 31 of Chapter 38, R. S. Mo. 1939.

Sections 6 and 7 of Article X of the Missouri Constitution provide as follows:

"Section 6. Property exempt from taxation.-- The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile

of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; Provided, that such exemptions shall be only by general law."

"Section 7. Other exemptions void. -- All laws exempting property from taxation, other than the property above enumerated, shall be void."

The Supreme Court has held that exemptions under this section have reference solely to tangible and specific lands and personalty, and incomes are not within its provisions and are not exempt from taxation. *Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S. W. 196. It was held in the case of *State ex rel. Globe-Democrat Pub. Co., v. Gehner*, 316 Mo. 694, 294 S. W. 1017, that no property is exempt from taxation except that specifically exempted by law and that which is not subjected to taxation.

Section 10936, R. S. Mo. 1939, provides as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 10937, R. S. Mo. 1939, provides as follows:

"The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States;

third, lands and other property be-
longing to this state; fourth, lands
and other property belonging to any
city, county, or other municipal cor-
poration in this state, including mar-
ket houses, town halls and other public
structures, with their furniture and
equipments and all public squares and
lots kept open for health, use or orna-
ment; fifth, lands or lots of ground
granted by the United States or this
state to any county, city or town,
village or township, for the purpose of
education, until disposed of to individ-
uals by sale or lease; sixth, lots in
incorporated cities or towns, or within
one mile of the limits of any such city
or town, to the extent of one acre, and
lots of one mile or more distant from
such cities or towns, to the extent of
five acres, with the buildings thereon,
when the same are used exclusively for
religious worship, for schools or for
purposes purely charitable, shall be
exempted from taxation for state, county
or local purposes."

We find no statute attempting to provide an exemption from taxation of water works and sewer bonds such as have been issued by the Town of Wright City, Missouri, but in the case of State ex rel. St. Louis Co. v. Gordon, 268 Mo. 713, 188 S. W. 160, the Supreme Court held an act of the Legislature of 1907 unconstitutional which attempted to exempt from taxation county road bonds, same being violative of Sections 6 and 7 of Article X of the Missouri Constitution. In the case of Vice v. City of Kirksville, 280 Mo. 348, 217 S. W. 77, the Supreme Court held an act of the Legislature of 1905 attempting to exempt city water works bonds from taxation unconstitutional, as violative of Section 6 of Article X of the Missouri Constitution.

The water and sewer bonds issued by the Town of Wright City, Missouri, however, should be considered as securities held for investment by the owner or purchaser of the bonds and are taxable the same as other personal property. Municipal bonds are uniformly held to be subject to general taxation unless lawfully exempted therefrom by constitutional and statutory provisions. The general rule is stated in 26

R. C. L., Section 202, page 334, as follows:

"State or municipal bonds are looked upon merely as securities held for investment by the owner and are taxable for the same reasons that other obligations to pay money are taxable in the hands of the creditor."

The same authority also states the general rule that municipal bonds are not taxable by the Federal Government, 26 R. C. L., Section 61, page 85, Section 292, page 335.

"Municipal corporations cannot issue bonds exempt from taxation unless the power to do so has been delegated to them and even the Legislature cannot authorize municipalities to issue bonds exempt from taxation if the constitution forbids."
(McQuillin Municipal Corporations, Vol. V, Section 2394, Page 5006.)

The school bonds issued by the School District of Wright City, Missouri were authorized by the provisions of Article 5 of Chapter 72 of the Revised Statutes of Missouri, 1939. We find no statute exempting such school bonds from general taxation. Any such statute, however, would be violative of Sections 6 and 7 of Article X of the Missouri Constitution, which said Section 6 of Article X of the Missouri Constitution only provides for an exemption by general law of certain real estate used exclusively for school purposes. See also *Wire Company v. Wollbrinck*, supra; *Kansas City v. College*, 111 Mo. 141, 20 S. W. 35; *State ex rel. Spillers v. Johnston*, 214 Mo. 656, 113 S. W. 1083. Under the provisions of Section 10936 and 10937, R. S. Mo. 1939, school bonds are subject to taxation the same as other personal property. With reference to taxation, school bonds are generally held taxable the same as municipal bonds and are classed as such in the hands of the purchaser or investor.

Conclusion

It is, therefore, the opinion of this Department that the water and sewer bonds issued by the Town of Wright City,

Hon. Alvin H. Juergensmeyer

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Dec. 11, 1941

Missouri, as well as the school bonds issued by the School District of Wright City, Missouri, are subject to taxation for state, county and local purposes the same as other personal property in the hands of the purchaser or owner thereof at place of the taxpayer's domicile.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

ELEEMOSYNARY INSTITUTIONS: Board of Managers^{may} by rule provide that when accommodations are limited psychotic cases may be given preference over senile dementia cases.

December 13, 1941

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

"The following motion was passed at a meeting of the Board of Managers, State Eleemosynary Institutions, on November 9, 1941:

"In view of the overcrowded condition of the four mental hospitals, and, that a number of counties have been sending to the State Hospitals elderly and senile persons who are adjudged mental incompetents, but are not psychotic and do not need treatment as such, the superintendents of the respective State Hospitals are instructed to give preference to the psychotic cases in the matter of admissions up to the capacity of the various institutions, and not to receive senile cases where it will prevent the reception of psychotic cases of a more urgent nature, but to place such application for such senile patients upon proper list to be received as soon as there is room for their reception and, meanwhile to require their county

courts or other sources making application or commitments of patients to furnish proper questionnaire disclosing the type of such patients in order that their status in this connection may be determined in advance of their admission.'

"We would like to have an opinion from your office that this is legal before we circularize the county clerks."

Under Section 9328, R. S. Mo. 1939, it is provided that "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto."

Section 9330, R. S. Mo. 1939, provides as follows:

"The indigent insane of this state shall always have the preference over those who have the ability to pay for their support in a state hospital; and if there are not provisions in the state hospitals for the accommodation of all the insane persons in the state, then recent cases of insanity, by which term are meant cases of less than one year's standing, shall have preference over cases of more than one year's standing: Provided, no county shall have in the institution more than its just proportion, according to its insane population."

In Section 9358, R. S. Mo., 1939, the word "insane" is defined as "including every species of insanity or mental derangement."

Under the above statutes it will be seen that the indigent insane sent by the counties to the state hospitals cannot be classified according to types of insanity but preference is given to those whose insanity is of recent origin. We

believe that the obvious purpose of this preference is that those whose insanity is not of long standing may be cured or at least helped in a better and more efficacious fashion than those whose insanity is of long duration. This view is supported by the other statutes dealing with the state hospitals. Section 9274, R. S. Mo. 1939, provides that the Board of Managers of the State Eleemosynary Institutions shall appoint a health supervisor who shall be skilled in the science of psychiatry and shall have at least seven years' experience as a physician. Section 9284, R. S. Mo. 1939, provides that the duties of this health supervisor shall be to direct in the manner of the treatment of the health and sanitation of the several institutions under his charge and management, and shall advise and counsel with the superintendents thereof and the several assistant physicians therein.

The 1941 General Assembly passed a statute to be known as Section 9283a (Laws of Missouri, 1941, page 689), which reads as follows:

"The state eleemosynary board, upon the joint recommendation of the president of the board and the superintendent of each institution concerned, shall have authority to appoint surgeons, pathologists, clinical directors, statisticians, radiologists, dentists, psychologists, anesthetists and other technical and professional employees necessary to the welfare of the several institutions; and the compensation therefor shall be fixed by the superintendent, with the approval of the board."

A reading of the above provision shows that the whole method and intent of the Legislature in providing for state hospitals is to provide a place at which the insane may be treated and if possible cured. Therefore, this intent of the Legislature must be kept in mind in construing the rights and powers of the Board of Managers of State Eleemosynary Institutions.

Section 9263, R. S. Mo. 1939, provides that the Board of Managers shall have the authority to make all necessary rules,

regulations and by-laws for the management of each institution. Since the intent of the Legislature is to provide institutions for the cure or rehabilitation of the insane rather than for the care and confinement of the same, we believe that the Board of Managers may by rule and regulation provide that in case the accommodations in such state institutions are limited that those persons who may be cured or rehabilitated should be admitted in preference to those who have no chance of regaining their sanity.

Senile dementia, or insanity caused by old age, is graphically defined in *Byrne v. Fulkerson*, 254 Mo. 97, l. c. 121, as follows:

"Of this affliction learned authors say that it 'begins, as a rule, so gradually that its boundary line cannot be fixed. It is marked by progressive decay of the mental faculties, of which memory is one of the first to fail; and the loss of memory is at first more marked for recent than for remote events. The instincts and affections change, the tastes alter, and the sense of delicacy often suffers. In the purely intellectual sphere we observe an impaired judgment and a weakened power of attention. There is apathy, indifference to current events, and a disposition to be interested in trifles. The emotions become unstable. Some of these patients are irritable, easily excited, prone to weep easily and without much apparent cause A not unusual form of senile dementia is a type of delusional insanity. In advanced cases, especially, in which all the mental and moral faculties are clouded, delusions are observed. These delusions are usually of a depressive or persecutory kind; a common one is the idea of loss of property, or of being robbed.'"

It will be seen, therefore, that insanity caused by old age is a progressive mania in which the patient gradually

gets worse and the chance of rehabilitation or cure is very small.

It must be pointed out that Section 9330, supra, provides that a preference shall be given to those cases which are of less than one year's duration. Therefore, in order for the rule and regulation, quoted in your request, to be valid, the affliction in the psychotic case must be of less than one year's duration. If such case is of more than one year's duration and an application is made by a person suffering from senile dementia who has been afflicted for less than one year, then the latter must be admitted in preference to the former.

Therefore, we believe that the rule set forth in your request that psychotic cases shall be given preference over persons suffering from senile dementia, is a proper and valid exercise of the powers of the Board of Managers of State Eleemosynary Institutions.

Conclusion

It is, therefore, the opinion of this Department that the Board of Managers of the State Eleemosynary Institutions may by rule and regulation provide that where accommodations are limited that preference may be given to psychotic cases of less than one year's duration over patients suffering from senile dementia of less than one year's duration, because the intent and purpose for which our state institutions were established was for the cure or rehabilitation of the same rather than as a place of confinement.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO

ELEEMOSYNARY
INSTITUTIONS -

State Superintendent has no authority
to act as agent or representative for
a patient in the signing of checks
or transaction of private business
matters.

December 19, 1941

Mr. Ira A. Jones,
President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

We are in receipt of your letter of December 11,
1941, wherein you request an opinion from this Department
on the following statement of facts:

"Would you give me an interpretation or
would you ask the Attorney-General for an
opinion on the following question that has
come to my attention.

"Occasionally a patient will have a small
amount of money due him on an insurance
policy, and the Insurance Company will
forward this amount in the form of a
check to the patient. Very often in
these cases, we feel that the patient
is mentally incompetent to endorse this
check, and too, some patients will refuse
to endorse their check.

"On what authority can the Superintendent
endorse and cash these checks and place
them to the credit of the patient? Is
there a law in Missouri that authorizes
the Superintendent of a Mental Hospital
to collect funds which are due mentally
incompetent patients, especially if the
patient does not have a legal guardian?

"These questions have been raised by
Insurance Companies insisting that the
Superintendent receive and receipt checks,

and state that the family or relatives of these patients do not feel there is sufficient money rebated to pay for the expense of having a guardian appointed.

"A Probate Court and a Lawyer representing a patient's family as executor of a will, asks that I receive and receipt a check for a mentally incompetent patient in my Hospital, in order that an estate may be settled. In this case there has been no guardian appointed. I refused to accept this check on the grounds that I do not feel that being a Superintendent, makes me a legal guardian for patients under my care, nor do I feel that I can act as an Agent for this mentally incompetent patient, in signing papers in the procedure of settling up this estate."

Section 9278 R. S. Missouri, 1939, provides, as follows:

"The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed as manager, and shall devote his entire time thereto, and shall receive, unless otherwise provided for, the sum of \$3,600.00 per annum, to be paid monthly, together with all necessary and actual traveling expenses. The superintendent of the Missouri state school shall receive the sum of \$3,600.00 per annum, to be paid in monthly installments, together with all necessary and actual traveling expenses."

It will be noted from a reading of this Section that it provides that the superintendent shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed manager.

Section 9300 R. S. Missouri, 1939, provides:

"All moneys received by any institution for the support of patients therein, from whatever source received, shall be paid into the state treasury, and shall be placed to the credit of the fund for the support of the eleemosynary institutions."

This latter Section provides that all moneys received for the support of patients therein, from whatever source, shall be turned over to the State Treasurer. Of course, it will be particularly noted that this Section has reference only to the money for the support of the patients and we do not think has application to petty funds that might be placed in the hands of the superintendent for the private use of any particular patient. However, we do not find any section which directly, or by inference, clothes the superintendent, or any other person connected with an eleemosynary institution, with authority to transact private business matters for, and on behalf of, any of the patients of the institution. In absence of any statutory authority, it is our opinion that whenever there are funds due any particular patient, that a court of competent jurisdiction in the county from which said patient is a resident should appoint some suitable person as guardian for the patient, with power to receive the funds and make the necessary endorsements on checks and sign the necessary papers.

Mr. Ira A. Jones

-4-

December 19, 1941

CONCLUSION

In conclusion it is the opinion of this Department that in the absence of a statute giving the superintendent or other person connected with an eleemosynary institution direct, or implied, authority to act in behalf of a patient incarcerated in an eleemosynary institution, such superintendent shall not have authority to act in the capacity of agent or representative for any patient.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

OFFICERS: Vacancy filled in prosecuting attorney's office
VACANCY: by circuit judge is only temporary.

December 30, 1941

Honorable John A. Johnson
Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of December 29, 1941, which is as follows:

"I respectfully request your opinion on the following facts:

"The Honorable Paul Chitwood, the former Prosecuting Attorney of Reynolds County, Missouri, during the month of August, 1941, accepted employment with the Federal Government. He was absent from his office at least ten days prior to August 31, 1941, and he submitted his resignation to Governor Donnell as Prosecuting Attorney of Reynolds County, to become effective on August 31, 1941. No one was acting as Prosecuting Attorney or discharging the duties of Prosecuting Attorney of Reynolds County until October 1, 1941, when Judge Edward T. Eversole, Judge of the Twenty-first Judicial Circuit of Missouri and Judge of the Circuit Court of Reynolds County, Missouri, acting upon the request and information of the Sheriff of Reynolds County, Missouri, and various other citizens, took cognizance of the fact that the office of Prosecuting Attorney of that county had in fact been vacant for more than thirty days.

"Judge Eversole, by order of court, appointed me Prosecuting Attorney of that

county. A certified copy of that order is here attached. I took the oath of office, and entered upon the duties of Prosecuting Attorney on October 1, 1941, and am at the present time discharging the duties of that office. I acted as Prosecuting Attorney during the regular November Term of the Circuit Court of Reynolds County, Missouri, and there are now pending four prosecutions in justice of the peace courts in that county as well as several criminal cases set for an adjourned term of the Circuit Court to be held upon January 6, 1942. I am still discharging the duties of Prosecuting Attorney of Reynolds County, Missouri, to the best of my ability.

"On December 15, 1941, Governor Donnell appointed Mr. John H. Chitwood, a Republican lawyer of Reynolds County, Missouri, as Prosecuting Attorney to fill the vacancy created by the resignation of Paul Chitwood. On December 22, 1941, Mr. Chitwood presented his commission, and also presented a claim for the salary of Prosecuting Attorney from December 15 to and including December 31, 1941.

"I respectfully submit the following questions upon the above statement of facts:

"1. As between Mr. Chitwood and myself, who is entitled to discharge the duties of the office and receive the salary of said office pending the decision of the Supreme Court of Missouri as to the person entitled to the office of Prosecuting Attorney of Reynolds County, Missouri?

"2. Who would be the proper person to bring an action to determine the person

entitled to the office of Prosecuting Attorney of Reynolds County, Missouri?"

The appointment of yourself as Prosecuting Attorney of Reynolds County by the circuit judge was made under authority of Section 12949, R. S. Missouri 1939, which provides as follows:

"If he be sick or absent, such court shall appoint some person to discharge the duties of the office until the proper officer resume the discharge of his duties."

The fee or salary to you for the time of your appointment is governed by Section 12950, R. S. Missouri 1939, which provides as follows:

"The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

The appointment under the above two sections is merely a temporary appointment and the appointment was not made for a period such as an appointment made by the Governor in case of a vacancy. The appointment was merely made by the circuit judge until the Governor could act in the case of a vacancy. That it was only a temporary appointment and not for the unexpired term of the prosecuting attorney who resigned was held in the case of State v. Duncan, 116 Mo. 288, 1. c. 307, 22 S. W. 699, where the court said:

"* * * Moreover, aside from statutory provisions, there exists an inherent power in a court, if there be no prosecuting officer in attendance, to appoint a temporary representative of the state. State v. Moxley, 102 Mo. loc. cit. 384, and cases cited. And the fact that in the absence of the circuit attorney, the trial court permitted another to represent him, was tantamount to an appointment."

Under the opinion above written by Sherwood, Judge, the court

specifically said that the lower court had the inherent power to appoint a temporary representative of the state.

The purpose of the enactment of Section 12949, *supra*, was to prevent a vacancy happening such as under the facts stated in your request which would prevent the enforcement of the criminal laws. It was so held in *State v. Moxley*, 102 Mo. 374, 1. c. 384, where the court said:

"This section evidently refers to both the preceding sections. Under it the attorney appointed by the court to prosecute in the place of an absent, sick or disqualified officer has the same power to draw and to sign bills of indictment as the regular official. If this be not true then it must be confessed that there is a very lame place in our criminal practice.

"If the contention of defendant's counsel is to prevail, then, if a prosecuting attorney should be for any reason disqualified, all the wheels of criminal justice would be brought to a standstill for the reason that there would be no vacancy in the office that the governor could fill, and no power in the court to make a temporary appointee who could in all things discharge the duties pertaining to the office in question. The law does not intend any such absurdity, and will not permit such a failure of justice. And aside from statutory provisions, such as those quoted, the power thus to appoint a temporary representative of the state, one armed with full authority to discharge in full the office he temporarily fills, is of necessity an inherent power in courts of justice. The authorities abundantly sustain this view. *White v. Polk County*, 17 Iowa, 414; *State v. Bass*, 12 La. Ann.

862; Dukes v. State, 11 Ind. 557; State v. Johnson, 12 Tex. 231; 1 Bishop Crim. Proc., sec. 280."

Also, that such an appointment is only a temporary vacancy was held in the case of State v. Bobbitt, 270 S. W. 378, paragraph 9, where the court said:

"The last assignment of error in the motion for new trial is the action of the court in appointing Don S. Lamm to act as prosecuting attorney to conduct the prosecution. Mr. Lamm had been prosecuting attorney and had signed the information. The order appointing him as special prosecutor recited that the prosecuting attorney had resigned, and that the county was at that time without a prosecuting attorney, and that Mr. Lamm was appointed for that reason. It is said that nature abhors a vacuum. Likewise, vacancies in public office are not usually permitted to exist for a long time; but this appears to be an instance of at least a temporary vacancy. The statute apparently does not cover the exact situation. Sections 743 and 744, R. S. 1919, provide for the appointment of some person to perform the duties of such office, if the prosecuting attorney is sick or absent, with full power in such person to perform the duties of said office and collect the fees thereof.

"The power of the court to appoint some person to discharge the duties of the prosecuting attorney, in the event of a vacancy in such office, does not depend upon statutory provisions, but is inherent in courts of justice. State v. Moxley, 102 Mo. 374, loc. cit. 384, 14 S. W. 969, 15 S. W. 556; State v. Duncan, 116 Mo.

288, loc. cit. 307, 22 S. W. 699. In the absence of express statutory provisions, the court committed no error in making such appointment and in permitting Mr. Lamm to conduct the prosecution of the case."

An appointment in case of a vacancy for the full unexpired term of the office of prosecuting attorney must be made by the Governor in accordance with Section 12989, R. S. Missouri 1939, which provides as follows:

"If any vacancy shall happen from any cause in the office of the attorney-general, circuit attorney, prosecuting attorney or assistant prosecuting attorney, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney-general, prosecuting attorney or assistant prosecuting attorney, as the case may be."

Under this section it is mandatory that the Governor make the appointment. I am presuming that since you state in your request that John H. Chitwood was appointed by Governor Donnell on December 15, 1941, and that John H. Chitwood presented his commission and also presented a claim for salary that he has taken the oath as prescribed in Section 6, Article XIV of the Constitution of Missouri.

Therefore, in answer to your first question it is the opinion of this office that Mr. John H. Chitwood is the lawful Prosecuting Attorney of Reynolds County, Missouri.

As to your second question, this matter can either be tested by your filing a quo warranto proceeding against John H. Chitwood, who we hold is the lawful prosecuting attorney, or it may be filed by Mr. John H. Chitwood against you as an usurper of the office.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General WJB:DA

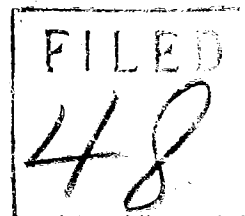
OFFICERS:
DEPUTY SHERIFFS:

A person can hold the office of deputy **sheriff**
and constable at the same time.

12828

January 16, 1941

1-17



Mr. Fred Keller, Sheriff
Andrew County
Savannah, Missouri

Dear Sir:

We are in receipt of your request for an opinion,
under date of January 13, 1941, which reads as follows:

"On January first I took my oath of
office as sheriff of Andrew County,
Missouri. In picking my deputies,
I had considered appointing the
constable of Nodaway township. How-
ever, the question has arisen, as to
whether a duly qualified constable
could legally serve as deputy sheriff.

"I would appreciate it very much if
you would send me your opinion in
the above question within the next
few days."

A deputy sheriff is not a state officer but falls
under the class of county officers. It was so held in
State ex rel. Walker, Attorney General, v. Bus, 135 Mo.
325, 1. c. 337:

"A deputy sheriff is not, in our
opinion, a state officer within the
intent and meaning of said section
of the constitution. In this section
the officers are clearly classified
by territorial jurisdiction and a
sheriff falls under the class of
county officers."

In a careful research we fail to find any statute
or any section under the Constitution which prohibits a
person from holding two county offices. The Constitution
does prohibit a state officer holding an office under the
United States as it appears in Section 4, Article XIV of
the Constitution of Missouri. The Constitution of Mis-
souri also prohibits, in counties or cities having more
than two hundred thousand (200,000) inhabitants, the hold-
ing, by anyone, of a state office and an office in any
county, city or other municipality. This is set out in

Section 18, Article IX of the Constitution of Missouri.

Since there is no constitutional prohibition under the Constitution or the statutes preventing a person from holding two county offices, we must refer to the common law. In the case of State ex rel. Walker, Attorney General, v. Bus, supra, which was passed upon by the Supreme Court of this state June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of school director in the City of St. Louis.

The case of State ex rel. Walker, Attorney General, v. Bus, supra, was followed in the case of State ex rel. Langford v. Kansas City, 261 S. W. 115, and in that case the court held that the office of a deputy sheriff was not incompatible with the office of city clerk. In paragraph 1 the court said:

"The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex

rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S. W. 1159.

In that case the court, at page 116, said:

"In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S. W. 639):

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices,

Mr. Fred Keller,

(4)

January 16, 1941

but there must be some inconsistency in the functions of the two--some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Also, in the case of State ex rel. v. Lusk, 48 Mo. 242, the Supreme Court of this state held that the office of the clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was a case originating in the Circuit Court of Cole County, Missouri.

Since the matter set out in your request must be considered according to the common law, it results that the ruling must be made in accordance with the facts in each separate case. Therefore, the question in your request is whether or not the duties of a deputy sheriff are incompatible with the duties of a constable. There is no question but that a deputy sheriff's duties and the duties of a constable are in common. A deputy sheriff can perform most of the duties that are performed by the constable and a constable can perform most of the duties performed by a deputy sheriff. Their duties are not antagonistic and in no way are their duties inconsistent.

CONCLUSION

In view of the above authorities it is the opinion of this department that since the duties of a deputy sheriff and the duties of a constable are not incompatible and are not inconsistent, a person can hold the office of deputy sheriff and constable at the same time.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

PROSECUTING ATTORNEY: Assistant prosecuting attorney should not represent a defendant in a trial. The determination of the matter should be left to the trial court.

February 5, 1941

Mr. Ben F. Kesterson
Attorney at Law
Cunningham Building
Joplin, Missouri



Dear Sir:

This department is in receipt of your letter of January 17th wherein you make the following request:

"I was appointed special prosecuting attorney to prosecute the case of State of Missouri vs. Delmar Petty, charged with murdering Eula Gipson on the 22nd day of February, 1940. This was one of the most gruesome murders ever committed in this county. The case was tried at the September term, 1940. Mr. Roy Coyne was prosecuting attorney at that time. The defendant was represented by Ralph Baird and Charles Walden. There was a hung jury. The case is coming up at this January term for trial.

Since the trial of this case, Mr. Ralph Baird has been elected prosecuting attorney and has appointed Mr. Charles Walden his chief assistant prosecuting attorney. Mr. Baird has disqualified himself as prosecutor in this case by reason of having defended the defendant in the first trial. Mr. Walden, his chief assistant says he will continue to represent the defendant while holding the office of assistant prosecuting attorney. I do not wish to do anything that is not perfectly fair and ethical in

February 5, 1941

this case but I do not believe it fair to the State to have the assistant prosecuting attorney represent the defendant. As special prosecuting attorney in this case, I would appreciate your opinion on the question. Can Mr. Walden continue to hold his office of assistant prosecuting attorney and still represent the defendant as his attorney?

A searching of the statute does not reveal that the precise question which you present is prohibited or sanctioned by any statute. However, there are a number of statutes which have an indirect bearing on Mr. Walden's position in defending the person mentioned in your letter. Section 11355 R. S. Mo. 1929 prohibits any licensed attorney, who is a co-partner with a prosecuting attorney or assistant prosecuting attorney, from appearing and defending in the courts. Section 11338 contains the proviso "that he shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney." However, the above proviso relates to the power of a prosecuting attorney in any county in the state not specifically designated by certain population. We assume that the prosecuting attorney of Jasper County is entitled to appoint an assistant under Section 11339.

Section 3648 does not refer to a prosecuting attorney, but prohibits a circuit judge when he shall have been counsel in a cause from hearing a case. We cite you to the above mentioned statutes for their probative effect, and as stated in the beginning they do not prohibit Mr. Walden from assisting in the defense, but can be used in arriving at a conclusion whether there is any conflict in Mr. Walden's different positions. 7 C. J. S. page 960 bears on the question:

"Any transaction by which an attorney

February 5, 1941

has taken a position, or acquired an interest, antagonistic to that of his client will be closely scrutinized by the courts; and may in many instances be avoided or invalidated irrespective of its merits, fairness, or good faith or whether or not it is in fact injurious to the client; and even where the existence of good faith and lack of injury to the client, or other facts, will exonerate him it is always incumbent upon the attorney to show such facts to the satisfaction of the court."

We think that the cannon of ethics relating to the legal profession in Special Rule 6 entitled Adverse Influence and Conflicting Interests should be considered in so far as ethics of the profession may enter the question:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client

Mr. Ben F. Kesterson

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February 7, 1941

with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed."

In view of the facts and the situation which you have presented, we think Mr. Walden's position in the matter should be determined by the trial court.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

CONSERVATION: Section 39 of the Wildlife Code is not violative of the "commerce clause" of the Federal Constitution.

February 11, 1941

2-17

Honorable H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri



Dear Sir:

We are in receipt of your letter of recent date wherein you state as follows:

"The following facts occurred in this county and since we are rather close to Arkansas, Kansas and Oklahoma they may occur again and I would like to have your opinion on what the law is as to this matter.

"The local Conservation Agent found a man in this county with about 270 pieces of fur. The fellow was driving an Oklahoma pick-up truck and had no hunting licenses or dealers licenses of any kind. He gave the explanation that he was a resident of Oklahoma, said that he bought the furs there and was transporting them to Fort Scott, Kansas through Missouri. The Conservation Agent signed an affidavit for his arrest and I filed an information charging him with illegal possession and transportation under section 39 of the Wildlife and Forestry Code.

Feb. 11, 1941

"Trial of the defendant was had before a local Justice of the peace, a lawyer, who believe it or not, released the defendant on the grounds that the section of the statutes was unconstitutional being in violation of the inter-state clause of the Federal constitution. The Conservation Agent and I would like to know whether the defendant violated section 39 of the Wild Life and Forestry Code and whether or not the said section is violative of the Federal Constitution."

Section 39 of the Wildlife and Forestry Code (1941 revision), to which you refer, provides in part as follows:

"Sec. 39. Subject to the provisions of these regulations and to any changes officially promulgated by the Commission, and to any statutes appertaining thereto, permits may be obtained by non-residents and aliens as evidences of granted and revocable privileges to pursue, take, transport, ship, buy, sell, store, use or possess certain wildlife, upon the payment of fees hereinafter stipulated; provided that such fees shall be the minimum and shall be increased to the amount of the fee for similar privileges required of non-residents by the applicant's home state; and further provided, that the domicile of the principal, and not of his agent, shall govern the type of permit required of any dealer or dealer's agent:

* * * * *

"(d) Non-resident State-wide Fur-buyer's Permit \$150.00--To possess, buy, store, transport and ship the products of fur-bearing animals, as

defined herein, throughout the state, at no time other than during the prescribed buying season, upon the payment of a non-resident fur-buyer's permit fee of one hundred and fifty dollars (\$150.00).

"(e) Limited Non-resident Fur-buyer's Permit \$25.00--To buy, possess, transport and ship the products of fur-bearing animals from authorized resident fur-buyers or fur-dealers, upon the payment of a limited non-resident fur-buyer's permit fee of twenty-five dollars (\$25.00); provided that such limited non-resident fur-buyer shall be exempt from such fee when all purchases made by him in this State are direct from an authorized resident fur-dealer who, within twenty-four (24) hours, certifies to the Commission each sale of a specified number and kind of furs to such limited non-resident fur-buyer."

You inquire whether the above section is violative of the "interstate commerce clause" of the Federal Constitution.

A rather detailed discussion of this question is found in 92 A. L. R. 1267, wherein it is said:

"On the theory that wild game belongs to the state in its sovereign capacity in trust for the whole public, and that any right of property acquired therein by capture and possession is a qualified right only, and subject to all reasonable limitations imposed for the protection and preservation of such game, it is generally held that statutes or regulations regarding the possession, transportation, or sale within the state of fish or game taken outside of the state are

a valid exercise of the police power, and not unconstitutional as an interference with foreign or interstate commerce."

Among the cases cited to support the above proposition are State v. Randolph, 1 Mo. App. 15, and State v. Judy, 7 Mo. App. 524.

The court in the former case said (l. c. 17):

"It is urged by defendant that, inasmuch as it appears that these prairie chickens were imported from Kansas, there can be no conviction. But the act in question makes it a penal offense to have prairie chickens in one's possession from February 1st to August 15th, in Missouri, no matter where the birds were caught. It is insisted that, if this be the meaning of the act, it is in violation of the Constitution of the United States; Congress alone having power to regulate commerce among the several States. We see nothing unconstitutional in the act. The game law would be nugatory if, during the prohibited season, game could be imported from the neighboring States. It would be impossible to show, in most instances, where the game was caught. The State of Missouri has as much right to preserve its game as it has to preserve the health of its citizens, and may prohibit the exhibition for sale, within the State, of provisions out of season, without any violation of the Constitution of the United States. So far as we know, this right has never been disputed, and its exercise by the absolute prohibition of the having in possession, or sale, of

game within the State limits, during certain periods of the year, is no more an illegal attempt to regulate commerce between the States than would be a city ordinance against selling oysters in July."

And in the latter case the court said (l. c. 525):

"It is claimed that the law violates provisions of the Constitution of the United States and of this State. We do not think so. Defendant is not deprived of his property without due process of law. The property was acquired with knowledge of the provisions of the act. The Legislature may, in some cases, pass laws which destroy the right of property. The protection of game is a public advantage, to which private interests may be made to yield to some extent. The Constitution of the United States does not expressly prohibit the passage of game-laws by the several States, nor is there any act of Congress professing to regulate the traffic between the States in game. The State of Missouri is certainly free to pursue its own policy in the matter of protecting game, and by so doing violates no law regulating commerce between the States. Phelps v. Racey, 60 N. Y. 10; The State v. Randolph, 1 Mo. App. 15."

Section 39, supra, requires a license to be purchased by non-resident fur-buyers when buying, possessing, transporting and shipping the products of furbearing animals. Said requirement for a license under the authority of many decisions is a valid exercise of the police power and is not unconstitutional as an interference with foreign or interstate commerce.

15 C. J. S., Section 66, page 386, provides in part that:

"According to some of the earlier authorities, after fish or game, lawfully caught, captured, or killed have been delivered to an interstate carrier for interstate transportation, they are articles of interstate commerce, not subject to the state police power; and where they have not only been lawfully caught or killed without the state, but are also intended to be transported to a point beyond the state, the state has no power to interfere with their transportation through the state or with their being temporarily within the state for some lawful purpose. However, in view of a valid federal statute which, by prohibiting the shipment or transportation in interstate commerce of game killed in violation of state laws, and by providing that foreign game, when transported into any state, shall be subject to the laws of that state, enacted in the exercise of its police powers, to the same extent as if such game had been produced within such state, has eliminated all questions of interstate commerce and given the states entire freedom to prohibit the importation of game into, or the exportation out of, its own territory, as well as power to prohibit the possession or sale of imported game, * * * * *."

Section 101 of the Wildlife and Forestry Code (1941 revision) provides in part as follows:

"LEGALITY OF WILDLIFE SPECIES TAKEN IN OTHER STATES: The laws of the state in which wildlife is taken shall determine the legality of the taking and permitted possession limits; otherwise when such wildlife is transported into Missouri, the regulations of the Commission shall apply as soon as such wildlife enters this state, except however, interstate shipments when neither the point of origin or point of destination is in Missouri; provided that the burden of proof shall be upon the person in possession of such shipments to show that such possession or transportation are not in conflict with these regulations."

Under the above quoted section it is not sought to require a license from non-resident fur-buyers where engaged in inter-state shipments, but persons having in possession such shipments have the burden of showing that same are properly not inter-state shipments.

In the case presented herein undoubtedly the person in possession of the furs could not show that they were engaged in inter-state shipment and, hence, it was sought to apply the requirements of Section 39 to said shipment.

In the case of *Cohen v. Gould*, 225 N. W. 435, the game warden of Minnesota seized six hundred and eighty muskrat skins which were purchased at Superior, Wisconsin, and shipped to Duluth, Minnesota. The furs were in two bags and bore no official tag or seal showing the legality of their original taking. The statute of Minnesota imposed upon the possessors of raw skins of wild animals the burden of proof that the animals were legally killed in or without the state. The court held that said statute did not impose a burden on inter-state commerce and pointed out that if the defendants would have accompanied the shipment with an invoice showing a lawful sale no one would have questioned the shipment.

The court said (l. c. 436, 437):

"Such police measures as our game laws would be futile indeed if they did not provide measures of enforcement adequate to oppose successfully the devices of those whose interest it is to violate them. We take judicial notice that much business is done in Minnesota in the sale at wholesale and retail and in the manufacture of furs; that the latter are imported in large quantities, not only from adjoining states, but also from Canada; and that law-abiding fur dealers and manufacturers do not seem to have had much difficulty in obeying our laws and the requirements of the officials charged with the enforcement thereof. In the case supposed by counsel, of a purchase by a Minnesota dealer of furs confiscated and lawfully sold by authority of Manitoba, no Minnesota official would question the shipment were it accompanied by an invoice from the Manitoba official showing the lawful sale by him. It is no objection to a police measure that it imposes upon citizens some but not an unreasonable burden of taking pains to see that the law is obeyed and to satisfy the officials charged with its enforcement that it is obeyed.

"* * * * * Those who make a business of buying and shipping furs are not so incompetent in their trade as to be unable to accompany any package of furs with something in the way of invoice or manifest showing its origin and history."

Hon. H. A. Kelso

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Feb. 11, 1941

From the foregoing we are of the opinion that the defendant violated Section 39 of the Wildlife Code if he was unable to prove that the shipment of furs was made in interstate commerce, and we are further of the opinion that said Section 39 is not violative of the "commerce clause" of the Federal Constitution.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

MW:EG

ROADS AND BRIDGES: Surplus in general county road fund can be transferred to a special road district.
COUNTY COURT: County court has no authority to rent road machinery to another county, but if they do, rental must be paid into the county treasury.

June 3, 1941

Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

*But see
w/d of 73-1943
to note.
b-11
See of 4-1944*



Dear Sir:

We are in receipt of your request for an opinion under date of May 28, 1941, which reads as follows:

"The county court of this, Iron County, leased certain road machinery owned by Iron County to Washington County and has now collected the money due for the use of the machinery, and inquire of me if this money could be turned over to the county treasurer and placed to the credit of the general revenue fund. I find no statute giving the county court any legal right to lease or rent road machinery to another county, but in as much as this has been done, I have advised the court that in my judgment this money should go to the road fund and not the revenue fund.

"Second, the court inquired of me if it could transfer funds from the county road fund to a special road district to be used for road purposes in the special road district. I gave the court my opinion it could not do so.

"Please advise me on each of the above matters."

In answer to the first paragraph of your letter we find no statute giving the county court any authority to lease road machinery to another county. We also do not find any section of the statute which gives any implied authority to lease road machinery to another county.

According to 15 Corpus Juris, page 536, par. 220, the rule of law is set out as follows:

"The control and management of all property, real and personal, for the use of a county, is usually expressly vested by statute in the county board or county court of each county, and in such control and management the board occupies a position of trust, and is bound by the same rules of fidelity as a trustee of an express trust. Such board cannot, however, authorize the use of county property for purposes other than those provided by law, as declared by statutes in effect at the time, the legislature having power, on account of a county being but a mere agency of the state, to control the use, management, and disposition of county property, except where the property has been acquired by a grant limiting its use to certain specified purposes. * * * * *

Also, in 15 Corpus Juris, page 537, par. 221, it sets out the rule as to the authority of renting or leasing county property as follows:

"In accordance with the general rule heretofore stated, that county boards or county courts have no powers other than those conferred expressly or by necessary implication, such courts or boards have no power to rent or to lease property or franchises owned by the county, in the absence of statutory authority so to do; and where they do possess statutory authority, it must be strictly pursued, or the lease will not be binding. * * * * *

Since the machinery has been leased and the money paid by Washington County to Iron County, the question is

into what fund the money must be placed.

In the case of Johnson v. Deuser, 56 S. W. (2d) 803, the court, in determining as to the receipt of surplus fees concerning which there was no express legislation on the subject, in paragraph 4 said:

"Concededly, there has been no express legislation upon the subject. However, if such surplus fees do not belong to the members of the board itself, then they belong to the county, and therefore would be payable into the county treasury by those in whose hands they are, as in the case of other persons chargeable with county funds. The general statutes are broad enough to cover that contingency, and appellants do not contest the point if we are correct in holding that they themselves are not entitled to retain the surplus funds remaining."

In the above case the court merely held that the excess fees should be paid into the county treasury.

In your request you state "I have advised the court that in my judgment this money should go to the road fund and not the revenue fund." Since there is no statutory legislation as to the receipt of this money or as to which fund it should be paid into, we are compelled to base our opinion on the case of Johnson v. Deuser, 56 S. W. (2d) 803, *supra*, which holds that the money should be paid into the county treasury and does not designate any particular fund. We will say that this money can be transferred from the county treasury to the road fund if the transfer is made in accordance with our opinion answering your second paragraph.

In reference to your request in your second paragraph, we are submitting the following authorities for our opinion in that matter:

Section 8526, R. S. Missouri 1939, reads as follows:

"The county courts in the several

counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

This section is based upon Article X, Section 11 of the Constitution of Missouri

Section 8527, R. S. Missouri 1939, reads as follows:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property laying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case

may be: Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

This section is based upon Article X, Section 22 of the Constitution of Missouri.

In reading the two sections together, it shows that it was the intention of the legislature that the taxes levied, collected and disbursed under Section 8527, supra, which are designated as special taxes, should not be transferred in any manner and should remain in the general road fund of the special road district or districts. This intention is construed by reason of the following: "to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: * * " No such provision appears in Section 8526, supra, which is a mandatory law requiring the county court to levy a tax of not more than twenty cents on the one hundred dollars valuation as a road tax and placed to the credit of the "county road and bridge fund."

Section 8527, supra, is not mandatory but is discretionary with the county court as to whether or not

they should make this additional levy in addition to the levy set out under Section 8526, supra. It will also be noticed under Section 8527, supra, the following appears:

"* * * * Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

Under the above provision the county court oversees the work done or materials furnished under the special tax as set out in Section 8527, supra.

Section 8527, supra, is earmarked to the effect that the tax levied under that section can only be used for road and bridge purposes and for no other purposes whatsoever. This provision prevents the county court from transferring any of said funds to any other fund but under Section 8526, supra, no such earmarks appearing in that section under certain conditions, the county court may transfer certain moneys from one fund to another which money must be a surplus.

In the case of Decker v. Diemer, 229 Mo. 296, 1. c. 336, the court, in holding that a surplus could be diverted from a fund having a given and designated purpose to another legitimate county purpose, said:

"The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer that question in the affirmative. We are of the opinion that the force of the Cottey Act is spent in another direction, as the history of the times of its enactment well shows, and that it ought not to be construed as prohibiting such transfer of funds. We are further of the opinion that

the various statutes providing for the transfer of funds, when practically construed, lend substance and countenance to the view we have expressed. We are further of the opinion that sections 6723 to 6729 inclusive, supra, now a part of article 2 of chapter 97, entitled 'Counties', is a live law though old. The chapter and article have been revised and amended from time to time and brought down for every day use. The Cottey Act was not intended to repeal it and the provisions of the two are not antagonistic or inconsistent. Repeals by implication are not favored. It is our duty to harmonize and preserve the whole body of the law, when we can. We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a 'surplus' within the purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

Also, in the case of State ex rel. v. Railroad, 270 Mo. 251, 1. c. 268, the court said:

"Section 22 of Article 10 of the Consti-

tution, which we have already quoted, provides that in addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article 10, the county court may in its discretion levy and collect a special tax not to exceed twenty-five cents on the one hundred dollars of valuation, to be used for road and bridge purposes, but for no other purpose whatever. This provision uses no other term of description than 'special tax.' The word special only means relating to a particular thing or class of things, and is explained fully by the clause requiring it to be used for road and bridge purposes, but for no other purpose whatever. The necessity for its use in this connection is made plain in *Decker v. Diemer*, supra. This court In Banc said (p. 336): 'The bald question then is: May a county court transfer a surplus and divert it from a fund having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer that question in the affirmative.' That portion of the levy authorized by the Constitution for county purposes which had been set apart for roads and bridges might be diverted from such purpose, and the people thought best to and did confine the additional levy to use for the special purpose for which they authorized it and no other. Thus any road-and-bridge tax in excess of the amount allowed by the Constitution for county purposes must be held sacred to the use for which it was authorized. The fact that it is levied nominally 'for road-and-bridge purposes' and that it is in excess of the tax authorized by section 11, article 10, of the Constitution, fixes its special

status and limits its use. The amendment does not purport to prescribe a name by which it must be called upon the record, but only to designate the use to which it shall be limited when collected. It is only necessary that it should be made separately from and in addition to the levy 'authorized for county purposes,' and that it should appear to be 'for road-and-bridge purposes.' All else is taken care of by the law which guards the legislative intent when once expressed. The same words are transferred from the Constitution to section 10482 of the present Revised Statutes, and there is nothing in the act in which they occur that suggests a different interpretation.

In both of the above cases in order that taxes could be diverted by the county court from one fund to another all warrants and debts properly chargeable to a fund in any one year must be paid and provided for before the balance of such fund is a "surplus." Of course, the transfer of funds from one fund to another is governed by the County Budget Act and especially so by Class 6 of Section 10911, R. S. Missouri 1939, which reads as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

June 3, 1941

CONCLUSION

In view of the above authorities it is the opinion of this department that the County Court of Iron County had no authority, either expressly or impliedly, to rent road machinery to the County of Washington. Since the road machinery has been leased and the money paid for the rental thereof by Washington County to Iron County, it is our opinion that the money should be paid into the general fund of the county treasury, but in accordance with the above opinion concerning the transfer of funds, the fund can be transferred from the general revenue fund to the special road district in compliance with Class 6, Section 10911, R. S. Missouri 1939, known as the County Budget Act.

In answer to your second question, it is the opinion of this department that the County Court of Iron County can transfer funds from the county road fund to a special road district to be used for road purposes in the special road district providing that the funds so transferred are a surplus and the transfer is made in compliance with Class 6 of Section 10911, R. S. Missouri 1939, known as part of the County Budget Act, but if there is no surplus the funds cannot be transferred from the county road fund to a special road district. If there is a surplus which is transferable from one fund to another, the county court still has supervision of the payment for the work done or materials furnished as set out in the last provision of Section 8527, R. S. Missouri 1939.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

WJB:DA

SPECIAL ELECTIONS * Vernon County - In Re instituting suit
BOND ISSUE : against the Missouri Public Service Cor-
CORPORATIONS : poration -- Participating in Election.

July 12, 1941

7-14

Mr. H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri



Dear Mr. Kelso:

I am in receipt of your letter of July 3, 1941,
requesting an opinion, which letter reads as follows:

"The purpose of this letter is to request from your office an opinion as to the effect and application of Section 11786 R. S. of Missouri, 1939. I request this opinion in my official capacity as Prosecuting Attorney of Vernon County, Missouri.

"The facts of my particular problem are briefly as follows: In November of last year, 1940, there was held in Nevada, Missouri, the county-seat of Vernon County, a special election the issue being the voting of a municipal bond issue in the amount of \$490,000. During the course of the campaign the issue became one of interest to all citizens of Nevada and a heated campaign resulted. A Citizen's Committee of persons in favor of the bond issue was organized and one against it. These committees, largely through the newspapers, presented the arguments for and against the bond issue. The Missouri Public Service Corporation took a very active part in the campaign through newspaper, printed matter of all sorts and the company also hired workers to canvas and solicit votes. This company is the one which furnishes gas, water and electricity to Nevada, and

incidentally to a number of other cities and towns. There was some bitterness on the part of proponents of the bond issue at the part the company took in the campaign. However there is no allegation that the company was guilty of any act of corruption per se. The objection was to the company taking any part in the election at all. The Missouri Public Service Corporation justified its position by argument that it had an investment to protect and in its argument also contended that increased taxes would result.

"In my previous paragraph I used the word 'company' and Missouri Public Service Corporation interchangeably. Technically the Missouri Public Service Corporation is a foreign corporation incorporated under the laws of the State of Delaware and licensed to do business in Missouri as a foreign corporation. This may be of some importance to you in rendering your opinion.

"The special election, which was so hotly contested, resulted in a complete victory for the opponents of the municipal bond issue. The proponents of the issue have consulted with me and are vigorously contending that I should file a proceeding under the statute set out in the first paragraph of this letter, i.e. Section 11786, R. S. Missouri, 1939.

"Most of the advocates that this action be brought are not lawyers and are not aware of the serious legal questions which are inevitably going to be an issue in the case if it be filed. I am outlining the following as questions concerning this case which I felt should have your consideration and which I would like for you to pass on in rendering your opinion to me.

1. Lawyers with whom I have discussed the matter argue that the section is invalid under the requirements of Section 28, Article IV, of the Constitution of Missouri in that the title (Laws of 1897, page 108) is defective.
2. That the statute, even if it were otherwise valid, would apply to all corporations organized and existing under Missouri law, including newspaper corporations, benevolent, religious, educational, scientific and any other corporation, and that the enforcement of its prohibitions would violate Section 14, Article II, of the Missouri Constitution and the Fourteenth Amendment of the Federal Constitution guaranteeing freedom of speech and of the press.
3. There is argument that Section 11807 is the legislative interpretation of the prohibitions of the Corrupt Practices Act and permits firms, organizations and corporations to publish and circulate printed matter in elections providing that such publications are not anonymous.
4. It is further argued that the Statute is invalid because it is 'class' or special legislation and violates the equal protection clause of the Constitution and due process of law.
5. And finally it is my desire to know whether or not this Statute applies to a Corporation which is incorporated outside the confines of the State of Missouri the Missouri Public Service Corporation being, as previously stated, a Delaware Corporation.

"This case if filed will result in bitterly contested litigation which will no doubt end in the Supreme Court. For this reason it is my desire to have some assurance of success in the matter before filing the case. Such a prosecution will be extremely costly and it

is my sincere desire to protect my county from becoming involved in a case unless I have some assurance that the result of the case will be a victory for the side of the prosecution.

"I believe that this states the situation. I therefore request that you render an opinion on the propositions as stated and that you also inform me if you will institute the proceeding in the name of the State against the Missouri Public Service Corporation. If you will not do you think my office justified in instituting the proceeding and if I so institute the proceeding will you aid me in prosecuting the case."

I desire to call your attention to the fact that Section 11786 has not been construed by the Appellate Courts, nor has its constitutionality ever been before any of the Appellate Courts.

I.

Your first question is: Does Section 11786 R. S. Missouri, 1939, violate Section 28, Article IV of the Missouri Constitution?

Section 11786, supra, provides:

"It shall not be lawful for any corporation organized and doing business under and by virtue of the laws of this state, to directly or indirectly, by or through any of its officers or agents, or by or through any person or persons for them, influence or attempt to influence the result of any election to be held in this state, or procure or endeavor to procure the election of any person to a public office by the use of money * * * or by discharging or threatening to discharge any employee of such corporation, * * * or to use or offer to use any power,

effort, influence or other means whatsoever to induce or persuade any employee or other person entitled to register before or vote at any election * * * or on any question to be determined or at issue at any election."

The remainder of the section fixes the penalty for violation of the section. The above statute is a part of what is commonly referred to as the Corrupt Practices Act.

In 1897, Section 11786 was enacted as part of an act consisting of three sections. The title to the Act read:

"AN ACT to amend an act entitled 'An Act to prevent corrupt practices in elections, to limit the expenses of candidates, to prescribe the duties of candidates and political committees, and provide penalties and remedies for violation of this act,' approved March 31, 1893, by inserting between section 4 and 5 three new sections, to be known as sections 4a, 4b and 4c."

The question that presents itself is, does the title comply with the Missouri Constitution, supra, which requires that each bill shall contain but one subject and that it must be clearly expressed in the title? Of course, we should presume that the act is constitutional, nevertheless, in considering whether or not you as Prosecuting Attorney, or I as Attorney General, should institute a suit against the Missouri Public Service Corporation, it is necessary that we should carefully examine the law and the facts in determining whether we would be justified in expending public funds.

At no place in the title of the original act of 1893, or the amendatory act of 1897, are corporations mentioned. In the case of *State ex rel. v. Hackman*, 292 Mo. 27, at page 32, the court said:

"* * * Though subject matter in an act be such as might constitutionally be enacted under one title, it cannot be

so enacted in a particular act, unless it be within the subject 'clearly expressed in the title' of such act. St. Louis v. Weitzel, 130 Mo. 616, 31 S. W. 1045. It follows that if the title to an act 'descends to particulars,' and states such particulars as the subject of the act, then not the general subject within which such particulars fall, but the particulars stated, becomes the subject stated in the title. In such a case the provisions of the act enactable, under such a title must be such as fairly relate to and have a natural connection with, not the general subject which might have been stated, but the subject which is stated, i.e., the particulars set out in the title (citing cases). An examination of these decisions and authorities, generally, discloses that the rule is but an application of the maxim, 'expressio unius exclusio alterius est'; and, if the descent to particulars is sufficiently definite that the express enumeration is affirmatively misleading as to the intent to include others, the other matter so included is not within the title, even though the designation of particulars is preceded by a general title."

In the case of Fidelity adjustment Co. v. Cook, 339 Mo. 45, 95 S. W. (2d) 1162, at page 1164, the court held:

"* * * the title must express the subject of the act in such terms that the members of the general assembly and the people may not be left in doubt as to what matter is treated of."

The case of City of Columbia v. State Public Service Commission, 329 Mo. 38, 43 S. W. (2d) 813, reaffirmed the rule that particulars following a general description limited the general description to the particulars enumerated.

In the City of Columbia case, the title describing the general purpose and subject as follows:

"* * * An Act to create and establish a public service commission, prescribing its powers and duties."

Immediately following which it enumerated the following particulars:

"And to provide for the regulation and control of public service corporations, persons and public utilities * * *."

The following is stated in the decision:

"Replying to this objection, counsel for appellant say that we should 'find that the title to the act, "An Act to create and establish a Public Service Commission, prescribing its power and duties," is broad enough to include all the duties and powers given to the Commission by the Public Service Commission Law * * *.' Under the foregoing rule, this suggestion can have no application because the title is not confined to any such general statement. It immediately descends to particulars by limiting the objects of 'regulation and control' to 'public service corporations, persons and public utilities,' without mentioning municipalities."

In the case of Graves v. Purcell, 85 S. W. (2d) 543, in an opinion by Commissioner Cooley, approved by the Supreme Court en banc, is a collection of the rules applying to Section 28 of Article IV. You will note that in the Graves case, supra, Judge Cooley stated the exceptions to the general rule to be that where an act contains matters not included in the title, but which are not restrictive of the general purpose of the act, they may be included in a bill.

The question arises, are the clauses in the act restricted to the expense of candidates, to prescribing the duties of candidates and political committees, and providing penalties and remedies for violation of the act? Or, is Section 11786 within the general subject of the title, "An Act to prevent corrupt practices in elections", and unrestricted by the subsequent clauses of the act? If the former, of course, it would include corporations, if the latter, it would exclude corporations. I have been unable to find any authority that is decisive of the above question, and it appears to me to be a very close question of which the court could take either view, but it is my opinion the title of the act does not comply with the mandatory requirements of Section 28, Article IV, of the Missouri Constitution.

II.

The next question is: Does Section 11786 include corporations organized under the laws of another state and licensed to do business in Missouri, or only to domestic corporations?

There can be no serious doubt but what the statute is penal and therefore, requires strict construction. Penalties cannot be created by construction, and nothing can be included in it which is not clearly described in the statute. The Supreme Court of Missouri in passing upon certain provisions of the Act stated in the case of *State ex inf. v. Bland*, 144 Mo. 534, that:

"This act is penal in its every nature and fibre. It provides for punishment as for felonies and as for misdemeanors, and also for forfeiture of office even after the incumbent has received a majority of the votes cast at the election and been inducted into office. The act should therefore be strictly construed, and nothing should be regarded as included in it which is not clearly and intelligently described in its very words. *Rozelle v. Harmon*, 103 Mo. 339; *Connell v. Western Union Tel. Co.*, 108 Mo. 459; *State ex rel. v. Smith*, 114 Mo. 180; *Dudley v. Western Union Tel. Co.*, 54 Mo. App. 391."

The following language in the statute, "Any corporation organized and doing business under and by virtue of the laws of this state" casts a serious doubt as to whether or not it was the intention of the legislature to include foreign corporations. At any rate, the legislature did not by words include foreign corporations but only domestic corporations, and certainly the legislature understood the difference between foreign and domestic corporations, and the only way the Act could be applicable to foreign corporations would be by construction.

There can be no serious question that the rule of strict construction of penal statutes has been consistently adhered to by the Missouri courts. *State v. Bartley*, 304 Mo. 58; *State v. Owens* 268 Mo. 481. The rule is clearly stated in 25 R. C. L. p. 1081, which is as follows:

"Under the rule of strict construction, such statutes (penal statutes) will not be enlarged by implication or intendment, beyond the fair meaning of the language used, and will not be held to include other offenses and persons than those which are clearly described and provided for, although the court may think the legislature should have made them more comprehensive."

If foreign corporations are to be included within the terms of the Act the word "and" appearing in the following phrase of the act must be interpreted to be "or" to-wit: "Organized and doing business" so that the phrase would be read "organized or doing business". It is true that the courts have held in penal statutes where it was clear and beyond question that the word "and" should be construed and read as "or" in order to convey the plain intention of the legislature.

The courts of our state and other states have held that a penal statute can never be extended by construction or implication, and to change the construction of the word "and" to "or" would bring within the terms and provisions of the Act a class of corporations, to-wit, foreign corporations, not named in the Act. However, in the case of *State ex rel Stinger v. Kruger*, 280 Mo. 293, the court said:

"In a prosecution under a statute to regulate the sale of intoxicating liquors, which declared that 'for every violation of the provisions of the first and second section of this act, every person so offending shall forfeit and pay a fine,' etc., and was construed to mean or. The first section of the statute prohibited the sale, without a license, of intoxicating liquors to be drunk upon the premises where sold; the second section made it unlawful to sell to minors, persons intoxicated, etc. The defendant was convicted for selling without a license, and on appeal contended the punishment prescribed was for a violation of the first and second sections; that is, both, and he had been wrongly sentenced for violating only the first section. The opinion treated this contention lightly, as it deserved to be, saying: 'Even a penal law should not be construed so strictly as to defeat the obvious intention of the Legislature. (American Fur. Co. v. United States, 2 Peters, 358). And and or are convertible as the sense of the statutes may require. (Townsend v. Read, 10 C. B. (N. S.) 308; Boyles v. Murphy, 55 Ill. 236). And this is the rule even in a criminal statute. (State v. Myers, 10 Iowa, 448; Miller v. the State, 3 Ohio St. 476.)' (People v. Sweetser, 1 Dak. 308, 314.)"

"According to those authorities and others we might cite, the courts will depart from the literal meaning of the words of a penal statute even when to do so will be to the disadvantage of the accused; and this doctrine is applied in interpreting the very words with which we are concerned. In harmony with the above cases, and expressly approving some of them, this court held the word or in a statute defining a crime, should be construed to mean and in order

to avoid attaching a meaning to the law which would be inconsistent with a rational purpose in its enactment. (State v. Long, 238 Mo. 383, 392.) A text-writer of high authority says: 'The conjunction and will be read as or and or as and when the sense obviously requires and this, in plain cases, even in criminal statutes against the accused.' (Bishop, Stat. Crimes 3 Ed.), p. 259.)"

In reading the above case it shows that the court held that "The conjunction and will be read as or and or as and when the sense obviously requires and this, in plain cases, even in criminal statutes against the accused", in order to avoid attaching a meaning to a statute which would be absurd and inconsistent with the rational purpose of the legislature. The courts give the words "and" and "or" such construction as to uphold the obvious intention of a legislative act in order to prevent the legislative purpose from being defeated. I know of no case where a court in construing the words "and" and "or" subjected corporations or any class of persons to penalties based upon the uncertain meaning of the intention of the legislative act.

III.

With reference to your question, if the statute applied to utility corporations would it not also apply to all other types of corporations, in my opinion it would include newspaper corporations, religious, educational, benevolent, scientific and all others. The statute does not classify utilities. The word corporation is inclusive and means all domestic corporations at least. If a proper construction of the statute is to include foreign corporations it would naturally follow that it would be applicable to all foreign corporations licensed to do business in the State of Missouri.

I think it unnecessary to lengthen this opinion by a discussion of whether or not the statute is in conflict with and violates the fourteenth amendment of the United States in that it denies to corporations protection of the law equal to that of natural persons. A leading case on the subject of the right of the State to create classifications between natural persons and artificial persons (corporations) based upon the difference in the right of the two where proper reason exists, is the case of *Mallinckrodt Chemical Works v. State of Missouri*, 249 Mo. 702, 238 U. S. 41, 59 L. Ed. 1192, in which the court used the following language:

"* * * As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. * * *

* * * * *

"It is insisted that to require an affidavit of innocence by the managing officers of corporations is an unjust discrimination against them, and hence repugnant to the 'equal protection' provision, because individuals, partnerships, and associations of individuals, although equally within the law against monopolies (sections 10,299, 10,303), are not required to make similar exculpatory affidavits. The question is whether, for the purpose of such a disclosure as is required by section 10,322, corporations may be placed in one class and individuals in another. The answer is not at all difficult. Of course, corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject. Classifications must be reasonable; that is to say, it must be

based upon some real and substantial distinction having a just relation to the legislative object in view. But here, as in other questions of alleged conflict with constitutional requirements, every reasonable intendment is in favor of the validity of the legislation under attack. Corporations, unlike individuals, derive their very right to exist from the laws of the state; they have perpetual succession; and they act only by agents, and often under circumstances where the agency is not manifest. The legislature may reasonably have concluded that, for these and other reasons, corporations are peculiarly apt instruments for establishing and effectuating those trusts and combinations against which the prohibition of the statute is directed, that their business affiliations are not so easily discovered and traced as those of individuals, and that there was therefore a peculiar necessity and fitness in annually requiring from each corporation a solemn assurance of its nonparticipation in the prohibited practices. The act is, in this respect, fairly within the wide range of discretion that the states enjoy in the matter of classification. *Missouri, K. & T. R. Co., v. Cade*, 233 U. S. 642, 650, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678, and cases cited."

The above case is one of the leading authorities on the question, and in applying the rule of the court in the case *supra*, you will readily see that the court might hold the statute violates the Fourteenth Amendment of the Constitution of the United States.

Mr. H. A. Kelso

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CONCLUSION.

Under the statement of facts contained in your letter, and the fact that the validity of Section 11786 has not been passed upon by any appellate court, I am constrained to say that I do not feel justified in instituting an action against the Public Service Corporation.

You inquire if I would furnish you assistance if you should determine to bring an action against the Public Service Corporation. It has always been my policy to furnish Prosecuting Attorneys assistance when requested. However, I do not believe that in view of the law and facts anyone could fairly or justly condemn or criticize you for refusing to institute the litigation and taking the risk of having your county pay the cost of the suit.

Yours respectfully

Roy McKittrick
Attorney General

RM:EMW

MISSOURI MANUAL:
SECRETARY OF STATE:

Exact salaries of all employees of the State must be given to the Secretary of State at the time he requests the information. Bracketing or giving or salary ranges will not suffice.

September 9, 1941

Mr. Elmer John Keitel, Sr.
Chairman
Unemployment Compensation Commission
Jefferson City, Missouri



Dear Mr. Keitel:

This department acknowledges receipt of your letter of September 8, 1941, wherein you make the following inquiry and wish our official opinion:

"We wish to request the opinion of your department as to the application of House Bill No. 230 which was recently passed by the Sixty-first General Assembly to the publication of salary schedules of the personnel of the Unemployment Compensation Commission."

"Under the system adopted by the Commission in collaboration with the Federal Social Security Board, salary schedules for the various classes of employees have been established and there is a minimum and maximum salary for each class of employees. The question we desire answered is: Does House Bill No. 230 require that the salary actually being received at the present time by each individual employee be shown after the name of the employee, or may the Commission show the salary range for various classes, and list below the names of the employees, showing the actual position held by each but not the actual salary now being received?"

September 9, 1941

"In view of the fact that this information is required to be submitted to the Secretary of State's office by September 10, we would appreciate receiving your opinion thereon as soon as possible."

Chapter 120 of Article 2, R. S. Mo. 1939, refers to the Missouri Manual and state publications. We are primarily interested in the Missouri Manual. Under Section 15000, it is the duty of the Secretary of State biennially, as soon as practicable after the organization of each General Assembly, to prepare 25000 copies of the Missouri Manual. In 1939 and 1941, the General Assembly amended Section 15002 relating to certain information to be published in the official manual. Originally this section required the name, post office address and previous occupation of every official and employee of the State. As amended by House Bill No. 230 the section now reads as follows:

"There shall be published in said manual the name, salary and post office address, and previous occupation, including street and number, of every officer and employee, of this state, and it shall be unlawful for any officer of this state to pay or authorize the payment of a salary to any appointee or employee unless he shall first file with the secretary of state, for publication in the manual, the name, salary, post office address and previous occupation of such employee."

It will be noted that the last portion of the section, quoted supra, prohibits payment of a salary to an appointee or employee unless such data be filed with the Secretary of State. We have examined the House journal with reference to the legislative debates on the question which you present and we have come to the conclusion that the very purpose of the amendment was to compel the printing of the exact salary of every employee and appointee of the State. It is universally held by the courts that the intention of the legislature is the paramount guide to interpreting a statute. We think the

Mr. Elmer John Keitel, Sr.

-3-

September 9, 1941

statute is plain and unambiguous, and the manner of giving the information on the salaries of your department which you propose would constitute a direct evasion of the statute.

We are, therefore, of the opinion that you cannot comply with the terms of Section 15002, as amended, by simply bracketing or giving the salary ranges of certain employees in a given class or classes, but must give the actual salary each and every employee is receiving in your department at the time that you comply with the request of the Secretary of State for such information, as well as all other information exactly as required by the statute.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN:NS

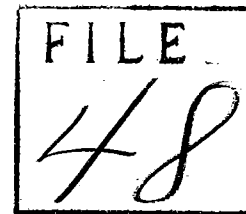
GAMBLING DEVICE:

Slot machines which pay off in cigarettes handed to player by owner of establishment are gambling devices. 13

October 11, 1941

10-13

Honorable H. A. Kelso
Prosecuting Attorney
Nevada, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"Certain merchants here have been approached on the subject of operating cigarette 'machines.' These machines are operated by dropping a penny in a slot. For each penny dropped the player receives a ball of gum. There are certain wheels which spin in different directions and when stopped form combinations of numbers or figures which when in certain sequences entitle the player to a package of cigarettes which are handed to the player by the merchant in whose place the machine is located. Are such machines gambling devices or 'slot machines?'"

Section 4675, R. S. Mo. 1939, provides as follows:

"Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling

table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

In State v. Follnow, 14 S. W. (2d) 574, the Supreme Court of Missouri had before it a person convicted of setting up and keeping a gambling device. According to the opinion the machine was of the following nature:

"It was operated by putting a nickel in the slot and taking out mint or something of the kind. The machine itself, as reconstructed, did not pay the player when he won. The winner was paid by the man in whose place the machine was operated."

The court held that,

"The evidence sufficiently shows that it was a gambling device, * *"

In State v. Godos, 39 S. W. (2d) 784, a similar device to the one described in your opinion request was held to be a gambling device under Section 4675, supra.

Conclusion

It is, therefore, the opinion of this Department that a machine which is operated by dropping a penny in a slot and

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a lever is pushed and certain wheels spin in different directions and when stopped form combinations of numbers and figures, which, when in certain sequences, entitle the player to a package of cigarettes which are handed to the player by the merchant in whose place the machine is located, "is a slot machine and a gambling device" and prohibited by Section 4675, R. S. Mo. 1939.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

CRIMINAL PROCEDURE: Affidavit substantially complying with civil procedure for appeal is sufficient for appealing in a criminal case.
BOND: Criminal appeal bond, after conviction, must be approved by the circuit judge and not the circuit clerk.

December 12, 1941 .

Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of December 10, 1941, which is as follows:

"On the 5th day of November, in the circuit court of this county, one Leonard Huff was tried on a charge of second degree burglary and larceny committed in connection with the burglary, the jury finding him guilty of burglary and larceny and assessed his punishment for the burglary at two years in the penitentiary but assessed no punishment for the larceny.

"Court then adjourned to December 1, 1941, to try other cases and to allow time for the filing of a motion for new trial in the Huff case.

"Motion for new trial was filed in due time, and on the 3rd of December, 1941, the motion for new trial was overruled, and the following minute entry was made by the clerk.

"Motion for new trial heretofore filed overruled. Affidavit for appeal filed, and appeal granted to Supreme Court. Appeal bond fixed at \$2,500.00 to be approved by the clerk in vacation, said bond to be filed on or before Dec. 8, 1941."

"Following is the affidavit for appeal,

omitting caption:

"Leonard Huff, the defendant in the above entitle cause, being duly sworn according to law, upon his oath states that the appeal in said cause is not made for vexation or delay, but because he, the said defendant, believes himself to be aggrieved by the judgment and decision of the court.'

"Court adjourned on the 3rd day of December until next regular term, and on the 5th day of December, the following bond was filed with the clerk and approved by him:

"We, Leonard Huff as Principal (omitting names of sureties) as sureties, are held and firmly bound to the State of Missouri, in the sum of Twenty Five Hundred Dollars, but to be void upon this condition: Whereas, the said Leonard Huff, the above named defendant, was on the 5th day of November, 1941, convicted on a charge of burglary and larceny, and his punishment fixed at Two years in the Missouri State Penitentiary; and Whereas the said Leonard Huff has been allowed an appeal by the court to the Supreme Court of Missouri. Now, if the said Leonard Huff, defendant and appellant, shall appear in the supreme court and surrender himself to the Marshall of said court if so ordered to so do by said court and to obey the mandate as the Supreme Court shall direct, and that he will render himself in execution, and obey any order which shall be made in the premises, then said bond to be void; otherwise to remain in full force and effect.

"Approved this 5 day of December, 1941.
R.C. Jones, Clerk Circuit Court.'

"I do not believe that the affidavit

for appeal meets the requirements of Section 4130, R. S. 1939, yet the supreme court in the case of State v. Wilson, 136 S. W. (2d) 1. c. 994, held a similar affidavit met the requirements of the above section, the objection to the affidavit in the case cited being that the affidavit 'does not purport to contain a prayer for appeal.' The affidavit did state "that the appeal prayed for" in the above entitled cause, etc. In this case it does not contain any such words.

"I find no law giving authority to the court to order that the appeal bond be approved by the clerk in vacation. In my opinion, this bond is not valid, as it does not meet the requirements of Sec. 4137, R. S. 1939. Section 4136, R. S. 1939, provides such recognizance, on habeas corpus, with sufficient sureties, be approved by the court or judge.

"The affidavit being insufficient to be considered an application for appeal, and especially the recognizance having been given after court adjourned and approved by the clerk is invalid, in my judgment, and the defendant could be by proper proceedings, surrendered by the sheriff to the warden of the penitentiary."

Section 4130, R. S. Missouri 1939, provides as follows:

"In all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant, provided, defendant or his attorney of record shall during the term at which the judgment is rendered, file his written application for such

appeal."

In the above section all that is necessary to ask for an appeal is the filing of a written application. It has been held in cases hereinafter set out that the filing of the affidavit, as required under the civil code, is considered the same as a written application for appeal. In the case of State v. Wilson, 136 S. W. (2d) 993, 1. c. 994, the court, in holding the affidavit sufficient, said:

"The requirements of the statute with respect to appeals in criminal cases have undergone change from time to time. Under Sec. 2696, R. S. 1899, Sec. 4277, R. S. 1889; Sec. 1973, R.S. 1879; Sec. 1, p. 855, c. 215, Gen. Stat. 1865, the condition imposed upon the defendant in order to perfect an appeal was simply that it be 'applied for' during the term at which the judgment was rendered. This was changed by Laws 1909, p. 461, Sec. 5292, R. S. 1909; Sec. 4086, R. S. 1919, so as to require an affidavit precisely like that provided under the code of civil procedure, except it could not be made by an agent or attorney. The statute in its present form, requiring a 'written application' was enacted in 1925, p. 198.

"The affidavit in the case at bar (omitting caption, signature and jurat) reads as follows: 'Richard Wilson, being duly sworn, makes oath and says that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment and decision of the court.' The objection that this instrument is not a 'written application' for an appeal is that the affidavit 'does not purport to contain a prayer for an appeal. Its reference to "the appeal prayed for in the above entitled cause" is in the past tense, as if at some previous stage of the case a prayer for an appeal had been made.' In

State v. Smith, 190 Mo. 706, 90 S. W. 440, 444, decided in 1905, under Sec. 2696, R. S. 1899, embodying the requirement that the appeal be 'applied for,' it was held that an affidavit conforming to the civil code was not necessary, but in reaching that conclusion it was pointed out that, 'In the country circuits the universal practice in perfecting appeals conforms to the requirements of the statute applicable to civil cases, and affidavits are invariably filed.' That practice has again grown up under the present statute, as the instant case attests. We think the filing of such an affidavit a substantial compliance with the statute, and, therefore, overrule the state's motion to dismiss."

In the above holding it is specifically stated that an affidavit conforming to the civil code was not necessary and further held that the affidavit in the case was a substantial compliance with the statute. This affidavit did not contain a prayer for an appeal.

Under the facts in your request the trial court saw fit to recognize the affidavit of Leonard Huff for an appeal in that he ordered the record to read as follows:

"Motion for new trial heretofore filed overruled. Affidavit for appeal filed, and appeal granted to Supreme Court. Appeal bond fixed at \$2,500.00 to be approved by the clerk in vacation, said bond to be filed on or before Dec. 8, 1941."

The affidavit in question stated that the appeal was not made for vexation or delay and further stated all of the elements necessary for an appeal. Under the Constitution it is not mandatory that the court allow an appeal, but under the statute, upon compliance with the procedure set out, the court must allow an appeal. The whole matter is governed by statutory law and not by the Constitution. In our opinion we believe that the affidavit which was approved by the court

in granting the appeal was sufficient.

On the question of bail after conviction the foremost authority and holding was in the case of *Ex Parte Carey*, 267 S. W. 806, 1. c. 807, where the court said:

"In Missouri there is no constitutional right to bail after conviction; the provision guaranteeing bail, except in capital cases, relates to persons who are accused, before trial and conviction. *Ex parte Heath*, 227 Mo. 393, 126 S. W. 1031. Nor is there any constitutional right of appeal in this state. Such right is enjoyed solely by statute, and the privileges and immunities ancillary thereto, including stay of execution and bail pending the appeal, are likewise of statutory creation, and consequently limited to the number and kind given by statute. *Ex parte Heath*, supra; *State v. Leonard*, 250 Mo. 406, 157 S. W. 305.

"The statutory provisions which govern the staying of executions, and the letting of the defendant to bail, pending an appeal from a judgment in a criminal cause, are embodied in the following sections, Revision of 1919:

"Sec. 4088. No such appeal or writ shall stay or delay the execution of such judgment or sentence, except in capital cases, unless the Supreme Court, or a judge thereof, or the court in which the judgment was rendered, or the judge of such court, on inspection of the record, shall be of opinion that there is probable cause for such an appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the Supreme Court thereon, and shall make an order expressly directing that such appeal or writ of error

shall operate as a stay of proceedings on the judgment; but in capital cases the order granting the appeal shall operate as such stay absolutely.

"Sec. 4089. If the court in which the judgment was rendered, or the judge thereof, refuse such order, he shall nevertheless suspend the execution of the judgment, except as to fine and costs, if necessary, to allow sufficient time to make application to the Supreme Court, or a judge thereof, for such order.

"Sec. 4090. When any order to stay proceedings shall be made by the Supreme Court, or by any judge in vacation, the same, together with the writ of error, if any, shall be filed with the clerk of the court in which the judgment was rendered, who shall furnish the party filing the same with a certificate thereof, together with a copy of the order.

"Sec. 4091. If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty of the sheriff, if the order were made by the court rendering the judgment, or upon being served with the clerk's certificate and a copy of the order, to keep the defendant in custody without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal or the writ of error.

"Sec. 4092. In all cases where an appeal or writ of error is prosecuted from a judgment in a criminal cause, except where the defendant is under sentence of death or imprisonment in the penitentiary for life, any court or officer authorized to order a stay of proceedings under the preceding provisions may allow a writ of habeas corpus, to bring up the defendant,

and may thereupon let him to bail upon a recognizance, with sufficient sureties, to be approved by such court or judge.'

"If the construction of these sections was one of first impression the writer would unhesitatingly hold with the Attorney General, who raises the question, that a convicted defendant cannot be let to bail under section 4092, pending an appeal from a judgment of conviction, unless and until a stay of execution has been granted under the provisions of section 4088. The two sections are in pari materia; they must be read together and both given effect. If section 4092 authorizes the bailing of a defendant regardless of whether he is entitled to a stay of execution under section 4088, then it completely nullifies the plain mandate of the latter section. It seems beyond cavil that, unless a defendant is entitled to a stay of execution, he is not entitled to bail, which is in effect a stay. According to my further reading of the sections just mentioned, a stay of execution, though a condition precedent to bail, does not in and of itself entitle the defendant to bail. He may have an absolute right to a stay of execution under section 4088 and yet bail may be withheld in the discretion of the court. According to the plain language of section 4092, the authority therein conferred is purely discretionary."

The above case very specifically sets out the law in reference to bail after conviction.

Sections 4088, 4089, 4090, 4091 and 4092, R. S. Missouri 1919, mentioned in the above case are now Sections 4132, 4133, 4134, 4135 and 4136, R. S. Missouri 1939, respectively. It will be noticed under Section 4092, R. S. Missouri 1919,

which is now Section 4136, R. S. Missouri 1939, that it specifically states, "* * may allow a writ of habeas corpus, to bring up the defendant, and may thereupon let him to bail upon a recognizance, with sufficient sureties, to be approved by such court or judge." It will be seen that it is discretionary with the court whether or not he will grant a writ of habeas corpus and allow bail, but it specifically states that if he grants the writ of habeas corpus the sufficient sureties must be approved by such court or judge. No mention is made of the approval of the surety under the recognizance in any other manner.

Under this section if the trial court, in its discretion, denied bail, the defendant could petition, either by writing or orally, to an appellate court under the same section for bail after conviction. It was so held in the case of *Ex parte Beckenstein*, 104 S. W. (2d) 404, paragraphs 1-3, where the court said:

"The city complains that no notice was given to it of this application. The city was not a party to the proceeding and was not entitled to any notice. Notice was given respondent, the sheriff of Buchanan county, and he does not complain. But the writ of habeas corpus is of such importance to the liberty of the people that our writ may issue even though unsupported by any petition. Section 1430, R. S. Mo. 1929 (Mo. St. Ann. section 1430, p. 1638); *State ex rel. Hulen v. Trimble*, 310 Mo. 274, loc. cit. 286, 275 S. W. 536, loc. cit. 540. And it is not necessary that application first be made to an inferior court. *Ex parte Hagan*, 295 Mo. 435, loc. cit. 440, 441, 245 S. W. 336."

Since Section 4092, R. S. Missouri 1919, which is now Section 4136, R. S. Missouri 1939, provided that the recognizance with sufficient sureties should be approved by such court or judge it cannot be approved in any other manner. When special powers are conferred or special methods are prescribed for exercise of power, the exercise of such power is within the maxim that the expression of one thing is the exclusion of another and the doing of the thing specified

except in particular way pointed out is nugatory. Kroger Grocery and Baking Company v. City of St. Louis, 106 S. W. (2d) 435, 341 Mo. 62, 111 A. L. R. 589; State ex rel. Kansas City Power and Light Company v. Smith, 111 S. W. (2d) 513, 342 Mo. 75. Section 4136, R. S. Missouri 1939, has not been passed upon in this state but was mentioned in the case of State v. Trimble, 275 S. W. 536, where in paragraph 8 it stated:

"Whether or not respondents had authority to intrust the approval of the securities to the clerk of the circuit court, we need not here inquire, since such question does not go to the question of jurisdiction of respondents nor to the question of an attempted exercise of powers in excess of their jurisdiction, but only goes to the manner in which they exercised such jurisdiction. If respondents acted erroneously, their act cannot be revealed by this proceeding in certiorari. State ex rel. v. Smith, 101 Mo. 174, 14 S. W. 108; State ex rel. Mo. P. Ry. Co. v. Edwards, 104 Mo. 125, 16 S. W. 117; State ex rel. Scott v. Smith, 176 Mo. 90, 75 S. W. 586. That question might have some bearing if the validity of the bail so taken is ever challenged, but such question is not before us, and we express no opinion upon it."

The facts in the above case were to the effect that a circuit judge refused to admit a defendant to bail and he filed a writ of habeas corpus in the Court of Appeals at Kansas City. The writ of habeas corpus was issued without the issuance of a written petition to the effect that the defendant should be admitted to bail and that the bail should be approved by the clerk of the circuit court where the defendant had been refused bail. Upon certiorari to the Supreme Court of this state the court set out in its opinion, paragraph 8, supra. It did not pass specifically on the section but inferred that the validity of the bail might be questioned. In view of these authorities above set out there is no question but that the bond approved by the circuit clerk is nugatory, and there is no question but

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that the sheriff has the authority to apprehend the defendant and hold him either for a bond or upon proper authority from the court transmit him to the penitentiary. If the court in this case had issued a stay of execution, as set out under Section 4132, it would be necessary to hold the defendant in the county jail of Iron County, but since under the holding of *Ex parte Carey*, supra, the filing of the bond took the place of a stay of execution and since the bond does not comply with the statutory law there is no stay of execution and the defendant is subject to apprehension and transportation to the penitentiary upon proper commitment papers.

We would suggest, however, that the defendant be apprehended and that he be given the opportunity to provide a bond in compliance with Section 4136, R. S. Missouri 1939. We suggest this procedure for the reason that if he is taken to the penitentiary he may file a writ of habeas corpus in the Supreme Court for admission to bail pending the appeal in his case which would mean much trouble and expense on the part of the county and state.

CONCLUSION

In view of the above authorities it is the opinion of this department that the affidavit for appeal in the case set out in your request is a substantial compliance with Section 4130, R. S. Missouri 1939.

It is further the opinion of this department that a bond approved by the circuit clerk is void and does not comply with Section 4136, R. S. Missouri 1939.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

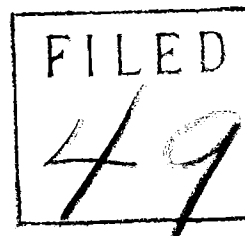
WJB:DA

TAXATION: Notice not required taxpayer on personal property and penalties accrued are payable by the taxpayer and cannot be abated by the county court.

August 2, 1941

Mr. Raymond J. Kiley
City Attorney
Portageville, Missouri

Dear Sir:



We are in receipt of your request for an opinion dated July 30, 1941, which reads as follows:

"Recently hundreds of citizens of this County have received letters from the Prosecuting Attorney advising them that their personal taxes for the years 1936 to 1940 inclusive were delinquent. The letters suggested that in the event the taxes together with accrued penalties were not paid within a period of two weeks, suits might be instituted for collection.

"In many of the cases the assessor did not personally, or by deputy, inspect the taxes property; nor, did he call upon the taxpayer for a listing of such property. In other cases the taxpayer was affirmatively advised by the deputy collector that he should not pay personal taxes because they were not collectible under the law. In still other cases taxpayers have asked for a full statement of all taxes due and upon receipt of the statement paid the bill and departed unconscious of the fact that they still owed taxes.

"Under these circumstances several questions, which are unclear in law, present themselves, viz:

"(a) In the event that the assessor,

either personally or by deputy, failed to view the property or call upon the taxpayer for a listing of his personal property, would the assessment be valid?

"(B) Is the taxpayer liable for penalties, having relied on the advice of the deputy collector that the taxes should not be paid?

"(C) Is the taxpayer liable for taxes after offering the full amount of taxes due and receiving a receipt which admitted personal taxes of the omission was the fault of the collector?

"(D) Has the County Court any authority to remove the penalties? If not can the penalties be abated by any authority?

"In nearly every instance the taxpayer is willing to pay any taxes that may be due, but feels that the imposition of penalties is inequitable since the non-payment was not his omission."

This request for an opinion will be answered as of one question and will not be divided into A, B, C, and D. All of the questions are so closely related that it would be a duplication to give authorities on each question separately.

Section 10973, R. S. Missouri 1939, partially reads as follows:

"In all counties, except the city of St. Louis, the assessor shall be provided with two books, one to be called the 'real estate book,' and the other to be called the 'personal assessment book.' * * * * *

Section 10990, R. S. Missouri 1939, partially reads as follows:

"The assessor, except in St. Louis city, shall make out and return to the county court, on or before the twentieth day of January in every

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year, a fair copy to the assessor's book, verified by his affidavit annexed thereto, in the following words, to-wit: * * * * *

It will be noticed under the two above sections the assessor must make out two books; one to be called "personal assessment book", the other to be called the "real estate book". These books, under Section 10990, supra, must be turned in to the county court on or before the 20th day of January in every year.

Section 11052, R. S. Missouri 1939, reads as follows:

"As soon as may be after the tax book of each year has been corrected and adjusted, and the amount of county tax stated therein according to law, the county courts shall cause the same to be delivered to the proper collector, who shall give receipts therefor to the clerks of the county courts respectively; and each collector shall be charged by such clerk with the whole amount of the tax books so delivered to him."

Under the above section, each collector is charged, by the clerk of the county court, with the amount of the tax books so delivered to him. When the taxes are not paid to the collector, in accordance with the amounts set out in both the personal and real estate books, then under Section 1110, R. S. Missouri 1939, he shall make lists thereof, one to be called the "personal delinquent list" and the other the "land delinquent list."

Section 11112, R. S. Missouri 1939, partially reads as follows:

"* * * For the purpose of this chapter, personal tax bills shall become delinquent on the first day of January following the day when said bills are placed in the hands of the collector, and suits thereon may be instituted

after the expiration of said first day of January, and within five years from said day. * * * * *

Under Section 10973, supra, the assessor having made his levy it becomes the duty of the taxpayer to pay the tax without notice. We only find one section which provides for the notice of the payment of all taxes. This section is 11079, R. S. Missouri 1939, and reads as follows:

"It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; said notice shall be given by posting up at least four written or printed handbills in different parts of each municipal township in said counties, and by publication for two weeks in a newspaper, if one be published in the county, in which he shall notify said inhabitants to meet the collector at such places in their respective townships as may be named therein, and the number of days (not less than three) that he will remain at each of such places for the purposes aforesaid; and it shall be his duty to attend at the time and place thus appointed, either in person or by deputy, to receive and collect such taxes: Provided, the county court may relieve the collector from visiting any municipal township in his county by an order of record to be made before notice under the provisions of this section is given."

Section 11083, R. S. Missouri 1939, makes it the duty of the collector to furnish to all nonresident taxpayers a statement of the amount of taxes assessed against

real estate; but these sections have been declared to be directory and not mandatory.

In the case of St. Francis Levee Dist. v. Dorroh, 289 S. W. 925, 1. c. 928, the court said:

"* * In passing, it might be noted that the date of delinquency of such levee taxes, or annual installments thereof, is precisely and definitely fixed by the statute, and is not dependent whatsoever upon the giving of any notice to the taxpayer or the making of a demand upon him for payment of such taxes. It might also be stated that appellant does not challenge herein the validity of the assessment of special benefits made against his respective lands, nor does he challenge the validity of the levee taxes (based upon such special benefit assessment) or the levy of the annual installments thereof; in fact, he has apparently recognized their validity by making payment of the principal of said annual installments. * * * "

The court further said: (par. 2 same 1. c.)

"* * In State ex rel v. Wilson, 216 Mo. 215, 287, 115 S. W. 549, 571, we said:

"This court has many times held that, when an assessor makes out his assessor's books, jurisdiction attaches and the rest of the proceedings are only directory (citing authorities). The broad principle announced and underlying all of these cases is, that when a valid assessment is shown, its entry upon the tax book and the failure of the property owner to pay it when due, a good cause of action is made out, and that all other requirements and proceedings are mere formalities and intended to assist and facilitate the collection of the taxes, and hindrances thrown in the way of a speedy collection of them."

"To like effect is State ex rel v. Dungan, 265 Mo. 353, 177 S. W. 604."

"In Noland v. Busby, 28 Ind. 154, a somewhat similar statute was held to be merely directory. Said that court:

"The statute makes it the duty of the treasurer on receipt of the duplicate, forthwith, to 'cause notice to be posted up at the courthouse door, and in three other public places in the county, and to cause the same to be published in some newspaper having general circulation in his county, if any there be, for three weeks successively, stating in such notice the amount of tax charged for state, county, school, road or other purposes, on each one hundred dollars valuation of the taxable property; and also the tax on each poll for state, county and other purposes.'" * * * If a valid assessment and levy had been made of the taxes and a proper duplicate thereof made out and placed in the hands of the treasurer for collection, his failure to give the notice would not invalidate the tax, or prevent its subsequent collection. That, like various other duties enjoined by the statute, can only be regarded as directory to the officer; the neglect to give the notice would not discharge the tax, or present a valid obstacle to the collection thereof."

In your request you ask:

"Has the County Court any authority to remove the penalties? If not can the penalties be abated by any authority?"

The county courts have no authority to abate penalties but the Legislature may pass a law authorizing them to abate penalties.

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At the present time the county court has no authority, by legislation, to abate penalties. The county courts are not the general agents of the counties or the state. It was so held in *Sturgeon v. Hampton*, 88 Mo. 203, 1. c. 213, where the court said:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void. * * * * *

In saying the Legislature has the authority to abate penalties, we are not overlooking Article IV, Section 51 of the Constitution of Missouri which reads as follows:

"The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any county or other municipal corporation therein."

or Article IV, Section 53, paragraph 22 of the Constitution of Missouri which reads as follows:

"The General Assembly shall not pass any local or special law:

* * * * *

"(22) Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:

* * * * *

At first reading, the above constitutional sections appear to even prohibit the Legislature from enacting laws abating penalties, but the two sections have been construed in *State v. Koeln*, 61 S. W. (2d) 750, 1. c. 755, paragraphs

11, 12, where the court said:

"Another clause of our Constitution, subsection 22, section 53, of said article 4, prohibits the enactment of any special or local law remitting 'fines, penalties and forfeitures.' It seems clear that this group of words is totally unrelated in signification to the group first discussed. It is evident that if both said subsection 22 and section 51 relate to the same subject, there would be a duplication, for section 51, if all inclusive, would render the subsection of 53 superfluous and nugatory. But under established rules of construction the courts should resolve seemingly conflicting or overlapping provisions of the Constitution by harmonizing them and rendering every word operative, if possible, so as to give effect to the whole. Applying that rule, and also the rule that the Legislature possesses all legislative powers not prohibited by the Constitution, expressly or by necessary implication, we are of the opinion that from the express limitation contained in said subsection, prohibiting the remission of fines, penalties, and forfeitures by special law, a necessary implication arises that general laws on that subject are not prohibited by the Constitution but are within the fundamental powers just referred to, and of opinion also that said section 51 does not, by express words or by necessary implication, prohibit the remission of fines, penalties, or forfeitures by general laws. * * * * *

They were also construed in State v. Bair, 63 S. W. (2d) 64, 1. c. 66, paragraphs 4 and 5, where the court said:

"* * In this situation, the legis-

lative power to remit the penalties involved here is well settled in principle. In Maryland v. B. & O. R. R. Co., 3 How. 534, 11 L. Ed. 714, it is held that the Legislature has a right to remit penalties imposed by law. 'In this aspect of the case,' the court said at page 552 of 3 How., 11 L. Ed. 714, 'and upon this construction of the act of Assembly, we do not understand that the right of the state to release it is disputed. Certainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty is of itself a remission.'

"* * * The Thirty-Eighth General Assembly passed an act (Laws 1895, p. 243) remitting penalties which seems to have furnished the pattern for No. 80. Unlike the latter, the former conditioned the remission, in instances where suits had been filed, upon the taxpayer's paying the costs together with attorney's fees. In construing the latter provision, this court in State ex rel. Bauer v. Edwards, 162 Mo. 660, 63 S. W. 388, held that the act simply gave the taxpayer an opportunity to avoid the costs and penalties by tendering the amount of the original tax before suit was brought and before the act expired by limitation. So we think that under a proper construction of the statute assailed in the instant case the filing of suits for delinquent taxes and penalties is not prevented, but that penalties are remitted, in the manner provided in No. 80, upon proper tender of payment of the original taxes, without penalties, fees, or costs, before judgment rendered (except as noted later)."

In view of the above two cases the Legislature is prohibited from passing a special law but the courts have construed that it may pass a general law in regard to penalties which has been done in the past few years.

In your request, Section (A) you ask as follows:

"In the event that the assessor, either personally or by deputy, failed to view the property or call upon the taxpayer for a listing of his personal property, would the assessment be valid?"

The law applicable to this question is set out in Section 10950, R. S. Missouri 1939, which partially reads as follows:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. * * * * *

It will be noticed under the above partial section that all that is required of the assessor, or his deputy, is " * * He shall call at the office, place of doing business or residence of each person required by this chapter to list property, * * " Nothing is said in the section requiring him to view the property.

Under Section 10951, R. S. Missouri 1939, it sets out the duties of the assessor, or his deputy, to the effect that if a person required to list property shall be sick or absent when the assessor calls for a list of his property, the assessor shall leave at the office, the usual place of residence or business of such person, a written or printed notice, requiring such person to make out and leave at the place named by said assessor, on or before some convenient day named therein, not less than ten days nor more than twenty days from the date of such notice. It also provides that if the person so notified shall neglect or refuse to deliver his listing made out, signed and sworn to, the assessor shall make the assessment. This section was construed in the case of State ex rel. v. Cummings, 151 Mo. 49, 1. c. 58, where the court said:

" * * * The assessor is required to call in person at the office, place of doing business or residence of each person subject to taxation, and require such person to make a correct statement of all taxable property owned by such person, or under the care, management, or charge of such person. If the owner is not at home, the statute requires that a written or printed notice be left at the place of business or residence of the taxpayer, notifying such person to make a list, and the assessor is required to specifically note the date of the service of such notice. By this personal call or written or printed notice, the taxpayer is secured the privilege of stating exactly what property he has and its value. When this call is made on the taxpayer, and request made on him for his list, or, if he be

absent, the notice is left for him, within the period from June 1st to January 1st succeeding, then jurisdiction is obtained to assess his property. We use the word 'jurisdiction,' for want of a more correct expression. Strictly speaking, tax proceedings are only quasi judicial, but, as they have the effect of judgments, the word 'jurisdiction' can readily be made applicable to them. As notice of strictly judicial proceedings is essential, so likewise it is made necessary in all enlightened systems of just and equal taxation. The similitude may well be continued by holding that, when the party is notified within the time and according to law, the subsequent proceedings may be irregular, and entitle a party to redress on appeal, but they are not void."

Section 10980, R. S. Missouri 1939, reads as follows:

"No assessment of property or charges for taxes thereon shall be considered illegal on account of any informality in making the assessment, or in the tax lists, or on account of the assessments not being made or completed within the time required by law."

This section was construed in the case of State ex rel. v. Wilson, 216 Mo. 215, l. c. 287, where the court said:

"And in the case of State ex rel. v. Phillips, 137 Mo. 259, this court held that, under Revised Statutes 1889, sections 7563, 7584 and 7702, which are the same as sections 9179, 9209 and 9323, Revised Statutes 1899, mere informalities in making assess-

ments of property or charges for taxes thereon, or in the tax lists, or on account of the assessments not being made or completed in the time required by law, and that no informality in making the back tax-book, should affect its validity, and were not defenses in an action to collect back taxes.

It is to be presumed that an assessment was legally made when shown that a tax bill has been issued under such assessment. It was so held in *State ex rel. v. Fullerton*, 143 Mo. 682, 1. c. 686, where the court said:

"The tax bill is, by statute, made 'prima facie evidence that the amount claimed in said suit is just and correct.' 2 R. S. 1889, sec. 7682; *State ex rel. v. Schooley*, 84 Mo. 447. No objection is made that said tax bill is not in proper form. It is not necessary then for plaintiff to go further and show that all steps taken by the assessor were regular. The presumption, in the absence of evidence to the contrary, is that the officer did his duty. *State ex rel. v. Wayne Co.*, 98 Mo. 362. It devolved upon defendant to show any omissions in that behalf after plaintiff had presented proof, which, under the statute, made a prima facie case."

CONCLUSION

In view of the above authorities it is the opinion of this department that the assessor need not view the property to make a valid assessment on personal property.

It is further the opinion of this department that the taxpayer is liable for penalties even though he relies on the advice of the deputy collector that the taxes should

Mr. Raymond J. Kiley

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not be paid.

It is further the opinion of this department that the taxpayer is liable for taxes after offering the full amount of taxes due and receiving a receipt which omitted personal taxes even though the omission was the fault of the collector.

It is further the opinion of this department that at the present time the county court has no authority to remove penalties on personal taxes and can only receive the authority by way of a legislative act and at the present time there is no legislation allowing the county court to remove the penalty assessed on a delinquent personal tax bill.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

SCHOOLS: Two districts are authorized to make a temporary combination of one building for negro children; State Superintendent may make apportionment of state moneys for the temporary combination.

August 11, 1941

2122
Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri



Dear Sir:

You recently wrote this department concerning the question of combining two school districts with reference to negroes. In the first instance, you set forth the specific problems as follows:

- "1. The temporary combination of a school district for the establishment of a colored elementary school and at the same time permit the white school in each district included in the combination to be maintained without combination.
2. The apportionment of state school money on account of the temporary combination of two or more districts for the establishment of a colored school."

Your first question is:

"Is it legal for two or more school districts to provide a temporary combination under the provisions of Section 10457, R. S. Mo., 1939, for the establishment of a colored elementary school and at the same time permit the white schools in each district included in the combination to be maintained without combination?"

Section 10457 refers to the temporary combination for educational purposes of two or more school districts, but, we think, refers solely to the combination of districts which are attended by white children. Said section is as follows:

"Two or more districts may combine temporarily for educational purposes should the school boards of all districts concerned agree to transport the pupils of one or more districts to a schoolhouse elsewhere, and such districts shall receive the same apportionment from the state school fund as they would otherwise have received, and may use such funds, or any part thereof, in transporting pupils: Provided further, that in such temporary combinations the record of daily attendance of pupils from each district shall be kept separate, and credited to their respective districts, as a basis for future apportionments."

We have considered the recent decision of State ex rel. v. Canada, 305 U. S. 337, in which the Supreme Court of the State of Missouri was reversed with reference to its holding on the entrance of a negro law student to the University of Missouri. We do not think this decision has much bearing on the question which you present other than the fact that negro children do not have the privilege of attending the same school, but do have the privilege of attending and having schools of equal opportunity maintained for them.

We must be guided by our statutes with reference to negro children. Section 10350, R.S. Mo. 1939, authorizes the board of directors to establish a school for colored children under certain conditions, or, in lieu thereof, may pay the transportation and tuition charges of such colored children to any district in the county wherein a school is maintained for colored children. There is a further provision in said Section 10350 to the effect that if there is no school building in a school district for colored children, the board of directors is authorized to rent suitable buildings. There is a further provision that the boards of directors of two or more districts may establish a joint colored school, the expense of which is to be borne by each district in proportion to the number of school children enumerated in each.

By the provisions of Section 10456, R. S. Mo. 1939, teaching units are to be determined for each and every district on the basis of the average daily attendance in such district during the preceding year, and any district maintaining a school for both white and colored children is entitled

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to receive aid for both, and the schools are considered separately in allowing the teaching units.

In view of the fact that the statutes plainly provide that each district is to be treated separately and both are to receive aid, and the fact that Section 10350 appears to be liberal with reference to the establishment, that is, the buildings, in the case of colored schools, and by the provisions of Section 10457, permitting the temporary combination of schools, we are of the opinion that it is legal for two or more colored schools to be provided with a temporary combination insofar as buildings are concerned.

II.

"Is it legal to make apportionment of state school money under the provisions of the law for a temporary combination as indicated in Section 10457, R. S. Mo., 1939, when such combination is for colored school purposes only?"

In view of our answer to your first question and the reasons therein stated, we think that it is legal to make apportionment of state school moneys for the temporary combination under the provisions of Section 10350, R. S. Mo. 1939, even though such combination is for colored schools only.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

DWN:NS

SCHOOLS: When state aid may be allowed.

August 18, 1941



Honorable Lloyd W. King
Superintendent
State Department of Public Schools
Jefferson City, Missouri

Dear Mr. King:

This Department is in receipt of your request for an official opinion, which reads as follows:

"In the light of the provisions of the laws governing the distribution of state school money and the recent decision of the Supreme Court, as indicated herein, I shall appreciate your advice and official opinion in answer to the following questions:

"1. Would the existence of any one or all of the following practices, permitted or authorized by the school board, eliminate a school district from qualifying for the distribution and use of public school funds for such units or parts of the school program in which these practices exist:

"a. The attendance of pupils at mass or the giving of any other religious instruction during the school day and under the jurisdiction of school teachers.

"b. The segregation in separate buildings or quarters of school children according to religion.

"c. The employment, as teachers, of Sisters, or others whose special religious vows prevent them from giving secular instruction with complete religious freedom.

"d. The assignment of teachers by some authority other than the school board, even though the board accepts such assignments and contracts for the payment of the salaries of such teachers.

"e. The display or use in the quarters of the school of any books, symbols, or tracts representing, or calculated to teach the pupils, any creeds, tenets, or beliefs of any sect or denomination.

"2. On whom rests the responsibility for determining the units or parts of a school program on which a district is entitled to the apportionment of state school funds?

"3. In determining the August 15, 1941, apportionment, and those of succeeding years, is it mandatory that the State Superintendent of Public Schools accept the certification of applications of boards of education by a County Clerk as sufficient evidence of the existence of free public schools in the county and their eligibility to receive state school money?

"4. If the County Clerk's certification of public schools is accepted for the distribution of state school money on August 15 and it is later determined that some of the school districts to which the apportionment was made did not qualify for the apportionment for all or a part of the units of the school program, what will be the proper course of action?

"5. What action shall be taken by the State Superintendent of Schools on this August 15 with respect to the apportionment of state school money to the District of Meta, or any other public school district in which similar conditions obtain.

"7. What is the present effect of the decision of the Supreme Court of Missouri in Case No. 37,264 (Harfst, et al., Appellants, v. Hoegen, et al., Respondents), upon the apportionment and distribution of the state school money on August 15 next; and should such decision be taken into account in making such apportionment?"

The decision referred to in your request is that of Harfst v. Hoegen (No. 37264, not yet officially reported), which was recently decided by the Supreme Court of Missouri. However, a motion for rehearing has been filed in this case and two motions to intervene have been allowed. Therefore, the decision is not final and it is not the law as yet in this State. However, what is said in that case would be highly persuasive upon any question which involves like facts. The Harfst Case involved the question of whether a certain school was a "public school" so as to be entitled to state aid. The school was owned by the Catholic Parish of St. Cecelia and was rented to the school district. The teachers were Sisters of the Most Precious Blood, a Catholic teaching order. The Nuns were hired by the school board of the district as teachers.

The facts in the case as shown by the opinion were as follows:

"We find the usual school day commencing with prayer in the morning. After prayer the pupils are marched, one room at a time, to the Catholic church next door for Holy Mass. After Mass the pupils are marched back to their school rooms where they receive religious instruction. In this they study the Catholic catechism and the child's Catholic Bible. On one or two days of each week the parish priest gives religious instruction to the pupils in the midmorning, either at the church or in the schoolhouse chapel. On Friday afternoons the pupils are again marched to the church for confession. In the quarterly 'Teacher's Report to Parents' the subject 'Religion' is included under 'Branches Pursued' and a grade in this subject is given to each pupil."

The court under the above set of facts held that the school was not a "public school" and therefore not entitled to state aid. Further reference will be made to this opinion in answering the questions submitted in your letter.

Your questions will be answered in their numerical order.

A

"The attendance of pupils at mass or the giving of any other religious instruction during the school day and under the jurisdiction of school teachers."

It must be born in mind that this question relates to the distribution of funds to schools under Article XI, Sections 1 to 11, inclusive, of the Constitution of the State of Missouri. Section 1 refers to the duty of the General Assembly to establish and maintain free public schools for the gratuitous instruction of all persons in the state between the ages of six and twenty. Section 11 refers to religious or sectarian schools and prohibits public funds to be paid to them, said section being as follows:

"Neither the General Assembly nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any county, city, town or other municipal corporation, for any religious creed, church or sectarian purpose whatever."

By Section 10337, R. S. Mo. 1939, care, control and equipment of a school is under the control of the Board of Directors. Said section contains further provision to the effect that the board may allow the free use of the school buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organization of citizens, or for such other civic, social or educational purposes as will not interfere with the prime purposes to which such buildings and grounds are devoted; and further provides that the annual or special meeting for any of the above mentioned purposes may, by a majority vote of the qualified voters, be prohibited.

There is another section relating to the annual meetings of the common school district. The fifth provision of the powers of the voters at the annual meeting under Section 10419, R. S. Mo. 1939, is as follows:

"To determine, by majority vote, whether or not the schoolhouse of the district may be used during the ensuing year for religious, literary or other purposes, or for the meeting of farmer or labor organizations, secret or otherwise."

The provisions of Section 10362, R. S. Mo. 1939, are to the effect that the school day shall consist of six hours,

occupied in actual school work, and the school week shall consist of five days. It is conceded by numerous authorities that the teaching of any form of religion in the public schools during the school hours, irrespective of the sect of the religion taught, whether it be Catholic, Quaker, Lutheran, Mormon, Baptist, Presbyterian, or other forms of Protestant religion, is prohibited. Knowlton v. Baumhover, 182 Iowa 691; Hysong v. Gallitzin School District, 164 Pa. 629; Gerhardt v. Heid, 66 N. D. 444.

We are, therefore, of the opinion that the conducting of mass or the giving of any other religious instruction during the school day is prohibited.

We shall next consider the question of such religious instruction not conducted during the school hours and not in conjunction with the general diffusion of knowledge and intelligence as contemplated by the Constitution.

The courts of Missouri have never passed directly on this phase of religious teaching in our schools. However, the question was directly before the Supreme Court of Indiana in State ex rel. Johnson v. Boyd, 28 N. E. (2d) 257, 1. c. 266, and the court said:

"The appellants also contend that it is significant that each morning, immediately prior to the beginning of school, the pupils were caused to attend at the nearby Roman Catholic Church where they were given religious instructions for thirty minutes by the Parish Priests. The findings do not disclose by whom the children were 'caused' to attend. The finding does disclose that the service was said to be voluntary. Since the children in question were children of Catholic parents and the service was voluntary and not within the school hours we fail to see that this amounts to sectarian teaching within the schools or that it could be held to make the schools parochial schools rather than public schools."

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In the decision of *Dritt v. Snodgrass*, 66 Mo. 286, the question arose as to the power of the board to make and enforce needful rules and regulations for the government and management of the school. As to the authority of the parent and the teacher in reference to a pupil, the court said (1. c. 298):

"* * * which every child within school age has a right, under the law, to attend, subject while so attending to be governed by such needful rules as may be prescribed. When the school room is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school, he may be punished or even expelled, under proper circumstances; for his conduct when at home, he is subject to domestic control * * *"

In view of the authorities mentioned above we are of the opinion that the attendance at mass or other religious instructions by pupils outside of school hours, would not constitute the maintaining of a sectarian school within the meaning of the Constitution.

B.

"The segregation in separate buildings or quarters of school children according to religion."

From a reading of your second question, we infer that you refer to the practice cited in the recently decided case of *Harfst v. Hoegen* (No. 37264), wherein a school district had two schools and the directors of the district had made it a rule requiring all Catholic students to attend the school taught by Nuns, while the Protestant children were required to attend the other school. Judge Douglas in speaking for the court said:

"The segregation of Catholic from the non-Catholic children and their mandatory attendance at one or the other of the two grade schools according to their religion, whether the schools be of equal or of unequal facilities, likewise constitutes a denial of complete religious freedom."

In view of the above statement, we believe that a school board is forbidden to segregate in separate buildings or quarters school children according to their religion.

C

"The employment, as teachers, of Sisters, or others whose special religious vows prevent them from giving secular instruction with complete religious freedom."

At the outset we wish to point out that this Department has made inquiry as to the vows taken by "Sisters" of the Catholic Church, and we find nothing therein that prevents them from giving secular instruction with complete religious freedom. From the information that we have obtained the only vows that nuns are required to take are those of poverty, chastity and obedience. However, answering your question, we are of the opinion that if any teacher of a public school has taken a religious vow which prevents the giving of secular instruction with complete religious freedom, then such teacher may not be employed as an instructor in the public schools.

In the case of McDowell v. Board of Education, 172 N. Y. S. 590, it was held that a schoolteacher who was a Quakeress was properly dismissed, not because of her religion, but because of certain views and beliefs which she declared were based on her religion, which prevented her from properly discharging the duty she had assumed, in that she was opposed to war, and to the existing war with the German government, would not uphold this country in forcibly resisting invasion, would not help, or urge her pupils to help, the United States government in carrying on the war with Germany, or to perform

Red Cross services, or to buy thrift stamps, and did not believe that a teacher was under special obligation to train her pupils to support the government of the United States in its measures for carrying on the war.

Therefore, we rule that if any person has taken a vow which prevents the giving of secular instruction with complete religious freedom, such person should not be employed as a teacher, and if employed the school is not a "public school" within the meaning of the Constitution and is not entitled to state aid.

D

"The assignment of teachers by some authority other than the school board, even though the board accepts such assignments and contracts for the payment of the salaries of such teachers."

As heretofore stated, the control and management of the school is under the authority of the school board, the hiring of teachers, the maintenance of the buildings, and all other necessary elements which are essential in carrying on a public school. The school board must in effect hire and make contract with the teacher, and should not be mere puppets, nor should the Constitution be circumvented by permitting others to select the teacher for the board on religious grounds, acquiesce or approve same. In this regard, we therefore again refer you to the case of State ex rel. Johnson v. Boyd, supra, in which the point was raised that the teachers employed by the school trustees were recommended for such positions by the authorities of various Catholic colleges. The court said (l. c. 265):

"The fact that these teachers were recommended by various Catholic normal schools can not be considered an important factor. The teachers were employed by the Board of School Trustees. They were chosen from persons regularly qualified and licensed to teach school agreeable to the laws of the State of Indiana. It is the duty of school trustees to investigate the character and fitness of teachers.

The trustees may do this in any proper manner which they may choose, including the procuring of recommendations. Recommendations from any reliable normal college should be helpful. The choice of teachers is within the discretion of the school trustees and unless such discretion be abused the courts will not interfere. * * *

Therefore, it is our opinion that the employment and assignment of teachers is under the exclusive control of the school board and no other person or group has the right or authority to select the teacher of a public school. But, the mere fact that the teachers are recommended by some third person or group does not vitiate the contract of employment, if in truth and fact the school board itself actually employs the teacher.

E

"The display or use in the quarters of the school of any books, symbols, or tracts representing, or calculated to teach the pupils, any creeds, tenets, or beliefs of any sect or denomination."

In view of our holding to question "A," to the effect that any religion, irrespective of sect or denomination, cannot be taught in the schools during school hours, we are of the opinion that books, symbols, tracts, fonts, cannot be displayed or used in the schools. In the Harfst case the chancellery court enjoined the use or display of such matters in the school room. His action in so enjoining was approved by the Supreme Court. Therefore, we approve and adopt that view in this opinion and rule that the display or use of any symbols or tracts representing any creeds, tenets or beliefs of any sect or denomination in a public school, is illegal and such books, symbols, etc., should be removed.

Therefore, in summation, we are of the opinion that in answering your questions A, B, C, D and E, that the existence

of any one or all of the conditions wherein we have held that they should not exist, would eliminate the school district from qualifying for the distribution and use of public funds.

F

"On whom rests the responsibility for determining the units or parts of a school program on which a district is entitled to the apportionment of state school funds?"

Section 10390, R. S. Mo. 1939, provides in part as follows:

"The state superintendent of public schools shall, annually, before August 15th, apportion the public school fund applied for the benefit of the public schools in the manner provided by law.
* * * * *"

The statute then sets forth the different sums of money that shall be apportioned to the various districts, and provides further as follows:

"* * * The clerk of each school district shall make a report to the county clerk between June 15th and June 30th of each year, showing the number of teachers employed, the total number of days' attendance of all pupils, the length of the school term, the average attendance, the number of days taught by each teacher, the salary of each teacher, and any other information that the state superintendent may require. The aforesaid report shall be sworn to before a notary public or the county clerk. The county clerk shall make a summary of all these reports and forward to the state superintendent of public schools, on or before July 15th, a report

showing the total number of teachers employed in the county, and the total number of days' attendance of all pupils in the county, the number of teacher employed for the full term and the number for half terms, and the number whose salary is one thousand dollars or more per year, and such other information as the state superintendent may require. Any district clerk, county clerk, or teacher, who shall knowingly furnish any false information in such reports, or neglect or refuse to make aforesaid report, shall be deemed guilty of a misdemeanor and punishable by a fine not exceeding five hundred dollars or imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. * * * * *

Under the provisions of the above statute the duty is imposed upon the clerk of the school district and the county clerk to obtain the necessary information upon which the apportionment is made and it is made a criminal offense knowingly to furnish any false information in such reports. As will be shown in the answer to the next question, the State Superintendent must accept these reports as true and cannot question their authenticity or accuracy. Therefore, it is the opinion of this Department that the responsibility of determining the unit of a school district which is entitled to apportionment of state school funds, rests upon the clerk of the school district and the county clerk.

G

"In determining the August 15, 1941 apportionment, and those of succeeding years, is it mandatory that the State Superintendent of Public Schools accept the certification of applications of boards of education by a county clerk as sufficient evidence of the existence of free public schools in the county and their eligibility to receive state school money?"

Section 10390, R. S. Mo. 1939, has been quoted in full in the preceding paragraph and we do not deem it necessary to quote this statute again.

Section 10393, R. S. Mo. 1939, provides as follows:

"The state superintendent of public schools is hereby authorized to correct any error made in the apportionment of the public school funds among the various counties of this state out of the public school fund of the year next following the date when such mistake was made, and the amount set apart to any county for the purpose of correcting an error shall be by him certified to the state auditor and to the county clerk, and the state auditor shall draw a warrant on the state treasurer for the amount so certified in favor of the treasurer of said county, and the county clerk shall apportion said funds to the various districts in said county as the funds of the year in which said error occurred, and the county treasurer may pay outstanding warrants for teachers' wages issued during the school year in which said error occurred, not to exceed the correction made."

Section 10599, R. S. Mo. 1939, sets forth the powers and duties of the state superintendent of public schools and provides in part as follows:

"* * * He shall exercise such supervision over the educational funds of the state as may be necessary to secure their safety and correct application and distribution according to law.* *"

In the case of State ex rel. Randolph County v. Evans, 240 Mo. 96, the Supreme Court of Missouri had before it the question of whether the state superintendent of public schools could attack the truthfulness or correctness of the enumeration made in the manner prescribed by statute of the children

within a school district. The court, through Judge Graves, said:

"If these enumerations are fraudulent no doubt they could be attacked and corrected in a proper action, but so long as they exist the State Superintendent cannot reach them in this collateral proceeding. Until they are corrected in a proper proceeding he must take them as a basis for a proper distribution of the school money. This view of course disposes of the enumerations for all the years, and in effect disposes of the case, but there are other matters urged by the motion to strike out which we prefer to discuss, and these we take next.

"But to my mind there is another reason why the contention of respondent Evans cannot be sustained. His duties as to the distribution of school funds are purely ministerial. No statute authorizes the State Superintendent to revise and correct enumerations on the ground of fraud. Such officer has been furnished with no legal machinery by which he can hold or have a hearing and adjudge the fact of fraud or no fraud in enumeration returns. He is not empowered to bring the interested parties before him. In fact the law makes no provision for him to make an investigation of the question of fraud. As indicated in the previous paragraph, I have no doubt that in a proper proceeding before a proper tribunal, with the proper parties before such tribunal, fraudulent enumeration lists may be purged of fraud, but the State Superintendent has not been constituted such a tribunal by law."

This case, although decided under statutes which are not identical with those in effect today, still deals

with the procedure that is to be followed in the apportionment of state school funds, and we believe authority in answer to the question presented above. The case further points out that Section 10393, supra, relating to the correction of errors by the state superintendent in the apportionment, applies only "when he has apportioned to a county less than that was due it."

Therefore, it is the opinion of this Department that it is mandatory that the state superintendent of public schools accept the applications of boards of education as true and that he cannot question the correctness of the application because he has no discretion in this matter and his duties are purely ministerial.

H

"If the county clerk's certification of public schools is accepted for the distribution of state school money on August 15 and it is later determined that some of the school districts to which the apportionment was made did not qualify for the apportionment for all or a part of the units of the school program, what will be the proper course of action?"

As pointed out in the Evans case, supra, and as will be noted from reading Section 10390, supra, criminal prosecution has been provided for and it is our opinion that this is the proper procedure to follow if the county clerks or the clerks of the respective districts have made false reports stating that certain districts have a certain number of teachers and pupils attending the public schools in that district. Furthermore, a civil action could be instituted against the school to recover the money received by them to which they were not legally entitled.

I

"What action shall be taken by the state Superintendent of Schools on this August

15 with respect to the apportionment of state school money to the District of Meta, or any other public school district in which similar conditions obtain?"

As pointed out in our answer to question "G", the state superintendent, in making the apportionment of state school money, acts in a ministerial capacity and it is mandatory that he make the apportionment according to the certification and application of the clerk of the county court.

J

"What is the present effect of the decision of the Supreme Court of Missouri in Case No. 37,264 (Harfst, et al., Appellants, v. Hoegen, et al., Respondents), upon the apportionment and distribution of the state school money on August 15 next; and should such decision be taken into account in making such apportionment?"

The recent opinion of Harfst v. Hoegen, as stated above, is not yet final, there being a motion for rehearing now pending, and therefore this case should not be taken into consideration in the apportionment and distribution of state school money on August 15th. Moreover, as pointed out in answer to questions "G" and "I," the state superintendent of public schools cannot question the application and certification but must make the apportionment according to the figures presented in such application and certification.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

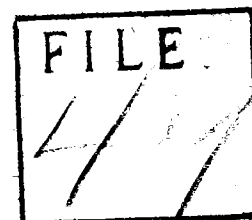
AO'K: OWN:EG

EXTRADITION: - A child who flees the State, although in the custody of the court as a neglected and delinquent, not having been convicted of any crime, cannot be extradited.

September 19, 1941

9-30

Hon. Guy D. Kirby,
Judge, Juvenile Court
Division Number One
Greene County
Springfield, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated September 18, 1941, upon the following statement of facts:

"I don't want to impose on your office, but I would like very much to have your opinion on this case. It is an emergency that has to be acted on right speedily.

"I have under the jurisdiction of the Juvenile Court, as a neglected child, a girl now 17 years of age. Several years ago, when she was of juvenile age, she was adjudged neglected, not delinquent, and placed in the care of the Probation Officer, who placed her, with the Court's approval, in what is called the Women's Welfare Home, a local institution, for an indefinite stay; subject, of course, to the future orders of the Court.

"A few weeks ago this girl escaped one night and we now have information that she is held in California. What I would like to have is your opinion as to whether or not it is the duty of the Court to have the Probation Officer go and bring her back;

and if so whether or not his expenses are properly charged against the County; and if so, what mileage and legal expenses he would be authorized in charging.

"Not being a delinquent, having committed no offense other than simply running away, I take it she would not be regarded as a fugitive from justice, requiring extradition. The girl's home has been here and she has a father living here who is unable to take care of her. For that reason the Court had to provide a place for her to stay. If the girl is not brought back, the result will probably be that she will be a wanderer and it strikes me that this Court is under some obligation to the child.

"I have my ideas about this question I am asking you, but in view of the fact that the Probation Officer is my appointee and acts under my orders, I would greatly appreciate an opinion from your office, so that I will have it in case any question should arise as to the right of the Probation Officer to be paid out of the County Treasury.

"I am enclosing memorandum of some sections of the statutes that may facilitate your investigation of the matter, if you are not already thoroughly familiar with it. * * "

We call your attention to Section 662, U. S. C. A. 18, Criminal Code and Criminal Procedure, Page 284, which reads as follows:

"Whenever the executive authority of any State or Territory demands any person as

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a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. * * * * *

(Underscoring ours.)

It will be noted that certain portions of the aforesaid section have been underlined, and from reading these you will note that in order to extradite a person he must first be a fugitive from justice, and, that a copy of an indictment or an affidavit must have been filed against him, charging the person with having committed treason, felony or other crime. Our department has taken occasion to call the Prosecutor's Office of Greene County and we have ascertained that the person referred to in your opinion request is charged as a delinquent, and was not charged with any crime. Therefore, this opinion proceeds upon the theory that no crime was committed by the juvenile.

We call attention to the case of State ex rel. Boyd v. Rutledge, 13 S. W. (2d) 1061, wherein the Court had this to say: (1. c. 1063)

"The Juvenile Court Act is applicable to children under 17 years of age, and

it deals specifically with such of those children as fall within its definitions of 'neglected' and 'delinquent.' In the definition of a 'delinquent child,' there is a long enumeration of acts, the commission of any one of which will constitute the doer a delinquent; these acts range from a violation of the criminal law all the way down to the habitual use of profane language. All of the acts so catalogued are by force of the statutes acts of delinquency. In its provisions for dealing with children who violate the criminal law, the act seems to have a dual aspect. * * * * "

The Court, in this case, in passing upon several sections of the Juvenile Act, had this to say:

"We now turn to the Act as it was when State ex rel. Matacia v. Buckner was decided, for the language 'that gives color to the view that it authorizes trial and punishment for crime.'

"Section 2592: ' * * * The practice and procedure prescribed by law for the conduct of criminal cases shall govern in all proceedings under this article in which the child stands charged with the violation of the criminal statutes of the state. * * '

"Section 2591: ' * * * But nothing in this article shall prevent the juvenile court from inflicting a punishment which shall extend beyond

the age of majority in cases where the delinquent shall be convicted of a crime, the punishment of which under the statutes of this state, when committed by persons over the age of eighteen years, is death or imprisonment in the penitentiary for a term of not less than ten years, * * * '

"Section 2598: ' * * * All punishments and penalties imposed by law upon persons for the commission of offenses shall, in the case of said delinquent children, rest in the discretion of the judge of the juvenile court, and execution of any sentence may be suspended or remitted in his discretion, '

"In the Matacia Case just referred to, the defendant was charged in the juvenile court with having committed rape, not as a crime, but as an act of delinquency, and it was held, among other things, that in those circumstances the defendant was not as to the mode of procedure entitled to the benefits of certain constitutional safeguards designed for the protection of persons put on trial for the commission of crime. * * * * " (Underscoring ours.)

Leading authorities are accurately summarized as follows in 4 American Jurisprudence page 14, Section 19:

"A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. A warrant may confer authority on a police

officer or private individual to make an arrest anywhere within the boundaries of a state, but it has no extraterritorial effect of any kind, and will not justify an arrest made outside the limits of the state."
(citing authorities)

To the same effect are authorities collected in an annotation in 61 A. L. R. 380. The courts of the United States have followed the same rule (McLean v. State of Mississippi ex rel Roy (5 C. C. A.) 96 F. (2d) 741, 745, 119 A. L. R. 670, certiorari denied by U. S. Sup. Ct. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 399; and, Kirkes v. Askew, Sheriff, (D. C. Okla.) 32 Fed. Supp. 802, 804 (2) et seq.). There is no Missouri statutory authority for arrest on foreign warrants.

In the case of Ex Parte Bass, 40 S. W. (2d) 457, 1. c. 462, - (328 Mo. 195)- the Court said:

"* * * The Juvenile court of Greene county was without jurisdiction to commit the petitioner to the penitentiary for the commission of a crime because no information had been filed by an officer having authority to file an information charging a crime.

"The Juvenile court had no jurisdiction to sentence the petitioner to the penitentiary or order his commitment even if a proper information had been filed. The petitioner cites section 8350, R. S. 1929, as authorizing the juvenile court to render such sentence and make a commitment. There is nothing in that section which supports his position except the closing sentence, which was definitely held to be unconstitutional in State ex rel. Wells v. Walker (Mo. Sup.) 34 S. W. (2d) loc. cit. 129, et seq. (Underscoring ours.)

In the case of Bonzo v. Kroger Grocery & Baking Co., et al, 125 S. W. (2d) 75, 1. c. 77, the court said:

"In Ex parte Bass, 328 Mo. 195, 200, 40 S. W. 2d 457, 459 (2), this court en banc said: ' * * * in State ex rel. Wells v. Walker (326 Mo. 1233), 34 S. W. 2d 124, a juvenile court's jurisdiction in such a case (proceedings involving delinquent children) ceases upon its determination and direction that the defendant shall be proceeded against, not as a delinquent, but under the general criminal law.' The Bass case held that, after an order in the circuit court, juvenile division, had been made directing that the accused be proceeded against, not as a delinquent but, under the general criminal law, a commitment thereafter issued out of said court, juvenile division, on a judgment imposing a penitentiary sentence upon a plea of guilty, under which commitment the accused was being held in the penitentiary, was void. It follows that the second judgment in the instant case of the circuit court, juvenile division, finding the present plaintiff not guilty, is of no probative value."

Therefore from the reading of Section 662 of the Federal Statutes, supra, together with the excerpts from the Missouri decisions, it necessarily follows that Juveniles under the Missouri law may be handled in one of two manners by the Juvenile Court. They may be charged with a crime, if they have committed a crime, or they may be charged and dealt with by the Court as neglected and delinquent children, if they have committed a crime, or are otherwise delinquent.

September 19, 1941

On the other hand, if a child is treated by the Court, merely as a neglected and delinquent child, as the situation is set forth in the opinion request, we can turn to no statute which makes it a crime to run away from a county home in which the child has been committed by the Court as a delinquent child, and reliance has to be made upon the record, as it appears in the Juvenile Division of the Circuit Court of the County. When turning to the record we find that no affidavit or complaint was made against the child charging a crime. Therefore, we are of the opinion that the Executive authority of this State has no authority, under Section 662 of the Federal Statute, to demand the executive of another State to turn over to the Messenger of this State a delinquent child who has fled from the home in which it was committed, unless, at this time the delinquent child can be charged with some crime by affidavit, in a new procedure.

CONCLUSION.

We are of the opinion that if a child who has been tried by the Circuit Court in the Juvenile Division, merely as a neglected and delinquent child and has not been proceeded against for some particular crime, departs from the State, it cannot be brought back to this State through extradition.

Respectfully submitted,

APPROVED:

B. RICHARDS CREELCH
Assistant Attorney General

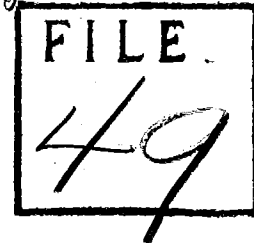
VANE C. THURLO
(Acting) Attorney General

BRC:RW

PROBATION OFFICERS: - Probation officers have authority
to go to any portion of the State
(COUNTIES OVER under order of the court and to
90,000.) be reimbursed for necessary
expenses in so doing, so long
as the total sum of expenses
does not exceed \$200.00 for any
one year.

October 3, 1941

11/26
Hon. Guy D. Kirby
Judge of Division No. 1
Greene County
Springfield, Missouri



Dear Sir:

We are in receipt of your request for an opinion
dated September 27, 1941, which reads as follows:

"This will remind you that I had a
conversation with Mr. Creech in your
office last Wednesday and asked for
an opinion about a matter of this kind:

"Suppose there is a child, under 17 years
of age, under the jurisdiction of the
Juvenile Court; a neglected child only,
not a delinquent or a criminal.

"By order of the Court the child is
placed in a children's home, privately
owned and controlled, in St. Louis,
for an indefinite stay until further
order of the Court.

"After a stay there, the Court in the
exercise of its jurisdiction orders the
child released from that institution and
brought back to Springfield; to be
placed in an institution here or turned
over to its parents. The Court makes
such order and orders the Probation
Officer to go and get the child and
return it; still retaining jurisdiction.

October 3, 1941

"Would the expenses of the Probation Officer in going and coming pursuant to this order be properly taxed against the County?

"You perhaps remember that I discussed this question with you Wednesday and your offhand verbal opinion was that it would be a proper charge. I would appreciate the satisfaction of a written opinion from you to that effect.

"There is no controversy, but your opinion will enable us to proceed hereafter with the assurance that we are within the law."

Section 9681 R. S. Missouri, 1939, reads as follows:

"The circuit court or the criminal court where constituted as a juvenile court under this article shall appoint a discreet person of good character, not under the age of twenty-five years, to serve as probation officer during the pleasure of the court. Whenever there is to be a child brought before the juvenile court, it shall be the duty of the clerk of said court, if practicable, to notify the probation officer in advance of that fact. It shall be the duty of the probation officer to make such investigation of the child as may be required by the court, to be present in court in order to represent the interests of the child when the case is heard, and to furnish to the court such information and assistance as the judge may require, and to take charge of any child before and after trial, as may be directed by the court. Probation officers

are hereby vested with all the power and authority of sheriffs to make arrests and perform other duties incident to their office. The juvenile court shall have power to make rules specifying the duties of the probation officers in any and all cases. * * "

Section 9683 R. S. Missouri, 1939, provides as follows:

"Salaries of probation officers, deputies, clerks and stenographers. -
* * * * not exceeding twelve hundred dollars per annum in counties of 90,000, and less than 200,000 inhabitants; * * the circuit court or the criminal court when constituted as a juvenile court under this article, may appoint necessary clerks and stenographers who shall receive a salary of not less than twelve hundred nor more than fifteen hundred dollars per annum. * * * * *
Actual disbursements for necessary expense, exclusive of office expenses, made by probation officers while in the performance of their duties, shall be reimbursed to them out of the county funds after approval by the judge of the juvenile court; but no officer shall be allowed for such disbursements a greater sum than two hundred dollars in any one year. * * * * *"

We take notice that Greene County has a population in excess of 90,000, for the purpose of this opinion.

Section 9687 R. S. Missouri, 1939, provides as follows:

"Any probation officer may, without warrant or other process, at any time until final disposition of the case of any child over whom said juvenile court shall have acquired jurisdiction, take any child placed in his care by said court, and bring such child before the court, or the court may issue a warrant for the arrest of any such child; and the court may thereupon proceed to make any lawful disposition of the case."

Section 9689 R. S. Missouri, 1939, reads as follows:

"In any case where the court shall commit a child to the care of any association or individual in accordance with the provisions of this article, the child shall, unless otherwise ordered, be subject to the control of the association or individual to whose care it is committed, but subject to the order of the court in committing such child and to any further order made by the court. When any child shall be found to be neglected or delinquent within the meaning of this article, and when such is also found to be feeble-minded or epileptic, the juvenile court may make an order committing such child to the Missouri state school, under such conditions as the court may prescribe, conformable to the laws governing said institution."

In the case of Hastings v. Jasper County 314 Mo. 144, 1. c. 150, the Court had this to say:

"Probation officers are appointed by the circuit judge sitting as a juvenile court by reason of authority vested in such officer by statute, not for a specified term of years, but until and subject to removal in a lawful manner. After appointment and qualification certain duties and powers are conferred by statute as have heretofore been stated. (Chap. 21, Art. VI, R.S. 1919.)

"The right, authority and duty are created by statute; he is invested with some portion of the sovereign functions of the government to be exercised for the benefit of the public and is consequently a public officer within the definition given by this court.

"Nor can it be said that probation officers are state officers. * *

* * *

"Our conclusion, from the foregoing, is that probation officers are public officers whose duties are created by law, are to be wholly performed within the limits of a county and for the benefit of the people of that county and whose salaries are paid by the county courts from the funds of such counties, and appellant is therefore a county officer * * * * "

It will be noted from reading Section 9681, supra, that the probation officer is appointed by the Circuit Court or the Criminal Court, where constituted as a judicial Court and in Section 9683, supra, it will be

October 3, 1941

particularly noted that the actual disbursements for necessary expenses, exclusive of office expenses, made by a probation officer while in the performance of his duties shall be reimbursed out of the county funds after approval by the Judge of the Juvenile Court, but no officer shall be allowed for such disbursements, a greater sum than Two Hundred (\$200.00) Dollars for any one year. No doubt the legislature intended that the probation officer should be under the control and supervision of the Circuit Court or Criminal Court through his appointment, by virtue of Section 9681, supra, and said officer should have the further duties and authorities cast upon him by Section 9687, supra. It will be particularly noted in Section 9689, supra, that the Court shall retain control of the child, even though said child be committed to some association or individual.

In the opinion request the specific question was asked: Would the expenses of the probation officer, in going and coming, pursuant to an order of the Court, be properly taxed against the County? In this particular, we call attention to the case of *Bowers v. Missouri Mutual Association*, 62 S. W. (2d) 1058, 1. c. 1063, where the Court said:

" * * * Laws are passed in a spirit of justice and for the public welfare and should be so interpreted if possible as to further those ends and avoid giving them an unreasonable effect. *Gist v. Rackliffe-Gibson Constr. Co.*, 224 Mo. 369, 384, 123 S. W. 921. In arriving at the legislative intent, doubtful words of a statute may be enlarged or restricted in their meaning to conform to the intent of the lawmakers, when manifested by the aid of sound principles of interpretation. *Straughan v. Meyers*, supra, 268 Mo. loc. cit. 588, 187 S. W. 1159; *City of St. Louis v. Christian Brothers College*, 257 Mo. 541, 552, 165 S. W. 1057; *State to Use, etc., v. Heman*, 70 Mo. 441, 451. And it has been said that 'while we have no right to construe a law by our view of its expediency, we can take that

feature into consideration in attempting to ascertain what was in the legislative mind.' State ex rel. Asotsky et al. v. Regan, 317 Mo. 1216, 1224, 298 S. W. 747, 749, 55 A. L. R. 773."

From this latter case, we have quoted general propositions of law which are applicable in the construction of statutes and we are of the opinion that the legislature undoubtedly intended that the probation officer would have the right to go to any part of the State of Missouri, under order of the Court and bring before the Court children who might be proper subjects for the supervision of the Juvenile Judge and as was stated in the Hastings case, supra, the probation officer has state-wide authority. When applying the language of the portion of Section 9683, supra, we think the legislature clearly gives the probation officer the right to be reimbursed for any disbursement necessary for expenses incurred in carrying out his duty. Of course, subject to the approval by the Judge of the Juvenile Court. Provided, however, that such disbursements do not exceed a greater sum than \$200.00 in any one year.

CONCLUSION

We are of the opinion that a probation officer has the right when acting under the order of a Juvenile Judge, to go to any part of the State and either take or bring before the Court a juvenile and to be reimbursed for his expenses in so doing, providing such expenses do not exceed a greater sum than \$200.00 for any one year, in counties over fifty thousand.

Respectfully submitted

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

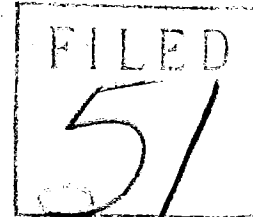
VANE C. THURLO
(ACTING) Attorney General

ERC:RW

TAXATION: County has no authority to purchase land to protect
COUNTIES: its tax lien. Holder of certificate under Jones-
Munger Act must pay subsequent taxes accrued before
date of collector's deed.

January 21, 1941

Honorable Marion E. Lamb
Prosecuting Attorney
Randolph County
Moberly, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of January 15, 1941, which reads as follows:

"Prior to the passage of Sections 9953A and 9953B, by the Legislature in 1939, which laws are found in The Laws of 1939, Page 851, the County of Randolph at the third offering of property for sale for delinquent taxes, purchased several pieces of property to protect themselves.

"The county now has an opportunity to sell some of this property and has asked the collector to issue a deed, which the collector refuses to do, upon authority of Sections 9957C and 9954B of the Laws of 1933, until the county pays taxes that have accrued since the purchase of the property by the county. It is the contention of the county court that the county should not pay taxes on this property and that the county court has a right to strike off these taxes, which would give the collector authority to issue his deed."

The first question involved in your request to be passed upon by this office will probably answer the full request. You state in your request that Randolph County has been purchasing property at third sales to protect

January 21, 1941

the claim of the county for the delinquent taxes. You also state that the purchase was made previous to the enactment of Sections 9953a and 9953b, Laws of 1939, page 851, which relate to the purchase of property by a trustee for the county. In 61 Corpus Juris, page 1229, the rule is set out as follows:

"Authority for a state, county, or municipal corporation to purchase land sold at a tax sale is ordinarily regarded as purely statutory, although there is authority to the effect that a city may purchase at a tax sale under a general authority to purchase property for governmental purposes.
* * * * *

In a thorough search of the statutes of this state, we find no authorization for a county to purchase real estate for the protection of their claim for delinquent taxes. There are provisions for the purchase of a foreclosure of a school loan for the protection of the school fund and there are provisions for the purchase of real estate for governmental purposes. Section 2078, R. S. Missouri 1929, permits the county to receive gifts and donations of land under certain circumstances.

In the case of Bayless v. Gibbs, 251 Mo. 492, l. c. 506, the Supreme Court, in passing upon the authority of the county courts of the respective county, stated:

"This court, in numerous cases, has repeatedly held, that the county courts of the respective counties of the State are not the general agents of the counties of the State. They are courts of limited jurisdiction, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null

and void.

"Consequently, this court has also repeatedly held, that all persons while dealing with said courts or agents are bound to take notice of their powers and authority.

"Among the cases so holding are the following: Sturgeon v. Hampton, 88 Mo. 203, 1. c. 213; State ex rel v. Crumb, 157 Mo. 545; Cape Girardeau South Western Railway Co. v. Hatton, supra; Wheeler v. Reynolds Land Co., 193 Mo. 279; Moss v. Kauffman, 131 Mo. 424; Hooke v. Chitwood, 127 Mo. 372."

There is no question but that the county courts cannot act outside of their statutory authority and any other act would be null and void.

In the case of Ray County, to the use of the Common School Fund, v. Bentley et al., 49 Mo. 236, 1. c. 242, the court said:

"* * * They have no power to purchase land or hold the same unless it is given to them by statute. Nor have they authority to assume the exercise of this right, in a case like this, by implication. * * * * *

Also, in the case of Sturgeon v. Hampton, 88 Mo. 203, 1. c. 213, the court said:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority

their acts are void. Saline County v. Wilson, 61 Mo. 237; Wolcott v. Lawrence County, 26 Mo. 275; Steines v. Franklin County, 48 Mo. 167. Persons dealing with such agents are bound to take notice of their powers and authority. State v. Bank, 45 Mo. 538; Andrew County v. Craig, 32 Mo. 531. We should go far to uphold their acts when merely irregular, but in this case the right to a deed for these lands must stand upon the order of the county court discharging the company from the payment of the agreed compensation to the school fund, and the consideration of one thousand dollars paid up stock. Both these acts were not simply irregularities, but they were without any warrant or authority in law and are void. These infirmities appear upon the face of the deeds and orders to which they make reference, and the purchaser from the company took with full notice."

Also, in the case of Saline County v. Wilson, 61 Mo. 237, l. c. 239, the court said:

"* * * County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond, their acts are void.

"Numerous decisions of this court enunciate and illustrate this well settled rule. * * * * *

Under the above authorities there is no question

but that a county has no authority to purchase real estate at a third sale in order to protect its claim for delinquent taxes. Since they have no authority to make such a purchase, it is not necessary that we answer the balance of your request, but for your information will explain the procedure set out under Sections 9957c and 9954b, Laws of 1933, pages 440 and 435, respectively. Section 9954b, Laws of 1933, reads as follows:

"Any purchaser at delinquent tax sale of any tract or lot of land, his heirs or assigns, who takes possession of any tract or lot of land within the redemption period shall be required to pay the taxes subsequently assessed on such tract or lot of land during the period of occupancy and within the redemption period, and upon failure so to do, or if he commit waste thereon, such purchaser, his heirs or assigns, shall forfeit all rights acquired by his certificate of purchase, so far as the tract or lot of land taken possession of is concerned."

Section 9957c, Laws of 1933, page 400, partially reads as follows:

"Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, * *"

The language in this partial section is plain and unambiguous and specifically states that before the holder of a certificate shall receive a deed he shall pay all taxes since the issuance of the certificate, and also this section provides prior taxes that were not foreclosed by a sale under which holder makes demand for deed.

The above sections specifically state the method

January 21, 1941

under which a deed can be obtained and the county court, under Section 9950, Laws of 1933, page 427, has no authority to compromise back taxes after a certificate has been issued and property sold under the Jones-Munger Act.

In the case of State v. Gehner, 11 S. W. (2d) 30, 1. c. 34, the Supreme Court of this state, in Banc, in construing laws exempting property from taxes, said:

"In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption, the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' Fitterer v. Crawford, 157 Mo. loc. cit. 58, 57 S. W. 533, 50 L. R. A. 191.

"As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and it must be clear and unambiguous.' Kansas Exposition Driving Park v. Kansas City, 174 Mo. loc. cit. 433, 74 S. W. 981.

"Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption.' Beach on Public

Corp. par. 1443; Dillon on Munic. Corp. (3d Ed.) par. 776, and cases cited; 1 Burroughs on Taxation, section 70; 1 Desty on Taxation, p. 108; Cooley on Taxation, pp. 204, 205."

That property sold under the Jones-Munger Act could be exempt from certain years' taxes by the act of the county court is not allowable under any circumstances.

Under Section 9953b, Laws of 1939, page 851, the Legislature recognizes the fact that a county cannot purchase real estate being sold under the Jones-Munger Act to protect its lien for taxes, when they authorized a trustee to purchase the property for the benefit of their participants of the taxes which were a lien against the property. They specifically stated in Section 9953b as follows:

"* * * Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. * * * * *"

Hon. Marion E. Lamb

(8)

January 21, 1941

Even under this section the county does not take possession of the property to the extent that it would be exempt from further taxes, but merely takes possession of the property through the trustee who holds as trustee for the benefit of all the funds entitled to participate in the delinquent taxes against the property so sold. It is the duty of the trustee buying said property, as soon as possible, to resell the property when a sale will pay all of the taxes against the property. This statute does not specifically exempt the payment of the taxes while in the name of the trustee appointed by the county court.

CONCLUSION

In view of the above authorities it is the opinion of this department that the County of Randolph had no authority to purchase the several pieces of property at the third offering under the Jones-Munger Act for the protection of the lien of the county for its taxes upon the property even though the purchase was made previous to the law which authorized a trustee to buy said lands for the protection of the different funds participating in the delinquent taxes.

It is further the opinion of this department that one holding a certificate of purchase and desiring a deed from the collector must first pay all taxes that were not foreclosed by the original sale and all taxes subsequent from the time of the issuance of the certificate to the date of the request for the collector's deed.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

SCHOOLS - : Board of Regents may use
discretion in preserving
STATE TEACHERS COLLEGES: or destroying vouchers, checks,
warrants, bills etc.

May 14, 1941

Mr. Uel W. Lamkin
President
State Teachers College
Maryville, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
dated April 29, 1941, which reads as follows:

"Here at this college we have kept
all of the vouchers, checks, warrants,
bills, etc. that have passed through
the business office since the establish-
ment of this institution some thirty-
five years ago.

"It was my impression that we had to have
an order from the State Legislature to
destroy any of these papers, which order
has never come through.

"An examination of the statutes, however,
seem to me to provide that they shall
be preserved for a period of four years.

"These papers are beginning to be a bur-
den on our storage capacity. Have we
authority to destroy all of them that
are more than four years old?"

Article 20, of Chapter 72, Revised Statutes of
Missouri, 1939, among other things sets forth the method
of appointing a Board of Regents, and Section 10760 of
said Article provides as follows:

Mr. Uel W. Lamkin

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"Each state teachers college shall be under the general control and management of its board of regents, and the board shall possess full power and authority to adopt all needful rules and regulations for the guidance and supervision of the conduct of all students while enrolled as such; to enforce obedience to the rules; to invest the faculty with the power to suspend, or expel any student for disobedience to the rules, or for any contumacy, insubordination, dishonesty, drunkenness or immoral conduct; to appoint and dismiss all officers and teachers; to direct the course of instruction; to designate the textbooks to be used; to direct what reports shall be made; to appoint a treasurer for such college, and to determine the amount of his bond, which shall be in amount not less than ten thousand dollars; and to have the entire management of the college, including qualifications for admission."

We do not find any particular statute or law which specifically provides that any vouchers, checks, warrants, or bills etc., should be destroyed. The reason for the absence of any such statute is probably that it is always a question of fact and discretion as to when a voucher, check, warrant or bill (as referred to in your letter) will cease to be of use to the State Teachers College or other persons who have business transactions with said college.

Therefore, in view of the fact that there has been a specific method set up for the control and management of the several teachers colleges of the State of Missouri through a Board of Regents, and, in view of the

Mr. Uel W. Lamkin

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fact that the Board of Regents have the broad powers as set forth in Sections 10760 and 10761, and subsequent sections, the legislature must undoubtedly have intended that the Board, in its discretion should determine how long vouchers, checks, warrants and bills should be preserved as records in any particular teachers college.

In the case of State v. Board of Regents, 264 S. W. 698, 1. c. 700, the court held:

"While the board, in a sense, represents the state in the performance of its duties, it is but one of the many necessary instrumentalities through which the former is enabled to act within the scope of the powers conferred by law. These powers embody no attributes of sovereignty which would entitle them to be designated as the state's alter ego. While in a sense the board is an agent of the state with defined powers, the importance of its duties with their attendant responsibilities, is such as to necessarily clothe the board with a reasonable discretion in the exercise of same. * * * "

CONCLUSION.

Therefore, we are of the opinion that all vouchers, checks, warrants and bills shall be preserved by the several teachers colleges in the state of Missouri only so long as the Board of Regents shall, in its discretion, find it expedient to preserve such records, keeping in mind the legal effect of such vouchers, checks, warrants or bills, and the extent of time of their usefulness to such teachers college.

Respectfully submitted,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

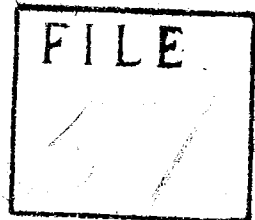
VANE C. THURLO
(Acting) Attorney General

BRC:RW

Board of Health: House Bill No. 501 is valid and authorizes
the board to set up a merit system of its own.

September 15, 1941

Mr. A. Louis Landwehr
Business Administrator
Board of Health
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of
September 10, 1941, which is as follows:

"Under the provisions of House Bill
501, 61st General Assembly the State
Board of Health must comply with any
of the rules and conditions made by the
United States Public Health Service,
The Children's Bureau or any other federal
agency or any other branch of United
States Government acting under the
provisions of the federal law in order
to secure for the State of Missouri
funds allotted to this State by the
United States Government for health
purposes under the provisions of such
act of Congress relating to health.

"In reference to the above, the Board
of Health requests an opinion from your
office as to whether this Bill constitutes
an enabling act to allow said Board to
come under the State Merit System or whether
it will be necessary to set up our own
merit system. We would also like to know
the proper procedure for the handling and
paying out of these federal monies."

House Bill 501, Sixty-first General Assembly, as passed and approved, provides as follows:

"The State Board of Health is hereby directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States appropriated by Congress for Health purposes and to comply with any of the rules or conditions made by the United States Public Health Service, The Children's Bureau or any other Federal agency in regard to health funds distributed to the States, and to comply with any of the rules and conditions made by said services or bureaus or other branches of the United States Government acting under the provisions of the Federal law in order to secure for the State of Missouri funds allotted to this state by the United States Government or health purposes under the provisions of such acts of Congress, relating to health; * * * * *."

The background for this piece of legislation is in certain acts of Congress granting money to the State of Missouri and attaching certain conditions to those grants.

In the Act appropriating money to the State of Missouri for maternal and child-health services, 42 U. S. C. A. Section 703 (a), (3) is as follows:

"A State plan for maternal and child-health services must * * * * *
(3) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel stand-

ards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are necessary for the proper and efficient operation of the plan. * * * * *

In the Act appropriating money to the State of Missouri to provide services for crippled children, 42 U. S. C. A., Section 713 (a), (3) is as follows:

"A State plan for services for crippled children must * * * * * (3) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are necessary for the proper and efficient operation of the plan. * * * * *"

Article IV, Section 1 of the Missouri Constitution is as follows:

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

In *Merchants Exchange v. Knott*, 212 Mo. 616, it is said of this provision, l. c. 640:

"Legislative power in Missouri is, therefore, lodged with the General Assembly and not elsewhere except as to such of it as may be delegated under the provisions of that instrument - for instance, to cities in matters of local concern. Briefly, legislative power is the power to make laws. What is a law? 'Municipal law,' says Chancellor Ken, 'is a rule of civil conduct prescribed by the supreme power of a state.' (1 Kent. Com. (14 Ed.) 447.) That definition is part of Sir William Blackstone's, which adds, 'commanding what is right and prohibiting what is wrong.' In his notes to Blackstone (1 Sharswood's Blk. Comm., p. 44) Judge Sharswood defines a law to be: 'A rule of civil conduct prescribed by the supreme power in a State, commanding what is to be done, and prohibiting the contrary.'

"Now, a rule is a rule, as distinguished from whim, caprice, compact, agreement, or mere discretion. 'Prescribed' means that the rule must not remain in the breast of the Legislature but shall be manifested and published in a public and conspicuous manner so as to be known as a rule of civil conduct. (1 Blk., p. 45.) That author instances Caligula's laws as violative of the idea evidenced by the word 'prescribed.' For it is said of that Emperor, according to Dio Cassius, that he wrote his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the people. Moreover, the rule must be 'prescribed by the supreme power in a State' - not by Roe, Doe, Box Cox, et al. Speaking to that part of his definition, Blackstone says (1 Blk., 46): 'For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore, it is requisite to the very essence of a law that it be made

by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.'

"(b) Measured by the foregoing definition of law, can the statute stand? We think not. We are of opinion that the power to bind and loose, to inaugurate or suspend the operation of the law, to say when and where it is law is of necessity an inherent and integral part of the law-making power, not to be delegated to, and wielded by, any commission. True, the act was passed by the General Assembly, approved by the Chief Executive and stands published as authenticated law, but to all intents and purposes it is only a barren ideality, having such life as is thereafter breathed into it from an unconstitutional source. No Missourian may know whether it applies to him or his concerns, as a rule of civil conduct, or will ever apply until in the 'opinion' of the commissioners it 'may be' considered 'necessary.'

"The General Assembly may not clip itself of one iota of its lawmaking power by a voluntary delegation of any element of it - by putting its constitutional prerogatives its conscience and wisdom, 'into commission.' On this point Judge Cooley says in an oft-quoted passage (Cooley's Const. Lim. (6 Ed.) 137): 'One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility.'

by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

Measured by these rules the court held invalid an act that purported to delegate to a commission the (212 Mo. 636):
" * * * power to capriciously say (as their 'opinion' serves) to what places, in what territory and at what times the statute shall apply, or whether it shall be in force on a single square inch of Missouri soil." The court further said (212 Mo., 1. c. 637):

"It is obvious that the foregoing grant of power is given without statutory landmark, compass, map, guide-post or cornerstone in one whit controlling its exercise or prescribing its channel, or indicative of any certain intendment of the legislative mind, beyond the mere grant. In essence it is the power of pure and simple despotism. * * * * *"

Article I, Section 1 of the United States Constitution provides:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

In A. L. A. Schechter Poultry Corporation v. United States, 55 Sup. Ct. 837, (N.R.A. Cases) the court said of this provision, 1. c. 843:

"The question of the Delegation of Legislative power.--We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Company v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446. The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article I, Section 1. And the Congress is authorized 'To make all Laws which shall be necessary and proper for carrying into Execution' its general powers. Article I, Sec. 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the *Panama Refining Company Case* that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practically, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. *Id.*, 293 U. S. 388, page 241, 55 S. Ct. 241, 79 L. Ed. 446."

Under these rules the court held invalid an act authorizing the President to establish "Codes of Fair Competition" for business, but which laid down no criterion to govern the action of the President. It did not define what constituted "fair competition."

In order to answer the question before us, it is necessary to consider and determine the validity of both the Federal and State statutes above set forth.

In testing the validity of the state statute we desire to point out the following.

In Brock v. Superior Court, 71 P. (2d) 209(Cal.), 114 A. L. R. 127, it is held that a state legislature may adopt an existing law of Congress. The court said, l. c. 134:

"* * * It is of course, perfectly valid to adopt existing statutes, rules, or regulation of Congress or another state, by reference; but the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power. See In re Burke, 190 Cal. 326, 212 P. 193; Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202; and note, 34 Colum. L. Rev. 1077, 1084."

The same rule is also applied in Featherstone v. Norman, 153 S. E. 58 (a), 70 A. L. R. 449, 466, where it is said:

"* * * Adoption of existing exemptions and an existing method is not a delegation to Congress of the legislative power of the state. Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202. This act in no way undertakes to make future federal legislation a part of the law of this state upon that subject. When a statute adopts a part or all of another statute, domestic or foreign, general or local, by specific and

descriptive reference thereto, the adoption takes the statute as it exists at that time. * * * * *

Again, in *Smithberger v. Banning*, 262 N. W. 492 (Neb) 100 A. L. R. 686, the court held invalid an act of the State Legislature which was dependent for its operation upon the passage of legislation by Congress. The court said, 1. c. 695:

"* * * As we have herein determined this set of facts constitutes a delegation of legislative power to the Congress of the United States. The power to determine the amount to be raised by the tax is dependent upon federal legislation not yet passed."

It is, therefore, to be seen that an act of the state legislature of this nature must lay down a definite rule of action upon a course prescribed that is capable of ascertainment and can only adopt existing legislation of Congress - not future acts of Congress.

House Bill No. 501 does lay down a definite rule of action - the Board of Health is to comply with acts of Congress relating to the distribution of funds in these particulars and to comply with any rules and conditions made by the United States Public Health Service, The Children's Bureau or other Federal agency in regard to health funds distributed to the states. We know the acts of Congress can be ascertained as of October 10, 1941, the effective date of House Bill No. 501, and assume that the various departmental rules and regulations as of that date can also be ascertained.

We therefore think there is no complaint on the score of delegation of authority that can be made with respect to House Bill No. 501. In effect, the General Assembly of Missouri has said: The Acts of Congress and the departmental rules and regulations of the Federal agencies in regard to the health funds distributed to this state as they exist on October 10, 1941, shall be the law of this state.

Of course, this conclusion presupposes that the acts of Congress above set forth are valid and that the rules made thereunder constitute the mere filling in of administrative details - not legislation.

We have seen the acts of Congress requiring the state plans to provide methods relating to the establishment and maintenance of personnel standards on a merit basis "as are necessary for the proper or efficient operation of the plan."

We have seen the rules prescribed by the Federal Agencies setting forth what is "necessary for the proper and efficient operation of the plan" so far as the merit system is concerned.

To us there seems to be no logical distinction between legislation authorizing the President to establish "codes of fair competition" for business without laying down a criterion to govern his action, and legislation authorizing a Federal agency to determine what type of merit plan is "necessary for the proper and efficient operation of the plan," without laying down a criterion to govern its action. In each the power given is "without statutory landmark, compass, map, guidepost or corner-stone in one whit controlling its exercise or prescribing its channel, or indicative of any certain intendment of the legislative mind, beyond the mere grant." In the one, the code was to be "fair", in the other the plan is to be "proper." This is not Congress "laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." The power held by the Federal agencies under the acts heretofore set forth, "in essence * * * is the power of pure and simple despotism."

Were we permitted to rest legal conclusions nowadays on completely analogous pronouncements heretofore made by the courts, it would appear that the acts of Congress, leaving to the Federal agencies the authority to determine if a state merit system is "proper," are invalid as a delegation of legislative authority. However, we must keep in mind that the Knott Case was decided in 1908 and the N. R. A. Case in 1935. Since the last date, the theory of the "Constitution as it speaks today," (Marsh v. Bartlet, Mo. Sup. 121 S. W. (2d) 1. c. 742) has bloomed, and we find that legislation is held valid because the expanding need of state and nation demand such constitutional

construction. Further, the recent cases of *Currin v. Wallace*, 306 U. S. 1, 83 L. Ed. 441 (1938) and *United States v. Rock Royal Co-Operative*, 307 U. S. 533, 83 L. Ed. 1446 (1938), approving certain broad delegations of authority to the Secretary of Agriculture, while not analogous to the present statutes, indicate that the United States Supreme Court, as presently constituted, would, in all probability, uphold the provisions of the acts of Congress above set forth as proper, and sufficiently definite to avoid being a delegation of legislative authority.

Since we can no longer rely on past precedent, but must speculate on what the United States Supreme Court will do in the future, we must, in view of the trend reflected in the cases last cited, concede that the provisions heretofore set forth in the acts of Congress are valid. At least, they carry a presumption of validity, since every act of Congress is presumed to be valid until a court of competent jurisdiction declares otherwise.

It is, therefore, our opinion that under House Bill 501 the State Board of Health may take such action as may be necessary, relative to the establishment of a merit system, in order to comply with the acts of Congress and administrative rules therein designated that exist as of October 10, 1941. We desire to add, however, that House Bill No. 501 does not authorize the Board of Health to comply with any act of Congress or rule or regulation that may be enacted or promulgated after the effective date of House Bill No. 501.

In connection with this you ask in your request whether House Bill 501 allows the Board of Health "to come under the State Merit System or whether it will be necessary to set up" its own merit system. We are of the opinion the Board will have to set up a merit system of its own. There is no such thing as a State Merit System in Missouri. The only other merit systems in operation in this state are those carried on by the Unemployment Compensation Commission and the Social Security Commission. The first has for its authority Section 9426 d, R. S. Missouri, 1939, which relates to the Unemployment Compensation Commission alone. So far as we are informed, unless the Sixty-first General Assembly took some action, the Social Security Commission has no statutory authority supporting the merit system there in use. At any rate, neither plan is

available to the Board of Health. House Bill 501 adopts statutes and regulations of the Federal Government, not of the Unemployment Compensation Commission or the Social Security Commission.

We think this holds true even if the Federal regulations permit the Board to adopt or come under one of the merit systems already in operation in this state. The reason for this is the fact that House Bill 501 imposes a duty upon the State Board of Health which it must perform. To merely come under either of the other merit systems in operation in this state, would be a delegation by the board to another governmental agency of this state of its authority in this respect. This, we think, the board may not do. Further, to do so, would violate the intent of the Legislature of this State. To date that body has enacted House Bill 501 and Section 9426 d, R. S. Missouri, 1939, on the subject of merit systems. The fact there are two separate acts in no way referring to each other, indicates an intention of the part of the General Assembly to require separate merit plans. That intention is, of course, controlling.

With respect to that part of your request desiring to know the proper procedure for handling and paying out these Federal moneys, it appears that House Bill No. 501 further provides as follows:

"* * * said funds shall be received by the State Treasurer and deposited in separate funds to be known as the United States Public Health Title VI funds, the Venereal Disease Control fund, the Children's Bureau fund, and any other fund specially designated by a Federal agency for the use of the State Board of Health for health purposes, and to be paid out by the State Treasurer on requisitions drawn by the executive officers of the State Board of Health on a warrant of the State Auditor. Said funds being allotted to the State of Missouri for health purposes by the Federal Government of the General Assembly shall appro-

Mr. A. Louis Landwehr

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Sept. 15, 1941

priate the same to the use of the State Board of Health, under such provisions as are set out for the reception and use of funds by the Federal Government."

To us that seems to be sufficiently definite to need no explanation. Further, it would appear such is merely a matter of accounting and does not present any legal question for our opinion.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

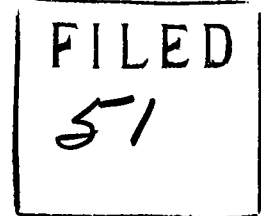
VANE C. THURLO
(Acting) Attorney General

LLB/rv

BOARD OF NURSES:

Nurses working under United States Health Service are not compelled to obtain nurse's license.

December 8, 1941



Laura Layher, R.N.
Executive Secretary
Missouri State Board of
Nurse Examiners
Jefferson City, Missouri

Dear Madam:

We are in receipt of your request for an opinion under date of December 2, 1941, which is as follows:

"The Board desires an opinion concerning the Missouri licensing of the U.S. Public Health Nurses.

"Is it necessary for the U. S. Public Health nurses, who are regular federal Civil Service employees and who are brought to this state because of the federal emergency and who will work under the direction of the State agency, to be registered in Missouri?

"These nurses are on the federal payroll and come to Missouri on the lend-lease basis, from the U.S. Public Health Service, and will be temporarily in Missouri.

"They are all licensed nurses, having registered in their original state.

"Your opinion will be appreciated."

The nurses are employed under the Public Health Service by virtue of Section 803, Title 42, United States Code Annotated, page 211. Under this authorization the nurses are allowed allowances for expenses.

Section 10032, R.S. Missouri 1939, describes the qualifications of a nurse and also describes the method of obtaining a license. This section is not applicable to employees of the United States and who are considered instrumentalities of the United States Government. The United States Public Health nurses derive their authority solely from the Public Health Service as hereinbefore set out. There is no question but that they are instrumentalities of the United States Government.

The Supreme Court of the United States, in holding that an employee, who is a member of such instrumentality of the United States Government, is not required to pass an examination or pay license fees in the case of William E. Johnson, v. State of Maryland, 254, U.S. 51, page 55, said:

"* * * Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch v. Maryland, 4 Wheat. 316, 4 L.ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. * * * * *

And the court further said:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch government servants remotely by a general rule of conduct; it lays hold of them in their

December 8, 1941

specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed. * * * * *

CONCLUSION

In view of the above authorities it is the opinion of this department that it is not necessary for the United States Public Health Nurses, who are regular federal Civil Service employees and who are brought to this state because of the federal emergency and who will work under the direction of the State agency, to be registered in Missouri in accordance with Chapter 61 R.S. Missouri 1939.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

COUNTY BUDGET LAW: In the county budget, the traveling and hotel expenses of the circuit court reporter should be classified in class 2.

April 11, 1941

Mr. J. F. Leggett, Jr.
Official Court Reporter
22nd Judicial Circuit
Bloomfield, Missouri



Dear Sir:

This is in reply to your recent request for our opinion in your letter which is in the following terms:

"I am court reporter for the 22nd Judicial Circuit, comprising Stoddard and Dunklin Counties, and under the statutes I am entitled to traveling and hotel expenses while attending circuit court away from home.

To start with these expense warrants were issued from class 2 of the county budget, then they were placed in class 4, and now the county clerk informs me that the Auditor has ruled that they should be in class 5. As I understand it, "expenses of holding Circuit Court" are placed in class 2 and certainly the expenses of the court reporter in getting to that court would be "expenses of holding Circuit Court". I can't see how any other interpretation could be put on these expenses.

I would appreciate it if you would give me an opinion as to which class of the budget my traveling and hotel expenses should be placed."

Regarding the classification of your salary, as distinguished from your expense account, we adhere to the

Mr. J. F. Leggett, Jr.

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April 11, 1941

opinion of the Attorney General to you dated March 1, 1934 (No. 52), ruling that such salary should be classified in class 4.

The County Budget Law, Section 10914 R. S. 1939 in part provides:

"The court shall show the estimated expenditures for the year by classes as follows:

* * * * *

Class 2. Expense of conducting circuit court and elections, * * * ."

And, Section 10911, R. S. 1939 in part provides:

"Class 2. Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this law. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1."

The traveling and hotel expense account of the court reporter is plainly included within the above quoted terms of Section 10911: "... cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this law." Such expense is made chargeable against Dunklin and Stoddard Counties comprising the 22nd Judicial Circuit (Section 2148 R. S. 1939), by Section 13347 R. S. 1939

April 11, 1941

which provides:

"Every official court reporter of a circuit or a criminal court in counties having forty-five thousand inhabitants and less shall be allowed and paid all sums of money actually expended only in necessary hotel and traveling expenses while engaged in attending any regular, special or adjourned term of court at any place in the circuit in which he is appointed, other than the place of his residence therein, or while engaged in going to and from any such place for the purpose of attending such terms of court. Such moneys shall be paid out of the county treasuries of the respective counties in said district in proportion to their respective populations."

The population of neither Dunklin nor Stoddard County exceeds 45,000, and the total combined population of the two counties exceeds 60,000. In such a circuit the reporter receives his traveling and hotel expenses under said Section 13347, which is the same as R. S. 1919, Section 12674, as it was ruled in the following terms in *Woodside vs. Dent County* 271 S. W. 766, 1.c. 767, 308 Mo. 227:

"Appellant was resident of Dent county within the judicial circuit for which he was the duly appointed, qualified, and acting official court reporter. Circuit court was held in every county in this circuit, and every county in the circuit had less than 45,000 inhabitants, though the total population of the circuit was more than 60,000. The facts in appellant's case clearly bring him within the purview of sections 12670 and 12674, R. S. 1919,

April 11, 1941

and he was entitled to recover the full amount sought."

Such expense is not provided for in any other classification by the budget law. Class 4 is for salaries of county officers, for office supplies, and office expense; class 5 is for emergency and contingent expense (Section 10911 and 10914 R. S. 1939).

It might be more convenient and desirable from a purely financial and bookkeeping and administrative standpoint to have expense accounts and salaries of all officers in the same classification in the budget - class 4. However, we are bound by the words of the statute as it now stands. In said Section 10911 and 10914 the items of expense mentioned in class 4 are "amount necessary for the conduct of the offices of such officers," and "office expense." Within class 4 are expenses of offices which are open and doing business regardless of whether the circuit court is in session, and offices which in their functions are not directly related to the circuit court. In writing class 2, the legislature seems to have regarded the payment of expense of holding circuit court (and of elections) as being of greater importance than everything except payment of care of insane paupers. The legislature gave priority to the payment of expense of holding circuit court over payment even of salaries. There can be no trial without a court reporter. The traveling and hotel expense of such reporter is one of the costs and expenses of holding circuit court; while class 2 includes court costs chargeable against a party to a lawsuit, it is not confined to such costs, but also includes expenses of holding circuit court chargeable against the county.

In classifying this expense heretofore, the State Auditor and the county clerks appear to have been following an opinion of the Attorney General dated January 23, 1934, addressed to Honorable Wade W. Maupin, Prosecuting Attorney of Carroll County (No. 58) wherein it is stated generally that all traveling expense should be classified in class 5. But the traveling and hotel expense of the circuit

Mr. J. F. Leggett, Jr.

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April 11, 1941

court reporter is hereby ruled to be an exception to that rule.

CONCLUSION

In the county budget, the traveling and hotel expenses of the circuit court reporter should be classified in class 2.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General

EH:RT

SHERIFFS:
FEES:

Entitled to commission on notice of garnishment;
entitled to fees on each case for serving writs
on more than one case for the same trip.

July 16, 1941

Mr. Amos Lee, Sheriff
Jefferson County
Hillsboro, Missouri

7-22
FILED

52

Dear Sir:

In answer to your letter of July 14, 1941, asking
for an opinion in reference to your commission on garnish-
ments, we submit the following:

I.

Your first query is--

"I am writing you for an opinion in
regard to Sheriff's Commission on
executions where a Summons to garnishee
is served on a Corporation. In our
case I serve five or six hundred sum-
mons to Garnishee on Pittsburg Plate
Glass Co. at Crystal City, Mo. The
Company answers in Circuit Court on
the return day of the execution and
pays the money they are holding to
the Circuit Clerk, who, in turn
distributes same. Am I entitled to
a commission on the money paid the
Circuit Clerk the same as if it were
paid to me?"

In the case of Ring v. The Chas. Vogel Paint & Glass
Co., 46 Mo. App. 374, 1. c. 377, the court, in construing
cost statutes, said:

"Preliminary to the discussion of the
items of cost here in controversy, it
may be stated that the entire subject
of costs, in both civil and criminal
cases, is a matter of statutory enact-
ment; that all such statutes must be
strictly construed, and that the of-
ficer or other persons claiming costs,
which are contested, must be able to

July 16, 1941

put his finger on the statute authorizing their taxation. Miller v. Muegge, 27 Mo. App. 670; Shed v. Railroad, 67 Mo. 687; Gordons v. Maupin, 10 Mo. 352; Ford v. Railroad, 29 Mo. App. 616."

Section 1560, R. S. Missouri 1939, reads as follows:

"All persons shall be subject to garnishment, on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees."

Under the above section it provides that a garnishment may be issued either on attachment before judgment or on execution after judgment.

Section 1561, R. S. Missouri 1939, reads as follows:

"When a fieri facias shall be issued and placed in the hands of an officer for collection, it shall be the duty of the officer, when directed by the plaintiff, his agent or attorney, to summon garnishees, and with like effect as in case of an original attachment. The service of garnishment in such case, and the subsequent proceedings against and in behalf of the garnishee, shall be the same as in the case of garnishment under an attachment."

The above section applies only to garnishments after judgment but the garnishment procedure is the same as if it were an attachment before judgment.

Section 1564, R. S. Missouri 1939, partially reads as follows:

"Notice of garnishment shall be served on a corporation, in writing, by de-

July 16, 1941

livering such notice, or a copy thereof, to the president, secretary, treasurer, cashier or other chief or managing officer of such corporation;
* * * * *

Section 1565, R. S. Missouri 1939, provides the manner of serving the writ of attachment by way of garnishment and describes the procedure of an officer's writ.

Section 1566, R. S. Missouri 1939, provides that the garnishee may discharge himself before final judgment by paying and delivering the property to the sheriff.

Section 1567, R. S. Missouri 1939, provides the method of a garnishee holding the property upon his executing a bond to the plaintiff in the case.

After the garnishee has answered or has paid the money or has turned the property into court in compliance with Section 1566, supra, then a judgment can be obtained in the same manner as judgment on an attachment and execution be issued thereon. It was so held in the case of Frohoff v. Casualty Reciprocal Exchange, 113 S. W. (2d) 1026, 1. c. 1029, par. 2, where the court said:

"Conceding that a garnishment proceeding in aid of an execution is technically not the institution of a new suit but only an incidental means of obtaining satisfaction of the judgment upon which the execution has been issued, the nature of the proceeding is nevertheless such as to require that the issues made up by the pleadings 'shall be tried as ordinary issues between plaintiff and defendant,' and not only is the ultimate judgment a 'final judgment' in the sense that it finally disposes of all the issues and parties, but it is one upon which execution 'such as is allowed by law on general judgment' may issue to enforce such judgment. * * * "

In the case of Ring v. The Chas. Vogel Paint & Glass Co., 46 Mo. App. 374, 1. c. 379, which case came to

the court on appeal on a motion to retax the costs, the court said:

"The court allowed the respondent one-half commissions on the amount realized from the sale of the goods. This item is also challenged. Under the peculiar facts, a novel question is presented. The day on which the goods were attached, the defendant corporation made a general assignment for the benefit of its creditors. The assignee was let in to defend the suit, and he gave a forth-coming bond for the property. The property was afterwards sold by the assignee under an order of court, with instructions to hold the proceeds until the attachment suit was determined. This action was decided in the plaintiff's favor, and the assignee was ordered by the court to pay to the respondent's successor in office the amount of plaintiff's judgment, and a sufficient amount to cover costs, in which were included half commissions for the respondent. This charge must be sustained, if at all, under the following clause of section 4989 of the statutes in reference to the commissions of sheriffs. The clause reads: 'For commissions for receiving and paying moneys on execution or other process, where lands or goods have been levied on, advertised and sold, three per cent. on \$500, and two per cent. on all sums above \$500, and half of these sums when the money is paid to the sheriff without a levy, or where the lands or goods levied on shall not be sold, and the money is paid to the sheriff or person entitled thereto, his agent or attorney.' A proper construction of this clause does not authorize this item of costs. The commissions (if any) would go to the respondent's successor who

July 16, 1941

collected and disbursed the money.

*****"

This case is the only case in Missouri construing the commission allowed an officer as set out in Section 13411, R. S. Missouri 1939. This section, referring to commissions, partially reads as follows:

"*****"

For commission for receiving and paying moneys on execution or other process, where lands or goods have been levied and advertised and sold, three per cent on five hundred dollars and two per cent on all sums above five hundred dollars, and half of these sums, when the money is paid to the sheriff without a levy, or where the lands or goods levied on shall not be sold and the money is paid to the sheriff or person entitled thereto, his agent or attorney. *****"

The above partial section describes the procedure and allowance of costs under two different statement of facts. The first statement of facts provides specifically for the receiving and paying moneys on execution or other process, where the lands or other goods have been advertised and sold. Under this statement of facts the officer is entitled to three per cent on the first five hundred dollars and two per cent on all sums above five hundred dollars. The second statement of facts allows one-half of that amount when the money is paid to the sheriff without a levy and no sale has occurred on the other goods and also where the money is paid to the person entitled to the money, his agent or attorney.

Where the money is paid in to the circuit clerk the circuit clerk is acting as agent for the plaintiff and all other persons, including the sheriff, who are entitled to their costs.

In the case of Ring v. The Chas. Vogel Paint & Glass Co., 46 Mo. App. 374, 1. c. 379, the court construed the above set out partial Section 13411, supra, to the ef-

July 16, 1941

fect that the commission is only due to the one that distributes the money involved in the case who is the then sheriff and did not pass upon the point whether the sheriff at that time is allowed a commission as set out in the above section. Section 13411, supra, which is in the disjunctive, should be construed that the last statement of facts in this section does not refer to the first statement of facts which contains the words "collected and paid out." In the case of State ex rel. v. Brown, 146 Mo. 401, 1. c. 406, 47 S. W. 504, the court said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In view of the above holding and under the facts in your request, the law, as set out in Section 13411, supra, permits the sheriff to point to the law which entitles him to the commission.

CONCLUSION

In view of the above authorities it is the opinion of this department that a sheriff is entitled to a commission on all moneys paid in by a garnishee under a writ of attachment and notice of garnishment upon final judgment to one and one-half per cent commission on the first five hundred dollars and one per cent on all other sums above

July 16, 1941

five hundred dollars. He is entitled to this commission even if the garnishee pays the money into the circuit clerk before final judgment and afterwards a final judgment is obtained.

II.

Your second query is--

"I would like also to have an opinion in regard to the mileage fee on said Summons to garnishee served on Pittsburgh Plate Glass Co. I serve as many as twenty-five Summons to garnishee at one time where each case is a separate one. Am I entitled to a mileage fee on each case?"

Section 13411, supra, specifically states as follows:

"* * * * *

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip
..... \$0.10"

The sheriff can point to this section which entitles him to mileage of ten cents in the serving of a writ or other order of court when served more than five miles from the place where the court is held. In the case of State v. Thatcher, 92 S. W. (2d) 640, 1. c. 643, par. 10, 11, the court said:

"* * * * * First, because the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied. * * * * *

July 16, 1941

In view of the above authority, and since the above section is unambiguous, it needs no construction. The only restriction placed in the above partial section provides that the sheriff shall not charge mileage for more than one witness subpoenaed or other writ served in the same cause on the same trip.

Under the statement in your request all are separate actions and in the same cause. Since the section mentions a specific restriction, it is presumed that no further restriction is placed upon the sheriff in claiming his fees for mileage. In the case of State ex rel. Buerk v. Calhoun, 52 S. W. (2d) 742, 330 Mo. 1172, 83 A. L. R. 1393, the court stated:

"* * * But it is a sound rule of construction that the general intent of a statute cannot be overthrown by subsidiary provisions of particular or limited application. * * * * *"

CONCLUSION

In view of the above authorities it is the opinion of this department that a sheriff is entitled to mileage fee on each summons in each separate case where he serves a notice of garnishment on a garnishee. He is entitled to mileage on each case even though he serves more than one summons on the same trip.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

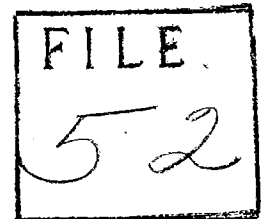
WJB:DA

RECORDER OF DEEDS: A fee may not be charged by a
Recorder of Deeds for recording
a discharge of a soldier in
military service.

4

October 25, 1941

Mr. Henry G. LePage
Recorder of Deeds
Cole County
Jefferson City, Missouri



Dear Mr. LePage:

We desire to acknowledge receipt of your request of October 23, 1941, for an opinion on the question of the duty of the Recorder of Deeds to require payment of a fee for recording a discharge of a soldier in military service, which is as follows:

"I will appreciate an opinion from you in answer to the following questions:

"Is there any provision in the Statutes providing for recording without a fee the discharge of a soldier from the United States Army or Navy?

"Is there any provision in the Statutes providing for recording without a fee the discharge of any Veteran of the World War or any previous war in which soldiers or sailors of this country participated?"

We are unable to find any statute, Federal or State, providing for a fee to be charged by a County Recorder of Deeds for recording a discharge of a soldier in military service. However, Section 15077, Revised Statutes of Missouri, 1939, does provide:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier,

Mr. Henry G. LePage.

- 2 -

October 25, 1941.

sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

Absent statutory provision for the charge of a fee for recording an instrument, a Recorder may not make such charge.

In passing on this question the court, in the case of *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 860, said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 28, 149 S. W. 638; *King v. Riverland Levee Dist.*, 218 Mo. App. 490, 493, 279 S. W. 195, 196; *State ex rel. Wedeking v. McCracken*, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S. W. 532, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S. W. 655; *Williams v. Charition County*, 85 Mo. 645."

Mr. Henry G. LePage.

- 3 -

October 25, 1941.

CONCLUSION

Therefore, it is the opinion of this Department that a fee may not be charged by a County Recorder of Deeds for recording a discharge of a soldier in military service.

Respectfully submitted,

S. V. MEDLING

Assistant Attorney General.

APPROVED:

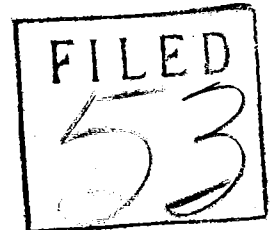
VANCE C. THURLO
(Acting) Attorney General

SVM/mc

TAXATION: Sales tax on coin operated games and devices.
SALES TAX: constitutional.

April 28, 1941

Honorable Max M. Librach
State Representative
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

"I would appreciate your rendering an opinion with respect to the legality of certain sections of House Bill No. 344. I call your attention to line 67 of page 3 of said bill, wherein all other coin-operated games, or devices, are subject to the two per cent sales tax. This provision of the Act raises a constitutional question in my mind, and hence my reason for inquiring of you as to its constitutionality.

"I might further add that as a practical matter should your Department hold this Act constitutional, that the collection of this tax would be almost impossible, for the reason that under the sales tax law it is the consumer who must pay the tax and the seller cannot absorb the same. Therefore, anyone who dispenses music or games under this provision would be required to collect the same off of every player.

"I would appreciate receiving your opinion with respect to this matter at your very earliest convenience."

House Bill 344 is the new Sales Tax Act and places a tax of two per cent. upon "all coin operated music boxes, all other coin operated games or devices."

"Sale at retail" is defined as:

"Any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace;"

It is elementary that the power of the Legislature in matters of taxation for public purposes is unlimited except in so far as restrained by the State or Federal Constitution or inherent limitations on the power to tax. State ex rel. Cement Co. v. Smith, 90 S. W. (2d) 405, 338 Mo. 409; Leonard v. Maxwell, 3 S. E. (N. C.) 316, Cooley on Taxation (4th Ed.) Vol. 1, page 171.

As said in State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S. W. (2d) 398, 1. c. 402:

"The inherent power of the Missouri General Assembly to levy taxes, independent of constitutional grant, is subject only to limitations prescribed in the Federal and State Constitutions. State ex rel. v. St. Louis, 318 Mo. 870, 894, 2 S. W. (2d) 713, 720 (11); Hannibal & St. J. R. Co. v. State Board of Equalization, 64 Mo. 294, 307; State ex rel. v. Smith, 338 Mo. 409, 90 S. W. (2d) 405, 406 (1)."

The definitions used in the sales tax statutes, rather than the popular meanings, control the interpretation to be given to the words used in the law. Thus, "sale" means whatever transaction the statute specifies. As pointed out in Sandberg v. Iowa State Board, 225 Ia. 103, 278 N. W. 643, "The Legislature is its own lexicographer."

Therefore, our General Assembly in providing that certain services are a sale at retail, by its definition brings those services within the purview of the Sales Tax Act.

We direct your attention to the fact that other jurisdictions have placed a similar tax upon services as well as upon tangible personal property, which designations have been upheld by the courts. *Renn v. Bedford*, 84 Pac. (2d) (Colo.) 827; *Indiana Creosoting Co., v. McNutt*, 210 Ind. 656, 5 N. E. (2d) 310, *Charleston Transit Co., v. James*, 4 S. E. (2d) (W. Va.) 297.

It is "so clear as not to be open to question" that this tax is an excise tax and not a property tax. *State ex rel. Cement Co., v. Smith*, 90 S. W. (2d) 405, 338 Mo. 409. This is in accord with the great weight of authority. *Stewart Dry Goods Co. v. Lewis*, 295 U. S. 550, 79 L. Ed. 1054, 55 Sup. Ct. 525, and cases collected in 89 A. L. R. 1432, 110 A. L. R. 1485, 117 A. L. R. 847 and 128 A. L. R. 893.

For the purpose of this opinion we do not deem it necessary to designate more specifically the nature of this tax in so far as it relates to services. We note, however, one writer on the subject has said, referring to the Missouri law, that "such taxes are on the border line between sales taxes and gross income taxes." Therefore, we rule that since the Legislature has the plenary power to levy taxes, subject only to specific constitutional inhibitions, that a tax may be

Apr. 28, 1941

imposed upon charges and fees on all coin operated music boxes and all coin operated games or devices, and that such tax is an excise tax.

You ask in your request as to the constitutionality of this provision. Such a broad request necessarily involves, in the words of Shakespeare, "a question deep and all kind of arguments." We will restrict ourselves to those provisions of the Federal and State Constitutions which this specific clause might contravene and will not consider those sections of the Constitution which might be violated by the Sales Tax Act as a whole. It is a well-settled rule of statutory construction that a statute is presumed to be constitutional. *Poole & Creber Market Co., v. Breshears*, 125 S. W. (2d) 23, 343 Mo. 1133, *Ward v. Public Service Com.*, 108 S. W. (2d) 136, 341 Mo. 227, and in order to render a statute unconstitutional it must appear so beyond a reasonable doubt. *State ex rel. School District v. Neaf*, 130 S. W. (2d) 509, 344 Mo. 905; *Hull v. Baumann*, 131 S. W. (2d) 721.

Article X, Section 3 of the Constitution of Missouri, provides as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The question of whether a tax of like nature is uniform upon the same class of subjects within the territorial limits of the authority imposing the tax, has been sustained by our court in *State v. Hallenberg-Wagner Motor Co.*, 108 S. W. (2d) 398. In that case the Supreme Court of Missouri held that the sales tax of 1937, which is similar to the instant act, did not violate Article X, Section 3 "because the burden falls alike on all taxpayers in substantially the same situation."

It is well settled that a wide latitude is accorded the taxing authorities in the selection of subjects for taxation. *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 43 Sup. Ct. 526, 67 L. Ed. 929. The limitation on the legislative discretion is that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U. S. 412, 40 Sup. Ct. 560, 64 L. Ed. 989.

As was said in *Ex Parte Asotsky*, 319 Mo. 810, 5 S. W. (2d) 22, 1. c. 27, 62 A. L. R. 95:

"The question of the propriety of a classification, measured by section 3, art. 10, is largely one for the Legislature. The courts may not declare a particular classification unreasonable and violative of said section 3, art. 10, unless the classification made cannot be justified on any reasonable grounds. So long as the tax imposed bears alike upon every one within the class and the classification can be justified upon any reasonable theory, the tax cannot be declared violative of section 3, art. 10."

Therefore, since the tax is upon all coin operated games or devices it will be seen that the tax falls upon all in the class and therefore does not violate Section 3, Article X, of our our Constitution.

While there is no constitutional inhibition against double taxation, still we point out that in *State v. Hallenberg-Wagner Motor Co.*, supra, this type of tax, since it is an excise tax, was held not to be double taxation and does not violate that rule of law that double taxation is not favored and is not to be presumed. We find no other constitutional provisions which this clause might contravene.

Apr. 28, 1941

You point out in your request that the collection of this tax from those who use coin operated games and devices would be most impracticable. We can only refer to what was said in Rinn v. Bedford, 84 Pac. (2d) (Colo.) 827, which case involved a sales tax upon services. The court said (l. c. 829):

"The method of collection is not shown to be unlawful, in fact it seems the only practical method; but this again is purely a matter of policy left by our Constitution to the discretion of the legislative branch of our state government. The wisdom or unwisdom of the legislation is not for us to decide."

This is in accord with the rule in Missouri as laid down in State ex rel. Parish v. Young, 38 S. W. (2d) 1020, in which our Supreme Court said (l. c. 1023):

"The power to levy and collect taxes is purely statutory, and has been confided to the Legislature and not the courts. De Arman v. Williams, 93 Mo. 158, 163, 5 S. W. 904; State ex rel. v. Ry. Co., 87 Mo. 236; City of Carondelet v. Picot, 38 Mo. 125, 130; 25 R. C. L. pages 27 to 29."

The method of collection is a matter with which we have nothing to do.

Conclusion

It is, therefore, the opinion of this Department that a two per cent. "sales tax" as imposed by House Bill 344 upon "all coin operated music boxes, all other coin operated games or devices," is constitutional and a proper exercise of the taxing power of the General Assembly.

Respectfully submitted,

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

Nepotism: As a rule death terminates the relationship by affinity, under Article XIV, Section 13 of the Constitution of Missouri.

May 6, 1941

5-7

Honorable Oliver L. Linck, Jr.
Assistant Prosecuting Attorney
St. Joseph, Missouri



Dear Sir:

This department is in receipt of your letter of April 24th, 1941, wherein you make the following inquiry:

"The members of Jones School District No. 62 Rural Buchanan County are Earl Brumley, Charles Jones and William Teaney. William Teaney's wife was a sister to Vianna Davis Brumley, but Mrs. Teaney died April 5, 1941. The question is whether William Teaney is restricted under the constitutional provision of nepotism from voting for Vianna Brumley. Would this relationship in any manner impair his position as a member of the district board under the above act?"

A postscript to your letter states the following:

"Vianna Davis Brumley has an application before the board for the position of teacher in relation to the above question."

We are not exactly clear as to the relationship involved. You state that William Teaney's wife was a sister to Vianna Davis Brumley. We cannot determine whether Vianna Davis

May 6, 1941

Brumley is the wife or related to Earl Brumley who is a member of the board. But we assume that she is within the prohibited degree as you state that William Teaney desires to vote for Vianna Davis Brumley.

It has been ruled under the nepotism act that the appointing power is prohibited from contracting with any relation by consanguinity or affinity within the fourth degree, and the fourth degree has been interpreted to include, but not lower than the fourth cousin.

We think that the rule relating to the nepotism act varies in this respect: that the relationship after death continues by consanguinity, but terminates as to affinity. There have been no direct decisions on this question in the State of Missouri. However, the decisions of *Kelly v. Nealy*, 12 Ark. 657 and *Blodgett v. Brinsmaid*, 9 Vt. 27, are directly in point to the effect that affinity ceases with the dissolution of the marriage which produced it. In fact, the greater weight of authority from the other states support the decisions mentioned above. The decision of *Brotherhood of Locomotive Firemen and Enginemen v. Hogan*, 5 Fed. Supp. 598, 1. c. 605, is to the effect that if there are no children of the marriage its dissolution terminates the relationship by affinity. The decision of *Stringfellow v. State*, 61 S. W. 719, 1. c. 721, is to like effect.

Having stated that the greater weight of authority is to the effect that dissolution of marriage terminates the relationship, we are of the opinion that the death of Mr. Teaney's wife terminated the relationship of Mr. Teaney with reference to Vianna Davis Brumley and that the nepotism act would not apply in so far as his voting for her is concerned.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

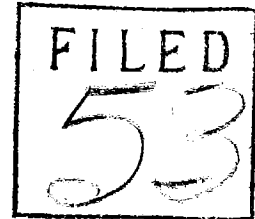
* Erratum

See, also, Opinion 207-75

OWN:CP

May 10, 1941

5-20



Mr. Max M. Librach
Representative
61st General Assembly
Jefferson City, Missouri

Dear Mr. Librach;

We are in receipt of your request for an opinion
wherein you state as follows:

"I would appreciate receiving from you an opinion as to the constitutionality of House Bills 487 and 488. These bills deal with workmen's compensation cases and are commonly called the Second Injury Statutes. One Bill is the Enabling Act for the second Bill.

"The problem that arises is as to whether or not the creation of a special fund out of which second injury cases are to be paid is constitutional under the Missouri Constitution. Some doubt arose in the minds of the Members of the Committee as to whether or not this special fund could be created in the State of Missouri. I might add that the Department of Education, of this State, as well as the Social Planning Council of the City of St. Louis, are very much in favor of this Bill; that no one seems to be opposed to it as it is already law in some twenty states throughout the United States."

House Bill No. 487 provides as follows:

"Section 3709. If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section.

"(a) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employe not exceeding one hundred fifty dollars, and, if not covered by the provisions of section 3701, the reasonable expense of his last sickness not exceeding two hundred and fifty dollars. But no person shall be entitled to compensation for the burial expenses of a deceased employe unless he shall have furnished the same by authority of the widow or widower, the nearest relative of the deceased employe in the county of his death, his personal representative, or the employer, who shall have the right to give such authority in the order named. All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the commission and shall be limited to such as are fair and reasonable for similar service to persons of a like standard of living. The commission shall also have jurisdiction to hear and determine all disputes as to such charges. If the deceased employe leaves no dependents the death benefit in this subsection provided shall be the limit of the liability of the employer under this chapter on account of such death, except as provided by Section 3707 of this chapter.

"(b) The employer shall also pay to the total dependents of the employe a single total death benefit, the amount of which shall be determined in the following manner, to-wit: There shall first be determined as a basis for computation $66\frac{2}{3}$ per cent of the employe's average weekly earnings during the year immediately preceding the injury as provided in section 3710 and such amount shall

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then be multiplied by three hundred and the amount so determined shall be the amount of such death benefit. The death benefit provided for shall be payable in installments in the same manner that compensation is required to be paid under this chapter, but in no case less than at the rate of six dollars per week nor more than twenty dollars per week. There shall, however, be deducted from such death benefit any compensation which may have been paid to the employee during his lifetime for the injury resulting in his death. If there be a total dependent or total dependents as the case may be, no death benefit shall be payable to partial dependents, or any other persons except as provided in paragraph (a) of this section.

"(c) If there be partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of such dependents proportionately.

"(d) The word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally, dependent for support upon a deceased employee in the following order and any death benefit shall be payable in the following order, to-wit:

"1. A wife upon a husband legally liable for her support, and husband mentally or physically incapacitated from wage earning upon a wife: Provided, that on the death or marriage of a widow, the death benefit shall cease unless there be other dependents entitled to any unpaid remainder of such death benefit under this chapter.

"2. A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent with whom he is living at the time of the death of such parent, there being no surviving dependent parent or step-parent. In case there is more than one child thus dependent, the death benefit shall be divided among them in such proportion as may be determined by the commission after considering their ages and other facts bearing on such dependency. In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases, if there is more than one person wholly dependent the death benefit shall be divided equally among them.

"(e) All death benefits provided for in this chapter shall be paid in installments in the same manner as provided for disability compensation.

"(f) Every employer shall keep a record of the correct names and addresses of the dependents of each of his employees, and upon the death of an employee by accident arising out of and in the course of his employment, shall so far as possible immediately furnish the commission with said names and addresses."

House Bill No. 488 provides as follows:

"Section 3707. (a) All cases of permanent disability where there has been a previous disability shall be compensated on the basis of the average annual earnings at the time of the last injury. If the condition resulting from the last injury is a permanent partial disability, there shall be deducted from the resulting condition the previous disability

as it exists at the time of the last injury, and the compensation shall be paid for the difference. If the condition resulting from the last injury is a permanent total disability, the employer at the time shall be liable only for the last permanent injury considered alone and of itself: Provided, that if the compensation for which the employer at the time is liable, as herein provided, is less than the compensation provided in this Act for permanent total disability, then in addition to the compensation for which such employer is liable and after the completion of payment of such compensation, the employee shall be paid by the state the remainder of the compensation that would be due for permanent total disability under Section 3706(a) of this chapter out of a special fund known as the Second Injury Fund created for such purpose in the following manner:

"Every employer shall pay to the State Treasurer for every fatal injury arising out of and in the course of employment sustained by an employee having no dependents as defined by Section 3709 of this chapter, a lump sum of \$1,000, which shall be in addition to the amounts provided for burial and the expenses of the employee's last illness. Such payments are to be placed in a fund to be known as the Second Injury Fund, which is to be used exclusively for the payment of compensation as provided above. The State Treasurer shall be the custodian of the Second Injury Fund and the Missouri Workmen's Compensation Commission shall direct the distribution thereof in the manner and amounts provided for in this chapter for the payment of compensation. In event a deposit is or has been made by an employer under the provisions of this section in the Second Injury Fund, and dependence in any degree is later proved as in this chapter provided, the State Treasurer is hereby authorized and directed to refund such deposit upon certification of the Workmen's Compensation Commission of the establishment of such dependency.

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"(b) If more than one injury in the same employment causes concurrent temporary disabilities, compensation shall be payable only for the longest and largest paying disability.

"(c) If more than one injury in the same employment causes concurrent and consecutive permanent disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability."

As we construe the above House Bills, whenever an employee sustains a fatal injury arising out of and in the course of employment, and said employee has no dependents, the employer is required to pay the State Treasurer as custodian a lump sum of \$1,000.00. These payments are to be placed in a fund to be known as the Second Injury Fund for the compensation of employees who by a combination of successive injuries have become permanently and totally disabled.

A good statement of the purpose of the above statutes is found in the case of Salt Lake City v. Industrial Commission, 199 Pac. (Utah) 152, 1. c. 155, 156, wherein the court said:

"The real purpose of the statute, both subdivision 1 and subdivision 6 heretofore quoted, is the building up and maintaining of a special fund for the compensation of employees who by a combination of successive injuries have become permanently and totally disabled, but whose total disability is not otherwise provided for in the Industrial Act. We submit the following as a typical illustration: If A. should suffer the total loss of one eye, his compensation under the regular schedule (Comp. Laws Utah 1917, Sec. 3138) would be not exceeding \$16 per week for 100 weeks. If he should afterwards lose the other eye in the same or different employment within the act, he would be entitled under the same schedule to an additional sum of not exceeding \$16 per week for 100 weeks.

The total compensation for the loss of both eyes would be not exceeding \$16 per week for 200 weeks. But the loss of both eyes under section 3139 of the same compilation constitutes permanent total disability, for which the injured employe is allowed 60 per cent. of his average weekly wages for a period of five years from the date of the injury, and thereafter 45 per cent. of such average weekly wages during the remainder of his life, the maximum not to exceed \$16 and the minimum not less than \$7 per week. The discrepancy between the total amount payable to the employe for these successive injuries under the regular schedule and the amount he would receive had he lost both eyes in the same accident under section 3130 would amount to a considerable sum, dependent entirely upon how long the employe lives after the expiration of the first 200 weeks. The \$750 exaction from employers is to take care of this discrepancy so that the entire burden may not be cast upon the last employer. If the law imposed the liability from him alone, the result would be that the unfortunate employe who has suffered only the loss of a single member would be handicapped in obtaining employment thereafter, for the loss of another member might result in permanent total disability. State Ind. Com. v. Newman, 222 N. Y. 363, 118 N. E. 794.

"These were undoubtedly the considerations which moved the Legislature to enact the provisions of the statute of which plaintiff complains. * * *"

House Bill No. 448, supra, declares that "the State Treasurer shall be the custodian of the Second Injury Fund and the Missouri Workmen's Compensation Commission shall direct the distribution thereof in the manner and amounts provided for in this chapter for the payment of compensation."

In determining the constitutionality of the above two House Bills we are immediately confronted with Section 19, Article X of the Constitution of Missouri, which reads in part as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, * * *"

In the case of B. F. Sturtevant Co. v. O'Brien, 186 Wisc. 10, 202 N. W. 324, the Supreme Court of Wisconsin was considering provisions similar to that contained in the above two House Bills. The Industrial Commission had found that the appellant employer was liable under a statute providing that where an employee came to his death through accident in the course of his employment, without dependents, \$1,000 was to be paid into the state treasury for the benefit of persons entitled thereto under the act. The employer refused to make the payment as ordered by the Commission, alleging that same was unconstitutional for a number of reasons.

The statutes of Wisconsin, before the court for construction and determination, contained the following subsections:

"(f) In each case of injury resulting in death, leaving no person wholly dependent for support, the employer or insurer shall pay into the state treasury such an amount, when added to the sums paid or to be paid on account of partial dependency, as shall equal four times the deceased employee's average annual earnings, such payment to the state treasury in no event to exceed one thousand dollars.

"(g) The moneys paid into the state treasury pursuant to paragraph (f) of this subsection with all accrued interest is hereby appropriated to the Industrial

Commission for the discharge of all liability for additional death benefits accruing under this subsection."

The court said (l. c. 326):

"But, no matter how beneficial or wise the legislation, it must be conceded that the Legislature must have complied with constitutional requirements in passing the act. Section 2, art. 8, Wisconsin Constitution, provides:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law."

"The act in question requires that certain funds be paid into the state treasury and paid out of the state treasury by direction of the Industrial Commission. It therefore comes clearly within section 2, art. 8, and the money can be paid out of the state treasury only in pursuance of an appropriation by law.

"Paragraph (g) of subdivision (4m) of section 102.09, provides:

"The moneys paid into the state treasury pursuant to paragraph (f) of this subsection with all accrued interest is hereby appropriated to the Industrial Commission for the discharge of all liability for additional death benefits accruing under this subsection."

"The provision of the Constitution is positive and prohibitory, but the language of the statute uses apt and appropriate terms to constitute an appropriation by law, and we entertain no doubt that the Legislature complied with section 2, art. 8, in the amendment of the compensation statutes in question."

The above House Bills provide no appropriation of the Second Injury Fund to the Workmen's Compensation Commission, held by the State Treasurer as custodian, and would seem therefore to be in conflict with Section 19 of Article X of the Missouri Constitution. An examination of the Sturtevant case, supra, reveals that the statutory provisions are quite distinguishable. In the Wisconsin case the employer paid the funds into the "State Treasury" while under the provisions of the above House Bills it is paid to the "State Treasurer" as "custodian." From a reading of the provisions in the above bills it is evident that if same were enacted into law it would not be the intention of the Legislature that the Second Injury Fund, held by the State Treasurer, be state funds. Otherwise, the Legislature would provide that the funds be paid into the State Treasury.

In State ex rel. Stevenson v. Stephens, 37 S. W. 506, money and securities were deposited with the State Treasurer by investment companies for the protection of investors. The question arose whether this money could be paid without a warrant and appropriation. The court, after citing Sections 15 and 19 of Article X of the Constitution, said (l. c. 508, 509):

"It is next insisted that though respondent may hold the money as treasurer, and for the purpose of making the security good, still he can only be required to pay it out in the manner and under the restrictions of the constitution and laws of the state. Section 15 of article 10 of the constitution requires that 'all moneys now, or at any time hereafter, in the state treasury, belonging to the state, shall, immediately on receipt thereof, be deposited by the treasurer to the credit of the state for the benefit of the funds to which they respectively belong,' and 'shall be disbursed by said treasurer for the purposes of the state, according to law, upon warrants drawn by the state auditor, and not otherwise.' Section 19 of the same article provides that 'no moneys shall ever be paid out of the treasury of this state, or any of the funds under its management, except

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in pursuance of an appropriation by law.' The statute contains like provisions. Rev. St. 1889, Sec. 8662. It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security intended for the protection of those dealing with bond investment companies, and was not money belonging to the state, within the meaning of the constitution. The securities, whether in money, bonds, or notes, are held by the treasurer in trust, not for the use or benefit of the state, but for the protection of those who may hold the bonds, certificates, or debentures of bond investment companies which are authorized to sell such securities on the partial payment or installment plan. * * * * *

* * * It is clear that the legislature did not intend that the money or securities deposited should be paid out or returned under the regulation required in paying out the public money. We are of the opinion, therefore, that respondent had the implied power, under the act, to make the agreement, and that an appropriation or warrant of the auditor was not necessary. * * * * *

The moneys paid to the State Treasurer as custodian, are to be paid out under the direction of the Workmen's Compensation Commission for a special purpose, viz., employees who have suffered misfortune in their employment. These funds are held by the State Treasurer as a mere depository, and clearly are not state funds. We are therefore of the opinion that the Second Injury Fund may be collected and paid out by the State Treasurer under the terms of House Bills 487 and 488 without violating Section 19 of Article X of the Missouri Constitution.

The constitutionality of the Commission's order requiring payment of \$1,000 into the State Treasury was attacked in the Sturtevant Case, supra, for the additional reason that it violated the Fourteenth Amendment to the Federal Constitution. The court in answering this complaint said (1. c. 328):

"It is further claimed by the appellants that the legislation in question is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the federal Constitution. These objections are set at rest by the decision of the United States Supreme Court in the case of R. E. Sheehan & Co. v. Shuler, 265 U. S. 371, 44 Sup. Ct. 548, 68 L. Ed. 1061."

In the Sheehan Company Case, referred to in the above opinion, provisions similar to the ones at issue were upheld by the United States Supreme Court as not being in conflict with the Fourteenth Amendment. The court said (Law Ed. 1063):

"The companies contend that these subdivisions are in conflict with the 14th Amendment, and that the awards made thereunder deprive them of their property without due process and deny them the equal protection of the laws.

"The substance of these two provisions is that when an injury causes the death of an employee leaving no beneficiaries, the employer or other insurance carrier shall pay the state treasurer the sum of \$500 for each of two special funds: one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disabilities; and the other, in the vocational education of employees so injured as to need rehabilitation. The use of such special funds for such purposes is an additional compensation to the employees thus injured, over and above that prescribed as the payments to be made by their immediate employers. Such additional compensation is neither unjust nor unreasonable. Thus, an employee who, having lost one hand in a previous accident, thereafter loses the second hand, is, obviously, not adequately compensated.

by the provision requiring his employer to make payment for the loss of the second hand, independently considered, the total incapacity finally resulting from the loss of both hands working much more than double the injury resulting from the loss of each separate hand, considered by itself. In such a case, however, as in the case of an injury requiring vocational rehabilitation, it is the theory of the law that such additional compensation to the injured employee should not be required of the particular employer in whose service the injury occurred, but should be provided out of general funds created by payments required of all employers when injuries resulting in the death of their own employees, leaving no beneficiaries, do not otherwise create any liability under the Compensation Law.

"We do not think that the due process clause of the 14th Amendment requires that such additional compensation to injured employees of the specified classes should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created. * * *"

And in holding that these provisions did not conflict with the equal protection clause, the court said: (Law Ed. 1064)

"Nor are these provisions in conflict with the equal protection clause. The contention of the companies is that the prescribed awards are in the nature of a tax imposed upon the happening of a contingency, and are of unequal application; that is, that they are imposed only upon such employers as happen to have employees who are killed without leaving survivors entitled to compensation. However, this is not a discrimination between different employers, but merely a contingency on the happening of which all employers alike become subject to the requirements of the law. All are required to contribute, under identical conditions, to these special funds. State

Industrial Commission v. Newman, 222 N. Y. 368, 118 N. E. 794."

In the case of Home Accident Insurance Co. v. Industrial Commission, 34 Ariz. 201, 269 Pac. 501, provisions similar to those contained in the above two House Bills before us for consideration were attacked as being in conflict with the Fourteenth Amendment and a denial of the equal protection clause of the Federal Constitution. The court said (l. c. 505, 506):

"It is contended that the statute providing for the payment of the \$850 in question is unconstitutional and void, because it deprives petitioners of their property without due process of law, and denies them the equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and by section 4, article 2, Constitution of the state of Arizona. The argument is that this provision is arbitrary, unreasonable; and discriminatory, in that it provides for a special classification, consisting of only those employers coming under the Workmen's Compensation Act who employ persons without dependents, but with the right to claim compensation, and that it is not required that the beneficiaries of the payments thus made be employees of the persons whose payments create the fund, nor the dependents of such employees, but merely that they be employees disabled in industry. We think it perfectly plain that, though subdivision 9 does provide that only those employers who happen to have an employee without dependents killed shall make the payments in question, and that the beneficiaries of the fund may be employees of employers other than those making the payments, neither of these facts render it arbitrary or discriminatory, because the contingency upon the occurrence of which the employer becomes liable, is just as applicable to one employer as another. And perhaps it was thought that it would tend to place all employees upon a more nearly equal footing in

the matter of securing employment, since the Legislature may have entertained the idea that employees without dependents would be given the preference by some employers, in the absence of such provision, inasmuch as the accidental death of a workman without dependents would mean that the employer would pay the funeral expenses and nothing more.

"It is necessary on this phase of the case to do no more than give an excerpt from a decision of the Supreme Court of the United States in *Sheehan Co. v. Shuler*, supra, in which that court held in plain and unmistakable language that such a provision violated neither the due process nor the equal protection clause of the Constitution of the United States."

From the foregoing we are of the opinion that the provisions of the House Bills, Nos. 487 and 488, do not violate the Fourteenth Amendment and are not in conflict with the equal protection clause of the Federal Constitution.

Section 3, Article X, of the Missouri Constitution provides as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

In the Home Accident Insurance Company Case, supra, the statutes were also attacked as being violative of a constitutional provision providing for uniformity of taxation. The court said (l. c. 504, 505):

"Petitioners contend, further, that the portion of subdivision 9 providing for the payment in question is a tax measure, and the \$850. to be paid a tax, and that

it contravenes section 1, article 9, of the Constitution of Arizona, reading as follows:

"The power of taxation shall never be surrendered, suspended, or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only."

"It is obvious that the tax referred to in this section is a tax on property, and not a tax on an occupation or business. This court so held in *Re Auxiliary Eastern Canal Irrigation District*, 24 Ariz. 163, 207 P. 614, when it said that it 'relates to the revenue required for the general purpose of government, state and municipal.' It is equally clear that the \$850 subdivision 9 requires to be paid is not a tax on property at all, but a part of the compensation the employer, his insurance carrier, or the state compensation fund is compelled to pay, when the employee killed in the course of his employment leaves no dependents. It is just as much a part of the expense the employer must bear or the insurance carrier assume as the amounts to be paid directly to the employee or his dependents, because it is imposed for the same general purpose, the promotion of the welfare of those disabled in industry, and in the exercise of the same power, the police power of the state. The fact that it reaches the injured employee for whom it is intended through a somewhat different channel--that is, is paid into the state treasury and held in a special fund, to provide in the manner stated for the promotion of the vocational rehabilitation of persons disabled in industry--does not give it a tax status different in any degree from that of the compensation that must be paid directly to employees or their dependents.

Being imposed for the same purpose, and in the exercise of the same power, it is necessarily the same kind of tax as other compensation, and under all the authorities this is not a tax on property, but a tax on occupation or business."

* * * * *

"Under the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which fails within the inhibition imposed by the usual constitutional provision in relation to uniformity of taxation.

* * * * *

"To substantiate their contention that the \$850 is a tax on property petitioners cite two cases, *People v. Yosemite Lumber Co.*, 191 Cal. 267, 216 P. 39, and *Bryant v. Lindsay*, 94 N. J. Law, 357, 110 A. 823, upon which they chiefly rely. The New Jersey case is not in point, though the court did hold that the \$400, which an act of the Legislature, separate and distinct from the Workmen's Compensation Law and in no way amendatory or supplementary thereof, required employers to pay in all cases in which an employee killed left no dependents, was a tax on property, and therefore unconstitutional. This holding, however, was based principally upon the purpose for which the payment was required; the law providing that it be made to the commissioner of labor, to be used in defraying the expenses of the state labor bureau, and the court said that this was 'nothing more nor less than a tax imposed for the purpose of supporting the expense of a state agency,' very much the same as if it had been prescribed that it 'be turned into the state or county treasury, to be used in helping to defray the salaries of the various judges of the courts of common pleas,' whose duties required them to try cases arising under the Compensation Law. The other

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case is based on provisions somewhat similar to Arizona's, and is authority for petitioner's position; but we are clearly of the view, notwithstanding the holding therein, that the payment in question is not a property, but an occupation, tax. The great weight of authority is to this effect."

From the foregoing we are of the opinion that House Bills 487 and 488 are constitutional.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG

JUSTICE COURTS

Plaintiff, except infants, in a Justice Court cannot conduct his suit by an agent but may do so in person or by an attorney.

October 16, 1941

Hon. Max Librach
Member of the House of Representatives
Sixty-First General Assembly
418 Olive Street
St. Louis, Missouri



Dear Sir:

We are in receipt of your letter of September 20, wherein you request an opinion from this Department, upon the following statement of facts:

"I would appreciate receiving from you an opinion with respect to House Bill 270 which was passed and approved by the Governor at the recent session of the Legislature. House Bill 270 deletes the word 'agent' from Section 2593 of the 1939 Missouri Statutes. Also, Section 2595 eliminates the word 'agent'. However, Section 2596 has not been changed and the said section of the Statute permits an agent to defend a suit in a Justice Court. Also, Section 2603 permits an agent to have a suit continued.

"Because of this situation, it has become difficult to give an accurate interpretation of the law, that is to say, it is difficult as to whether or not the intent of all the sections of the Statutes mentioned mean that no agents are to practice in Justice Courts for any purpose whatsoever, or that they still might be permitted to defend suits as well as continue suits.

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"I would appreciate your opinion as to the extent to which an agent may participate in justice court procedure, if at all."

Section 2593, as it appears in the Revised Statutes of Missouri, 1939, reads as follows:

"Any plaintiff, except infants, may appear and conduct his suit either in person or by agent or attorney."

This Section was amended in Laws of Missouri, 1941, at page 414, by striking out the words "agent" and "or", so that this Section now reads as follows:

"Any plaintiff, except infants, may appear and conduct his suit either in person or by attorney."

In the case of Crescent Furniture Co. v. Raddatz, 28 Mo. App. 210, the Court construed Section 2593 in the form as it appears in the Revised Statutes of Missouri, 1939, and also Section 2596 R. S. Missouri, 1939, which latter Section reads as follows:

"Every defendant in any suit, except infants, may appear and defend the same, in person or by agent or attorney."

In this case the Court had this to say at l. c. 213:

"* * * A person can prosecute or defend in our courts either in person or by attorney, and in justices' courts he can do it by an agent who is not an attorney. Rev. Stat., sects. 2905, 2908, 2911. But where, in justices' courts, he prosecutes by agent, the proceeding must run in the name of the principal, just as in a court of record. The statute merely enables an agent, who is not an attorney, to conduct for his principal a proceeding just as he would do it if he were an attorney.

* * * * *

It will be noted from the reading of the new Section 2593, supra, that this Section has to do with any plaintiff, whereas, Section 2596, supra, has to do with every defendant. Therefore, it would seem that the legislature through the enactment of each of these Sections was endeavoring to fix the rights of both plaintiff and defendant in a suit before a Justice Court.

So, in construing these two Sections as they now appear in our laws, we turn to the cases as a guide for construction of statutes and in this connection we call attention to 3d Cyc. of Law and Pr. 1149, which reads as follows:

"So far as reasonably possible the several statutes although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms, nor will it be presumed that the Legislature intended to leave on the statute books two contradictory statements."

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In the case of State ex rel. Buchanan County v. Imel, 146 S. W. 783, 242 Mo. 293, the Court said:

"* * * One of the established rules for construing statutes is to examine closely the context of the act where the words to be construed occur, and thereby ascertain what meaning they were intended to convey. (Riggs v. Railroad, 120 Mo. App. 335, 1. c. 340; State v. Snyder, 182 Mo. 462, 1. c. 500; 82 S. W. 12)".

In the case of State ex rel. and to Use of Jamison v. St. Louis-San Francisco Ry. Co., 300 S. W. 274, 318 Mo. 285, 1. c. 290, the Court said:

"A construction should never be given a statute or a constitutional provision which would work such confusion and mischief unless no other reasonable construction is possible. * * *"

In the case of State ex rel. McAllister v. Dunn, 209 S. W. 110, 1. c. 112, 277 Mo. 38, the Court makes the following statement in discussing the construction of a statute:

"It is a well-settled rule that the Legislature is not to be held to have done a vain and useless thing."

In the case of Louisiana Purchase Exposition v. Schnurmacher, 132 S. W. 326, 1. c. 327, (Mo.) the Court said:

"It is a familiar canon of construction of statutes that the conditions under which the statute was enacted, and the purpose to be secured by it, should always be kept in view in determining what the Legislature meant by the language used in the statute. * * * "

We call attention to the case of *Smith v. Equitable Life Assurance Society*, 107 S. W. (2d) 191, 1. c. 195, Par. 4, where the Court had this to say:

"In determining the effect of an amendment of a statute the court must always proceed upon the basis that the Legislature intended to accomplish something by the amendment. *Holt v. Rea*, 330 Mo. 1237, 52 S. W. (2d) 877."

In order that we may properly construe Sec. 2593, *supra*, we invoke the reasoning of the Court in the case of *Stover Bank v. Welpman*, 323 Mo. 234, 19 S. W. (2d) 740, and here set forth portions of said opinion briefly: (l.c. 240, 241 and 245.)

"The Act of 1915 made two changes. It omitted use of the words 'sell' and 'selling' and omitted the words 'in a regular meeting of the board' theretofore included in the section. Section 80 of the Act of 1915 (Laws 1915, p. 140) became Section 11752, Revised Statutes 1919.

"It must be assumed that the Legislature had a purpose in 1915, in eliminating the words 'sell' and 'selling' and the words 'in a regular meeting of the board.' It must be assumed also, the Legislature in retaining the words 'indorse' and 'indorsing' was cognizant

of the provisions of the then existing Negotiable Instruments Law, and the definitions and provisions concerning indorsements therein contained, and the construction given to the prohibitive provisions by the courts. We do not conceive that the Legislature in amending the provisions by eliminating the words 'sell' and 'selling' and retaining the words 'indorse' and 'indorsing' used the latter words in a literal and unrestricted sense. Does the elimination of the word 'sell' and the words 'in a regular meeting of the board,' mean a maintenance of the inhibition undiminished, or mean a relaxation? Did the retention of the word 'indorse' make the elimination of the word 'sell' ineffective.
Did the omission of the act of selling from the statement of acts inhibited, serve to limit the meaning of the word 'indorse,' and inhibit the act of indorsing, if the indorsement constituted sale only?Section 90 eliminated the words 'sell' and 'selling,' as applied to notes received by the bank for money loaned, and Section 80 laid upon the board of directors the new requirement of making a record at each regular monthly meeting of its 'approval or disapproval of each and every purchase and sale of securities made since the last meeting.' This fairly implies that there might be not only purchases, but also sales of securities made by the officers not theretofore expressly authorized by the board but required to be submitted for its approval or disapproval."

Applying the general canons of construction as set forth in the cases, supra, together with the interpretation that has been given to old Sec. 2593, before the amendment, supra, and Sec. 2596, supra, in the Crescent Furniture Co., case, supra, we are of the opinion that the Legislature

clearly intended that any plaintiff, except infants, may appear in the justice court, but he must conduct his suit either in person or by an attorney and, as reasoned in the Stover Bank case, the words "in person", as well as the words "by an attorney" must have a restricted meaning. In Bouvier's Law Dictionary, 1934 Edition, P. 99, "Attorney-at-Law" is defined as: "An officer in a court of justice, who is employed by a party in a cause to manage the same for him." We say this for the reason that when the Legislature saw fit to delete from the Section the words "or by agent" it clearly intended to accomplish something by this amendment as was stated in the Smith case, supra, and as was reasoned in the Stover Bank case. The words that were left in the Section were to have a restricted meaning. Our attention is called to the case of Hughes v. Mulvey, Sanford, Vol. 1, (N. Y. Sup. Ct. Rep.) 92. We do not think that this case is in point for the reason that it will be noted in reading from page 93 of the opinion that the plaintiff's wife appeared in Court, accompanied by Mr. Flannagan, a counselor-at-law. It was contended in that case by the defendant that no recovery could be had because of the admission of defendant's wife to appear and plead for him at the return of the summons. The Court in commenting had this to say: (l. c. 94)

" . . . The defendant below is clearly wrong in his idea that the act creating Assistant Justices courts in this city, contemplated the employment of attorneys at law only, where it speaks of the appearance of a party in person or by attorney. The word 'attorney,' was used in its enlarged sense, and embraces any person to whom the party chooses to delegate his appearance"

We say this for the reason that we know of no case which precludes a practicing attorney from representing his client, although said client is not bodily in court at the time of such representation. This case would not be controlling in the situation before us for the further reason that the Legislature in Section 2593, supra, through the elimination

of the words "or by agent" and clearly enacted a section of the statute with wording much different from the section relied upon by the court in the Hughes case, supra.

Now turning to Section 2596, supra, it will be noted that the Legislature did not see fit to amend this Section. Of course no doubt they were fully apprised that such Section did exist in the statute for it followed in the same Article as Section 2593, supra, the one that was amended, and was no doubt apprised of the meaning given to the wording in Section 2596, supra, by the Crescent Furniture Company case. We do not think that there is any conflict between these two Sections and that each Section has been enacted to meet a particular situation different from the other. We do, however, point out the penalties invoked in Section 13314 R. S. Mo., 1939, which Section reads as follows:

"No person shall engage in the 'practice of law' or do 'law business,' as defined in section 13313, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association or corporation engage in the 'practice of the law' or do 'law business' as defined in section 13313, or both. Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri. It is hereby made the duty

October 16, 1941

of the attorney-general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state."

We do not, in this opinion, feel called upon to pass upon the effect of the words "or by agent" as contained in Section 2596, for the reason that we believe that it is always a question of fact as to when a person is amenable to the punishment invoked in Section 13314, supra, and each case would of course rest upon an independent statement of facts and the request for this opinion does not set forth any statement of facts or call for an opinion from this office as to whether a person is amenable to the punishment invoked in Section 13314, supra.

CONCLUSION.

We are of the opinion that there is no conflict between Section 2593, Laws of Missouri, 1941, P. 414, and Section 2596 R. S. Missouri, 1939, and that the amendment of Section 2593 R. S. Missouri, 1939, clearly prohibits an agent as differentiated from an attorney at law to appear in a justice court and conduct a suit for his principal who is plaintiff in the case.

Respectfully submitted

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

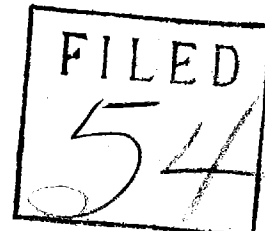
VANE C. THURLO
(Acting) Attorney General

BRC:RW

MUNICIPAL The manner of filling unexpired term for
OFFICES: the office of alderman in a city of the
ELECTIONS: fourth class.

March 14, 1941.

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Mr. Long:

This will acknowledge receipt of your request for an official opinion under date of March 4, 1941, which reads as follows:

"Please give me a ruling on the following situation:

"Alderman A resigned as Alderman to the City of Bowling Green and the Mayor appoints another Alderman to serve until the next General City Election. At that election there is still one year of the unexpired term to serve. Please advise me whether or not Alderman A can be elected and qualify to serve as Alderman for the unexpired term.

"We will appreciate your ruling on this at your earliest convenience."

We assume for the purpose of rendering this opinion that the City of Bowling Green is a city of the fourth class. Section 7123, R. S. Mo. 1939,

provides how vacancies in elective offices shall be filled in the city of a fourth class, and reads as follows:

"If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city: Provided, that when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment: Provided further, that any vacancy in the office of alderman which may occur within said six months preceding a general municipal election shall be filled in such manner as may be prescribed by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled."

The above statute provides that if a vacancy for alderman occurs within six months preceding a general municipal election, it shall be filled in such manner as prescribed by ordinance. Apparently, this vacancy occurred within six months of a general municipal election and the City of Bowling Green

has passed an ordinance authorizing the Mayor to appoint in such instances. The above section, further, provides that all other elective offices occurring within this period, prior to a general municipal election shall be filled by the Mayor, and further provides that if a vacancy of alderman does not occur within six months preceding a general municipal election, a special election shall be called.

Vol. 46, C. J., page 977, Section 127, in part, reads as follows:

"In the absence of statutes providing that, in the case of elective offices, an officer appointed to fill the vacancy shall hold until an election is held to fill the office, and except where merely the length of the term is fixed without reference to an unexpired term or to a vacancy in the term of office, it is generally held that officers, whether elected or appointed to fill a vacancy, will hold for the full period of the unexpired term, and it is frequently so provided by the constitution or by statute. * * *"

In the instant case, the statutory provision limits the length of time such officers shall remain in office.

After a careful examination of the statutory provisions, pertaining to the appointment of an alderman to fill an unexpired term, we find nothing prohibiting Alderman A making an effort to be elected for the remainder of the unexpired term, if he so desires, and in the absence of any such provision disqualifying him

Hon. Edward V. Long

- 4 -

March 14, 1941.

he, of course, may be elected to the unexpired term. We, of course, assume that he meets all of the qualifications for an alderman as he was recently holding such office.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

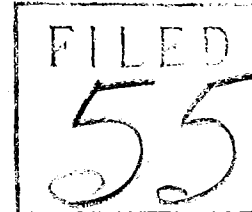
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

ARH:LB

INSURANCE; Approval of Articles of Association of Kansas City
Casualty Company.

1/20
January 20, 1941



Honorable Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Attention: Mr. William G. Chorn

Dear Sir:

We have received your letter of January 20th in which you enclose declaration of intention to form an insurance company under Article 6, Chapter 37, Revised Statutes of Missouri, 1929, said declaration comprising the articles of association of the Kansas City Casualty Company of Kansas City, Missouri, together with the affidavit of proof of publication.

We have examined the above mentioned declaration, articles of association and affidavit of publication and find the same to be in accordance with the provisions of Article 6, Chapter 37, Revised Statutes of Missouri, 1929, and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

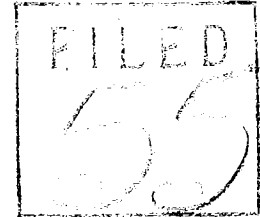
COVELL R. HEWITT
(Acting) Attorney-General

MW:EG

INSURANCE: **Stock** casualty companies under Article VI, Chapter 37, R. S. Mo. 1929, may issue participating contracts.

January 23, 1941

Honorable Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri



Dear Sir:

On July 9, 1936, R. E. O'Malley, then Superintendent of Insurance, asked this department whether a joint stock insurance company organized or licensed under the provisions of Article VI, Chapter 37, R. S. Mo. 1929, might issue participating policies of insurance. In response to that request, we wrote an opinion, dated August 14, 1936, holding that stock casualty companies operating under said Article VI could not issue insurance contracts, the terms of which permitted the policyholder to participate in the surplus or excess earning of the company.

On October 17, 1939, you asked this department for an opinion on substantially the same question; that is, whether a stock casualty company could write a Workmen's Compensation policy on the participating basis. You particularly asked us to consider whether Section 3327, R. S. Mo. 1929, which is contained in the article dealing with Workmen's Compensation, had any bearing on the question.

We answered this last request with an opinion dated November 3, 1939, in which we followed our earlier opinion of August 14, 1936, and further came to the conclusion that the said Section 3327, which provides in part that "nothing contained in this section shall affect the right of any insurance carrier or carriers to issue participating policies or to pay savings or dividends actually earned or saved" was not an enabling act; that this section did not create any new powers for insurance companies in regard to the issuance of participating policies, but merely reserved that right if the company in question was otherwise possessed of such powers.

We are still of the opinion that Section 3327 is not an enabling act giving any such powers, and we reaffirm that portion of the opinion of November 3, 1939. However, it is our purpose herein to again consider the fundamental powers of stock casualty companies doing business under the terms of Article VI, Chapter 37, R. S. No. 1929, and particularly as to their powers to issue contracts on the participating basis.

It will be observed that the 1936 opinion was decided chiefly on a construction given Section 5796 of said Article VI, which section provides in part as follows:

"Corporations may be formed for the purpose of doing business mentioned in the first class or division named in Section 5793 either on the stock or mutual plan and for the purpose of doing the business mentioned in the second and third classes or divisions on the stock plan * * * ; and it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized * * * ;"

After setting out the above quoted part of Section 5796, the opinion then proceeded in the following language:

"The Legislative intent is thereby made clear. Corporations organized for doing business under the first class named in Section 5793 must be formed either on the stock or mutual plans, and not both, and corporations formed for doing business under the second and third classes must be formed only on the stock plan. We believe that the General Assembly intended that corporations doing business on the stock plan should be

corporations owned and controlled entirely by the stock-holders and in neither the management nor the profits of which the policyholders participate."

In other words, the provision that "it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized," was construed to mean that a stock company could not issue a participating contract.

We have been unable to find any other statute which deals either directly or indirectly with the subject. There is no statute which states in so many words that a stock casualty company cannot issue participating contracts. Furthermore, there appears to be no decision of any appellate court in this state prohibiting a stock company from writing such a policy or any decision construing Section 5796 in any such way. Therefore, unless the language used in Section 5796 can be so construed, it would follow that the stockholders would have a right to give back a part of the excess earned to the policyholders by contract, if and when they might so desire. And this would appear to be true whether the articles of incorporation of any stock company or any statute specifically authorized such a contract or not.

We have found no authority exactly in point as to whether the articles of incorporation must authorize the issuance of this type of policy. The case of *Jacobs v. Wisconsin National Life Insurance Company*, (Wis.) 156 N. W. 159; however, has some bearing on the question. In that case, the defendant insurance company issued what was called a profit-sharing bond, which was, in substance, a contract to set apart annually from the earnings of the company and place in a special fund a sum of money equal to \$1.00 for each \$1,000.00 worth of insurance outstanding and in force for a period of thirty years. The insurance company was a capital stock company, and was capitalized for \$100,000.00. The lower court held that "said so-called profit-sharing bonds are void for want of authority in the defendant life insurance company to issue and sell the same." In other words, the lower court held that neither the articles of incorporation or any statute permitted

the issuance of such a contract. In reversing the case, the court said, l. c. 160:

"We are referred to no statute which forbids either expressly or by implication the making of such contract by a corporation like defendant. * * * The only ground assigned for holding the so-called income bond void is the speculative character of the investment therein. This affects only the obligee in the bond. It is not speculative, but quite certain as regards the obligor insurance company. The transaction amounts to this: The insurance company, instead of waiting for profits to accumulate and using these profits to promote and advance its insurance business, makes a contract whereby these anticipated profits are sold as above indicated, and thereby money is at once and in the early years of the insurance company available with which to advance its insurance business the purchaser of the bond taking his chances of reimbursement out of profits created or aided by his own money, and the insurance company assuming no other obligation than that of setting apart annually for a limited period from the annual premiums collected for life insurance \$1 for each \$1,000 of life insurance outstanding and in force.

"A contract is not to be condemned merely because it is ingenious (Govier v. Brechler, 159 Wis. 157, 161, 149 N. W. 740), nor unless it contravenes some rule of positive law or conflicts with public policy. Sheppard v. Pabst, 149 Wis. 34, 45, 135 N. W. 158. All stock corporations, when not expressly or by implication forbidden to do so, have general power to make contracts furthering the objects of their creation. This authority exists by necessary inference from the general powers conferred

on the corporation to do business.
Blunt v. Walker, 11 Wis. 334, 78
Am. Dec. 709; Clark v. Farrington,
11 Wis. 306; Winterfield v. Cream
City Brg. Co., 96 Wis. 239, 71 N. W.
101; Lastman v. Parkinson, 133 Wis.
375, 113 N. W. 649, 13 L. R. A.
(N. S.) 921.

"We discover nothing in the contract
here in question contravening any
statute conflicting with the objects
or purposes of the corporation or
offending against public policy, and
therefore the bond must be held to be
valid."

As we have already stated, there is no statute
which forbids either expressly or by implication the
making of such a contract on the participating basis by
a stock casualty company. Such a contract would not
contravene any statute conflicting with the objects or
purposes of the corporation, and surely public policy
would not be offended by a stock company giving back a
part of its excess earnings to its contract holders.

Stock casualty companies are given broad powers
to issue insurance contracts, and "when not expressly or
by implication forbidden to do so, have the general power
to make contracts furthering the objects of their creation."
The Jacobs case above held that no specific statutory
authority or specific powers given by the articles of
incorporation were necessary to permit the issuance of
contracts, the broad power of which the company had, unless
the specific matter was specially forbidden by law, and,
therefore, not included in the broad general powers.

The case of General Insurance Company v. Earle,
65 Pac. (2d) 1414, decided by the Supreme Court of Oregon
on March 16, 1937, is largely in point. In that case, the
plaintiff was a stock company domiciled in the State of
Washington, and sought to compel the Insurance Commissioner
of Oregon to permit it to write participating policies in
the State of Oregon. The plaintiff was authorized by its

charter to write participating policies in the State of Washington, but no such authority was given by statute in Oregon, and, conversely, no statute in Oregon specifically prohibited such a practice by stock companies. The court said, l. c. 1416:

"The two main contentions urged in support of the commissioner's ruling are substantially as follows: (1) That a policy containing this provision fails to specify on its face, as required by section 46-141, Oregon Code 1930, the amount of the premium to be paid thereon, since the amount which will ultimately be distributed to the holder is an indefinite sum which cannot be determined until the expiration of the policy period; and (2) that the payment by the insurer to the insured, under a participating policy, of any part of the premium stated in the policy, is unlawful under subdivision 7 of section 46-107, Oregon Code 1930, when made by a stock company.

"Section 46-141, in part, provides: 'Every insurance policy issued in this state shall bear on its face a true statement of the premium paid or to be paid and no insurance company * * * shall * * * offer, promise, * * * or pay directly or indirectly, any rebate of, or part of, the premium payable on the policy, * * * or any other valuable consideration or inducement * * * for insurance, on any risk * * * which is not specified in the policy of insurance; nor shall any company * * * offer, promise, give, sell or purchase any * * * property, or any dividends * * * or other thing of value whatsoever, as inducement to insurance * * * which is not specified in the policy.'

"In the nature of things, no insurance company writing a participating policy can tell in advance what losses it may sustain during any policy period, nor what amount of earnings it will have on hand for distribution to its policyholders at the expiration of such period. It therefore is impossible for it to specify on the face of the policy the exact amount which will be distributed to the holder upon the termination of the policy. Like all other insurance companies, the plaintiff was required to file its schedule of rates in the office of the insurance commissioner and, in writing its policies, was compelled to exact from its policyholders payment of the rate stated in the schedule filed with the commissioner. The amount thus to be paid was a definite and fixed amount and was stated on the face of the policy itself. This we think conformed to the provisions of section 46-141, Oregon Code 1930, which requires that every insurance policy shall bear on its face a true statement of the premium paid or to be paid, and that no rebate or other consideration for insurance shall be promised or paid unless specified in the policy. Whatever sum would later be repaid to the policyholder under this participating clause was of benefit to the policyholder and in the public interest. There is nothing wrong or immoral in the making or execution of such a contract and, unless forbidden by some other statute, the contract was lawful and in the interests of the public.

* * * * *

"It is contended that, under the proviso contained in subdivision 7 of section 46-107 Oregon Code 1930, stock companies

are prohibited from returning to their policyholders any part of their unabsorbed premiums. That subdivision directs that every insurance company, excepting a marine insurance company, before receiving a license or a renewal of a license to transact insurance business, shall file its rating schedules and policy forms in the office of the insurance commissioner, and shall observe its rating schedules and not deviate therefrom until amended or corrected rating schedules have been filed and, in its application of rates between risks of essentially the same hazard, shall make no discrimination. Following these provisions is a proviso reading as follows: ' * * * provided, that nothing herein contained shall prevent any mutual insurance company or any interinsurance or reciprocal insurance exchange from making return of unabsorbed premiums to members at the end of the policy period.'

"To this proviso we are asked to apply the rule that the expression of one thing is the exclusion of another. One of the offices of a proviso is to exclude some possible ground of misinterpretation of it, and this, we think, was the purpose sought to be accomplished by this proviso, for it could answer no other purpose so far as the return to its members of its unabsorbed premiums by a mutual company or interinsurers or reciprocal insurance exchanges are concerned. Their common-law right to distribute among their own members their surplus profits exists independent of statute, and this proviso merely confirms that right and places it beyond dispute. Moreover, if the interpretation sought to be given to section 46-141 could be upheld as to a stock company, it must be upheld as to a mutual company writing participating policies, for it applies to all insurance companies, whether stock or

mutual companies, and the failure to specify on the face of the policy the exact amount to be returned to the policyholder would be as fatal in one case as in the other and would be as much a bar to a mutual company as to a stock company.

"In construing statutes containing the same terms as are written into our statute, the Supreme Court of the state of Ohio, in *State ex rel, v. Conn.*, 110 Ohio St. 404, 144 N. E. 130, overruled both the objections urged here and, in doing so, we think clearly interpreted these particular provisions.

"The further contention that, in permitting the plaintiff to issue participating policies, it might cause a rate war, is answered by the fact that these policies have been in force for the last thirteen ~~years~~ and no rate war has ensued." (*italics*)

As stated in the Oregon case, a participating contract is of "benefit to the policyholder and in the public interest." Further, that "There is nothing wrong or immoral in the making or execution of such a contract and, unless forbidden by some other statute, the contract was lawful and in the interests of the public."

This, therefore, brings us to a consideration of the clause in said Section 5796, which provides that "it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized * * *;" This clause is very broad and indefinite. It does not describe what is meant by the mutual plan or what is meant by the stock plan of insurance. It certainly does not say that a stock company cannot write a participating policy in so many words. It also does not say that companies doing business on the mutual plan can write a nonassessable policy despite the fact that it has no capital stock fund to protect the policyholders, although we are informed that most mutual companies do write non-assessable policies. The principal question is then, what

is the mutual plan and what is the stock plan?

Mutual companies are described in Cooley's Briefs on Insurance, Second Edition, Volume 1, page 67, as follows:

"Mutual companies ordinarily possess no capital stock, but are made up of all the policy holders who take the place of the stockholders in an ordinary corporation, and act through agencies selected by themselves. The capital of such organizations usually consists of either cash or assessable premium notes, or both, contributed by the members to the common fund out of which each is entitled to indemnity in case of loss."

Mutual companies are described in 36 Corpus Juris, 1018, as follows:

"Mutual insurance is that system of insurance by which the members of the association or company mutually insure each other. It is that form of insurance in which each person insured becomes a member of the company, and members reciprocally engage to indemnify each other against losses, any loss being met by an assessment laid on all members. * * * If policies are issued to persons who are not members of the association, it is not mutual insurance."

Again, in 32 Corpus Juris, 1020, we find the following:

"There is an essential difference between stock and mutual insurance companies. A stock insurance company is

a corporation with a capital stock organized for the profit of its stockholders, who need not be policyholders. * * * The distinction between joint-stock insurance companies and mutual companies is that the former have a subscribed capital while the latter do not have such a capital but depend on their premiums. A mutual company is somewhat of the nature of a partnership; insured becomes a member of the corporation by virtue of his policy, is entitled to a share of the profits, and is responsible for the losses to the extent of his premium paid or agreed to be paid."

As to stock companies, we find the following in Cooley's Briefs on Insurance, Second Edition, Volume 1, page 66:

"A stock company is one which possesses a fixed amount of capital stock owned by shareholders, who constitute the corporation, and act through officers selected by them. These companies are in their organization and internal government controlled by the rules of law governing corporations generally, so far as they are applicable, and also by special rules applicable only to insurance companies. The shareholders in an insurance company have, in general, the same rights as the shareholders in any other corporation (Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1, 14 South. 490, 42 Am. St. Rep. 17), and the officers are generally invested with the powers usually appertaining to corporate officers."

From 32 Corpus Juris, 1005, we quote as follows:

"A stock insurance company is a corporation having a capital divided into shares, which is liable for the company's losses and expenses, and which is contributed by the stockholders who take the profits of the business. As distinguished from a mutual insurance company, it is a proprietary company established and carried on solely for the purpose of providing profits to its stockholders by the insurance of others. Although many proprietary companies carrying on ordinary life insurance business combine the mutual element with the proprietary, and divide their profits, apportioning a limited percentage to the stockholders as dividends on their shares and the balance of the policyholders, this practice does not transform the company into a mutual company."

The mutual plan of insurance, therefore, seems to be principally the lack of a capital stock fund, and, further, that the control of the company is exercised by the policyholders, each of whom must be a member of the company. The stockholders of a mutual company consist entirely of its members, all of whom are policyholders, and the members retain entire control of the company and elect the officers and director. In a stock company, the policyholders have no control whatsoever in the management of the company, and this power is vested entirely in the owners of the capital stock who need not be policyholders. Policyholders are not stockholders in a stock company and have no voice in the management of its affairs unless they might otherwise have acquired a share or shares of stock. Therefore, the control and management of the company, and the fact that each policyholder is a member of the company and is also insured, as well as an insurer, seems to be the distinguishing feature.

It cannot be said that the issuing of a participating contract by a stock company changes its character to that of a mutual. As stated in 32 Corpus Juris 1005, quoted above, "this practice does not transform the company into a mutual company."

The 1936 opinion of this office, and the concurring 1939 opinion, proceeded on the theory that the issuing of a participating policy was the one and principal distinguishing feature between the mutual plan and the stock plan of insurance. We do not believe this to be true.

The several cases on the subject, and also the textbooks on insurance, generally say that the stockholders of the stock company "take the profits of the business," or are "entitled" to receive the profits. In a stock company, the stockholders undoubtedly are "entitled" to the profits in the first instance, and no such company could be forced to divide the profits with its contract holders. However, being "entitled" to take the profits, and being forced to take and retain the same, appear to be two different things. We do not believe the Legislature ever had in mind the thought that the stockholders of a stock company should be forced, even against their will, to not only accept but also at all times to retain and personally keep each and every profit the company might make. Surely, if the Legislature had meant to say that, it would have used direct, clear and positive language to have accomplished that purpose.

It would follow, therefore, that, if any stock casualty company, organized or licensed under Article VI of Chapter 37, desires to return a part of its earnings to the policyholders, it is not prohibited from so doing. In the absence of a specific statutory prohibition, the stockholders of a stock company are at liberty to give away to their contract holders as much of the profits as they might desire, and any such practice would not contravene any provisions of the Missouri statutes nor public policy. It would be to the interest of the public to permit a participation, and of benefit to the policyholder.

CONCLUSION

It is therefore the opinion of this department that there is nothing contained in Article VI, Chapter 37, R. S. Mo. 1929, which either directly or indirectly prohibits the issuance of participating policies of insurance by stock casualty companies, and that any such

Hon. Ray B. Lucas

- 14 -

January 23, 1941

participating clause would be of benefit to the policyholders and in the public interest. Further, that there is nothing wrong or immoral in the making of such a contract whereby policyholders will be permitted to share in the profits of stock casualty companies.

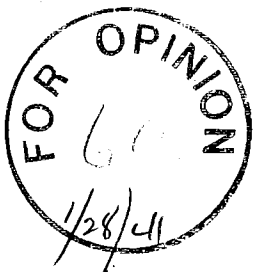
Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

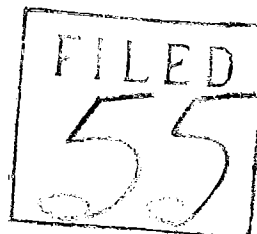
CRH:VC



INSURANCE: Approval of increase of capital stock and amendments to articles of incorporation of Employers Reinsurance Corporation.

January 29, 1941

1-29



Honorable Ray B. Lucas
Superintendent of Insurance
State of Missouri
Jefferson City, Missouri

Attention: Mr. Wm. G. Chorn

Dear Sir:

We are in receipt of your letter of January 29 in which you request the opinion of this Department as to the form and sufficiency of the papers submitted in connection with the increase of capital stock and amendments to the articles of incorporation of the Employers Reinsurance Corporation.

We have examined the certified copies of the papers submitted in connection with the increase of the capital stock of said company and the amendments to the articles of incorporation and are of the opinion that same are in conformance with the insurance laws of the State of Missouri and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney-General

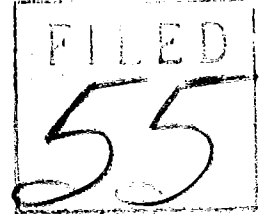
COVELL R. HEWITT
(Acting) Attorney-General

MW:EG

INSURANCE: Proceedings to increase capital stock of
the Business Men's Assurance Company of
America invalid.

February 7, 1941.

Honorable Ray B. Lucas, Superintendent
Insurance Department
Jefferson City, Missouri



Attention: Mr. William G. Chorn

Dear Sir:

We are in receipt of your letter of January 28th,
wherein you state as follows:

"We are enclosing herewith certified copies of the proceedings of a meeting of the Board of Directors and of the regular meeting of the stockholders of the Business Men's Assurance Company of America, both held on January 23, 1941. Both of the aforesaid proceedings, by resolution, authorized the amendment of the Company's Articles of Association or Charter to provide that the capital stock of the Company shall be \$1,000,000.00 divided into 10,000 shares of a par value of \$100.00 each; and further authorized a stock dividend of 100% upon the capital stock of \$500,000.00 now outstanding to be charged against the Company's surplus.

"We respectfully request your opinion as to whether or not the action taken at said meetings, increasing the capital stock of the Company from \$500,000.00 to \$1,000,000.00 by means

of a 100% stock dividend paid for out of surplus, was a proper and valid action and not in violation of the constitution or laws of the State of Missouri or of the United States.

"Please return the original copies of the aforesaid proceedings for our files and keep the carbons for your own record."

Section 5915 R. S. Mo. 1929 is a general section, under our statutes, relating to the increase and reduction of stock of insurance companies incorporated under the laws of this state:

"Any insurance company incorporated under the laws of this state may increase or reduce its capital stock for the purposes, in the manner and to the extent prescribed by law. Provided, the board of directors of any company desiring so to increase or reduce its stock shall file with the superintendent of the insurance department a certified copy of the proceedings, both of the stockholders' and directors' meetings, at which it was determined to increase or reduce such stock, and upon being satisfied that the law has been fully complied with, that the proceedings were regular, that the condition and assets of the company justify the increase or reduction, and that the same will not be prejudicial to the interests of the policyholders, the superintendent shall issue a certificate authorizing said increase or reduction, and showing that the stock of said company has been increased or reduced, the amount to which it is increased or reduced, the par value of the shares; and such certificate shall be filed and recorded as in this

chapter is provided for filing and recording the certificates of incorporation; and thereafter such company shall, with such increased or reduced capital, be subject to the same liabilities that it possessed or was subject to at the time of the increase or reduction of its capital; and the charter or certificate of incorporation of such company shall be deemed to be amended in respect to the amount of capital and the par value and number of shares, so as to conform to such increase or reduction."

Section 4546 and 4547 R. S. Mo. 1929 provide how the capital stock of any corporation may be increased respectively, as follows:

"The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received. Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock, which consent to such increase shall be obtained at a meeting of the shareholders, called for that purpose, and of which meeting sixty days' public notice of the time, place and general purpose of such meeting shall be given by advertisement in a daily or weekly newspaper published in the town or city where the principal offices of the company issuing such stocks or bonds may be located. All fictitious issues or increases of stock or of bonds of any corporation shall be void."

"The notice required by the preceding section shall be published at least

once a week in some newspaper in the town, city or county in which said corporation is located, the first insertion to be not less than sixty days, the last to be not less than one nor more than six days, previous to the day on which such meeting shall be held; but if there be no newspaper published therein, then in some newspaper published in the next nearest county, and by posting up a printed handbill in the office of said company."

In the case of Johnson vs. Kruckemeyer, 224 Mo. App. 351, 29 S. W. (2nd) 730, 1. c. 737, the court states the following rule of statutory construction:

" * * * As we read them, the two sections are not contradictory, and, in so far as they deal with different features of the same general subject-matter, it is our duty to read them together, and to harmonize them if possible. Betz v. Columbia Telephone Co. (Mo. App.) 24 S. W. (2d) 224; Sleyster v. Eugene Donzelot & Son (Mo. App.) 25 S. W. (2d) 147."

All of the above sections relate to the same subject-matter and when read together are in complete harmony.

In the case of State ex rel. vs. Cook, 178 Mo. 189, the court, in passing upon the question of whether it was necessary to go through the form of giving the sixty days' notice, said:

" * * * so the rule will be here announced, upon authority of the Riesterer case without further repetition of the reasons upon

which it had been predicated, that corporations in this State have by the unanimous concurrence of all the stockholders thereof, in meeting assembled, the right to increase their capital stock, or bonded indebtedness, without the necessity of going through the form of giving the sixty days' public notice of the time and place of such meeting, as the Constitution and statute designate, when all the stockholders express a waiver of such requirements. Such notice could have served no useful purpose whatever, under the facts as they are made to appear in this particular, where all stockholders of relator company were present and participated in the meeting called.

"It is our opinion that the sixty days' notice does not apply to conditions like the present, and that the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable. * * *"

There is no statement in the enclosed certified copies of the proceedings that all the stockholders were present at the meeting so as to waive the sixty days' notice requirement. The statement that "notice" was given is insufficient. Furthermore, there is no showing that the stockholders in attendance represented "the persons holding the larger amount in value of the stock."

Conclusion

From the foregoing, we are of the opinion that the proceedings taken by the Business Men's Assurance Company

Hon. Ray B. Lucas

-6-

February 7, 1941

of America to increase its capital stock were not in compliance with the laws of our State and, therefore, invalid.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

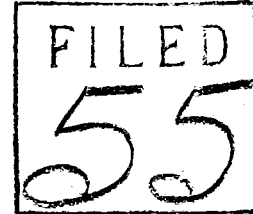
COVELL R. HEWITT
(Acting) Attorney-General

MW:LB

INSURANCE: Approval of papers as to form and sufficiency submitted in connection with increase of capital stock of Postal Life and Casualty Company under Article II, Chapter 37 R. S. Mo. 1929.

February 11, 1941.

Honorable Ray B. Lucas, Superintendent
Insurance Department
Jefferson City, Missouri



Attention: Mr. William G. Chorn.

Dear Sir:

This is to acknowledge receipt of your letter of January 30th, in which you request the opinion of this department as to the form and sufficiency of the papers submitted in connection with the increase of capital stock of the Postal Life and Casualty Company, a corporation organized under the provisions of Article II, Chapter 37 R. S. Mo. 1929.

We have examined the papers submitted in connection with the increase of the capital stock of the above company from \$100,000.00 to \$200,000.00 by means of 100% stock dividend paid for out of surplus and, are of the opinion that same is a proper and valid action and not in violation of the Constitution and Laws of the State of Missouri or of the United States.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

MW:LB

INSURANCE: Approval of increase of capital stock and amendments to articles of incorporation of Kansas City Casualty Company of Kansas City, Missouri.

March 11, 1941

3-11



Honorable Ray B. Lucas
Superintendent of Insurance
State of Missouri
Jefferson City, Missouri

Attention: Mr. Wm. G. Chorn

Dear Sir:

We are in receipt of your letter of March 11, in which you request the opinion of this Department as to the form and sufficiency of the papers submitted in connection with the increase of capital stock and amendments to the articles of incorporation of the Kansas City Casualty Company of Kansas City, Missouri.

We have examined the certified copies of the papers submitted in connection with the increase of capital stock of said company and the amendments to the articles of incorporation and are of the opinion that same are in conformance with the insurance laws of the State of Missouri and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

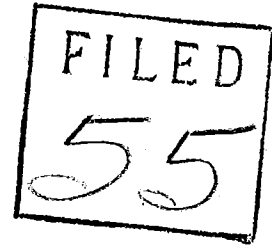
APPROVED:

VANE C. TAURLO
(Acting) Attorney-General

MW:EG

INSURANCE: Approval of articles of association of Commercial Bankers Mutual Casualty Company.

March 18, 1941



Honorable Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Attention: Mr. William G. Chorn

Dear Sir:

We have received your letter of March 18th, 1941, in which you enclosed declaration of intention to form an insurance company under article 7, chapter 37, R. S. Missouri 1939, said declaration comprising the articles of association of the Commercial Bankers Mutual Casualty Company of Kansas City, Missouri, together with the affidavit of proof of publication.

We have examined the above mentioned declaration, articles of association and affidavit of publication and find the same to be in accordance with the provisions of article 7, chapter 37, R. S. Missouri 1939, and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

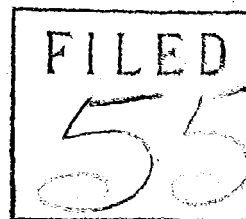
MW:DA

INSURANCE: Approval of Articles of Association of
Mutual Savings Life Insurance Company.

March 21, 1941

3/21

Honorable Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri



Attention: Mr. William G. Chorn.

Dear Sir:

We have received your letter of March 13th, 1941, in which you enclose declaration of intention to form an insurance company under Article 2, Chapter 37, R. S. Mo. 1939, said declaration comprising the Articles of Association of the Mutual Savings Life Insurance Company of St. Louis, Missouri, together with the affidavit of proof of publication.

We have examined the above mentioned declaration, Articles of Association and affidavit of publication, and find the same to be in accordance with the provisions of Article 2, Chapter 37, R. S. Mo. 1939, and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

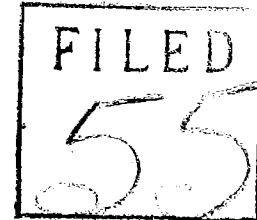
VANE C. THURLO
(Acting) Attorney-General

MW:CP

INSURANCE: Approval to amendment of Articles of Incorporation
of Commercial Bankers Mutual Casualty Company.

4/16
April 15, 1941.

Honorable Ray B. Lucas
Superintendent, Insurance Department
Jefferson City, Missouri



Attention: Mr. William G. Chorn.

Dear Sir:

We are in receipt of your letter of April 15th in which you request the opinion of this department as to the form and sufficiency of the amendment to Article 7 of the Articles of Incorporation of the Commercial Bankers Mutual Casualty Company organized under the provisions of Article 7, Chapter 37, R. S. Mo. 1939.

We have examined the certified copies of the amendment to Article 7 of the Articles of Incorporation of said company and are of the opinion that same are in conformance with the insurance laws of the State of Missouri, and not inconsistent with the constitution and laws of the State of Missouri and of the United States.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

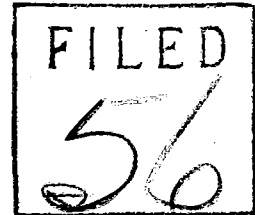
MW:LB

CORPORATIONS:
INSURANCE:
BUILDING & LOAN ASSOCIATIONS:

Insurance companies, both foreign and domestic, are required to register under the provisions of Section 5085 of R. S. Mo., 1939. Building & Loan Associations not required to comply with the general statute respecting registration of corporations.

May 13, 1941

Hon. Russell Maloney
Supervisor of Corporation Registration
Secretary of State's Office
Jefferson City, Missouri



Dear Sir:

This will acknowledge your letter of recent date, requesting an opinion, reading in part as follows:

"The purpose of this inquiry is directed to the following questions.

(1) May the office of the Secretary of State lawfully require and demand that insurance companies incorporated in states other than Missouri and which are licensed to do business in Missouri under the insurance laws of this state, file in his said office the registration provided for by section 5085, of article 1, of chapter 33, and require the payment of the registration fee provided for under section 5089, of said article and chapter?

(2) In the event that such foreign insurance corporations are not required to file annual registration under the provisions of section 5085, of article 1, chapter 33, is it the duty of the Secretary of State to address to such companies the letter required by section 8329 of article 3, of chapter 43, and enclose the form of affidavit set out in said section?

May 13, 1941

(3) What is the status of building and loan associations organized under the building and loan laws of Missouri with respect to the sections and articles of the Revised Statutes of Missouri 1939, herein before mentioned?"

The section of the statute (Section 5085 of R. S. Mo., 1939) to which you have above referred, reads as follows:

"Every corporation authorized or licensed, foreign or domestic, to do business in this state, other than corporations exempted from taxation by the laws of this state and farmers mutual insurance companies and mutual automobile insurance companies organized under article 15, chapter 37, R. S. 1939, shall annually, on or before the first day of July, register, in the office of the secretary of state, its corporate name and postoffice address, giving street and number, or building and number, or both, as the case may require; the name and correct postoffice address of its officers and directors, and if a foreign corporation, its principal agent in Missouri."

You will particularly notice the language of the statute, reading as follows: "Every corporation authorized or licensed, foreign or domestic, to do business in this state, * * * * * shall annually, on or before the first day of July, register, in the office of the secretary of state". Apparently by this language, the legislature intended that all corporations were to register with the secretary of state, excepting those which were expressly exempted. From this, it may be assumed that, since the legislature exempted, "* * * corporations exempted from taxation by the laws of this state and farmers mutual insurance companies and mutual automobile insurance companies organized under article 15, chapter 37, R. S. 1939 * * *" it was intended to include all corporations of whatever kind and character, whether foreign or domestic. The language, in this respect, is clear and unambiguous, and therefore, no room for construction exists. Cummins v. Kansas City Public Service Co. 66 S. W. (2d) 920, 334 Mo. 672; Keller v. State Social Security Commission, (Mo. Appeal) 137 S. W. (2d) 989. This conclusion

is fortified by consideration of Section 5078 of R. S. Mo. 1939, which reads as follows:

"Sections 5072 to 5077, inclusive, do not apply to insurance companies, and are not to be taken or construed to change or modify the laws which are directly applicable to that character of corporations, but apart from the insurance laws, all laws and parts of laws inconsistent with said sections are hereby repealed."

While the above section of the statute expressly exempts foreign insurance companies from compliance with the sections of the statutes therein mentioned, nevertheless, the language of that statute exempting insurance companies is not to be construed so as to exempt foreign insurance companies from registering under the provisions of Section 5085, supra. That section is mandatory in its terms. This is evidenced by the use of the word, "shall". Usually, the use of the word, "shall" in a statute indicates a mandate. This is particularly true when results shall follow in the event of failure to comply with such statute. *Ousley v. Powell* 12 S. W. (2d) 102; *State ex rel. Stevens v. Wurdeman*, 295 Mo. 566, 246 S. W. 189; *State ex inf. McKittrick v. Wymore*, 119 S. W. (2d) 941, 343 Mo. 98. Section 5091 of R. S. Mo., 1939, in substance and effect, provides that if any corporation fails to comply with the provisions of Article I, Chapter 33, on or before the 31st day of December in each year, the corporate rights and privileges of such corporation shall be forfeited.

It therefore follows, from what has been said, foreign insurance companies are required to register under the provisions of the statute before noticed, and pay a fee therefor as provided under the provisions of Section 5089 of R. S. Mo. 1939. Moreover, that the secretary of state is required to comply with Section 8329 of R. S. Mo., 1939. This is because Section 5086 of R. S. Mo., 1939 requires a corporation to make an affidavit to the effect that no part of the corporation's business or interests violates the laws of this state, relating to pools, trusts and combinations.

With respect to your third inquiry, it is our opinion that Section 5085, supra, does not apply to building and loan

May 13, 1941

associations organized under the building and loan laws of Missouri. This is because the Supreme Court in the case State ex rel. Wagner v. Farm & Home Savings & Loan Ass'n of Missouri, 90 S. W. (2d) 93 held that building and loan laws were exclusive for the regulation of such corporations. The court said:

"Building and loan associations are quasi public financial institutions, and for the protection of them the state of Missouri has by the act of 1931, provided special inquisitorial, supervisory, and regulating laws which are specific, adequate, complete and therefore exclusive. * * * * *

CONCLUSION

In view of the above, it is our opinion (1) that foreign corporations, authorized or licensed to do business in this state, are required to annually register on or before the first day of July in the Office of the Secretary of State. Moreover, that (2) it is the duty of the secretary of state, under the provisions of Section 5096 of R. S. Mo., 1939 to mail registration blanks as required under the provisions of Article I, Chapter 33 of R. S. Mo., 1939 and Section 8329 of R. S. Mo., 1939.

Building and Loan Associations are not required to comply with Section 5085 of R. S. Mo., 1939.

Respectfully submitted

APPROVED:

RUSSELL C. STONE
Assistant Attorney General

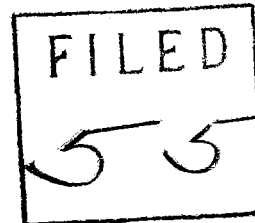
VANE C. THURLO
(Acting) Attorney General

RCS:ww

INSURANCE: Town mutuals may insure automobiles of members but coverage specifically limited to fire, lightning and windstorm.

August 13, 1941

Honorable Ray B. Lucas
Superintendent of Insurance
State of Missouri
Jefferson City, Missouri



Dear Mr. Lucas:

We wish to acknowledge your request for an opinion under date of May 7, 1941, wherein you state as follows:

"On March 5, 1941, Mr. Max Wasserman, in reply to a request from the Insurance Department, wrote a letter expressing the opinion that a town mutual insurance company, as provided by Article XVI, Chapter 37, R. S. Mo., 1929, could not legally issue policies of insurance against hazards other than fire, lightning and windstorm, as specifically authorized by Section 6064, R. S. Mo., 1929. Upon receipt of that letter instructions were issued by me to Traders Town Mutual Insurance Company of Kansas City, notifying that Company to cease the writing of any insurances except insurance against the hazards of fire, lightning and windstorm. The Company, through its attorneys, has taken the position that subsequently enacted statutes, a part of the general insurance laws of this State, permit it to write other coverages, and in support of this contention the Company has filed a memorandum brief with the request that such brief be submitted to your office for consideration. The brief

Aug. 13, 1941

is transmitted to you with this letter, with the request that same be reviewed and your official opinion be given, as to whether or not a town mutual may write insurance against risks other than the risks of fire, lightning and windstorm, and, in event it should be your opinion that such companies may write risks other than those specifically stated by statute, whether or not such company would, by the same token, be subject to other laws of this state pertaining to fire insurance companies and specifically those statutes relating to unearned premium reserve liability and the Missouri Fire insurance rating act, as embodied in Article VIII of Chapter 37, R. S. Mo., 1929."

On August 1st we received a supplemental letter from you covering the above subject matter, which reads as follows:

"On May 7th, 1941, a request was made for an opinion pertaining to the insuring powers of town mutual insurance companies. Attached to our request was a memorandum brief prepared by attorneys representing the Traders Town Mutual Insurance Company of Kansas City, in support of the contention of that Company that it has been granted by subsequent legislation all the insuring powers granted to regular stock and mutual fire and marine insurance companies under Section 5905 R. S. Mo., 1939.

"During the recent session of the Legislature, the section above referred to was repealed and re-enacted, and among other changes, the re-enacted section limits the insuring powers granted therein to insurance companies authorized to transact fire insurance business in this

state under the provisions of Article VI of Chapter 37'. This revision measure was known as House Bill No. 345 and was 'truly agreed to and finally passed' by the Sixty-first General Assembly of Missouri and signed by the Governor on July 29, 1941. Attached hereto you will find a copy of the amended section, to the text of which you will undoubtedly desire to give consideration, in connection with our request for an opinion, dated May 7, 1941."

The question presented is whether a company incorporated and operating as a town mutual under Article 16, Chapter 37, R. S. Mo. 1939, may insure the automobiles of its members against loss or damage resulting from hazards other than fire, lightning or windstorm. The inquiry is prompted by the action of the Traders Mutual Fire Insurance Company of Kansas City, Missouri, which has undertaken to insure the automobiles of its members against loss by collision and other hazards covered by the ordinary insurance contract designated as "comprehensive coverage."

Section 6186, R. S. Mo. 1939, provides that town mutuals may insure the "property" of its members, providing in part as follows:

"Hereafter all town mutual fire and lightning, tornado, windstorm or cyclone insurance companies organized for the sole purpose of mutually insuring the property of its members against any loss incurred by them from fire, lightning or windstorm, as may be provided by its constitution and by-laws, and not inconsistent with the provisions of this article, shall be exempt from all laws of the state of Missouri governing other insurance companies: * * * * *"

And again, in Section 6190, R. S. Mo. 1939, town mutuals are authorized to insure the "property" of its members, providing in part as follows:

"Upon the certificate being filed in the recorder's office, and the license or certificate of authority issued as provided in section 6189 of this article, such company and all town mutual fire insurance companies heretofore organized shall be authorized to insure its members against damage or loss by fire, lightning or windstorms to property situated in any county in which such company is authorized to do an insurance business. * * * * *

The first question to be determined is - Whether the authority of town mutuals to insure the "property" of its members is broad enough to include insurance on the automobiles of its members.

Section 655, R. S. Mo. 1939, lays down certain rules to be followed in the construction of all statutes of this state as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute:
First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import;
 * * * * *
 eleventh, the word 'property' shall include real and personal property;
 * * * * *

In the case of Allen v. Hartford Mutual Fire Ins. Co., 2 Md. 111, the court in holding that authority to insure

any kind of property against loss by fire includes personal as well as real property, said (l. c. 118):

"In the act of 1842, ch. 214, which is the original charter, we find given to the company, in the first section, 'full power and authority to make insurances on any kind of property, against loss and damage by fire.' More ample powers to make insurances, could not well have been given. The language used, is abundantly comprehensive, to include both real and personal estate, and all such interests in either, as the well settled principles of law recognize to be insurable interests."

There can be no doubt but that "an automobile is property." (Parry v. Maryland Casualty Co., 135 Misc. 883, 238 N. Y. S. 613, l. c. 614) And, consequently, we are of the opinion that town mutuals may insure the automobiles of its members.

The second question is - Having the authority to insure the automobiles of its members, are town mutuals limited to insure against the hazards of fire, lightning and windstorm, or may they also include such additional hazards, as theft, collision, etc?

32 C. J., Section 79, page 1028, states the following rule with reference to the power of insurance companies generally to insure against risks:

"The company may enter into a valid contract of insurance against such and only such risks as it is authorized to insure against by its charter or articles or the statutes under which it is created."

Thus, in the case of Delaware Farmers Mutual Fire Insurance Co., v. Wagner, 56 Minn. 240, 57 N. W. 656, it was held that authority to insure farm buildings, livestock

and grain against loss by fire did not cover the power to insure growing grain against hail. The court said:

"Section 338, c. 34, Gen. St. 1878, as amended at various times since its passage, provides that not less than 25 persons residing in adjoining towns, and owning, collectively, property of not less than \$25,000 in value, may form themselves into a corporation for the purposes of mutual insurance against loss or damage by fire, hail, lightning, or storms. Section 347 provides: 'Nor shall they insure any property other than detached dwellings and their contents, and farm buildings and their contents, and live stock, and hay and grain in the bin or stack.' The plaintiff corporation was organized under this statute, and the defendant became a member thereof. The amended articles of incorporation specify the hazards to be insured against, and the kinds of property to be insured, as specified in the statute. Neither the statute nor the articles authorize the insurance of standing or growing grain, and the statute, by its terms, expressly forbids it. Notwithstanding this, the plaintiff organized what is called the 'Hail Department' of its business, and went into the business of insuring standing grain against loss by hail. It attempted so to insure the defendant's standing grain, and issued him a policy purporting to do so. This is a suit brought by it to enforce payment of the premiums or assessments which he agreed to pay for such insurance. The defendant defended on the ground that such insurance was ultra vires, and beyond the powers of the corporation, and the court below so held, and ordered judgment on that

ground for the defendant. We are of the opinion that such attempted insurance was clearly ultra vires, and that the judgment for the defendant should be affirmed. So ordered."

For a companion case and to the same effect, see Delaware Farmers Mutual Fire Insurance Co. v. Wagner, 56 Minn. 243, 57 S. W. 656.

In the case of Andrews v. The Union Mutual Fire Insurance Co., 37 Me. 256, a corporation was authorized to insure against fire whether caused by "accident, lightning or any other means." The court in holding that the company could not insure against lightning not resulting from fire, said (l. c. 259, 260):

"No power is by its charter granted to the company to insure property from loss or damage occasioned by any other element than fire. If a loss by fire happen by lightning, or any other cause not within the exception, it may be recoverable. There is no more authority given to insure against loss or damage occasioned by lightning, than by any other element, unless that damage happen by fire."

In the brief submitted by Attorneys for the Traders Mutual Fire Insurance Company they find no fault with the reasoning of the above decisions but state that they are not applicable for the reason that they deal with "situations where the only authority to make insurance existed by virtue of a single law which did not specifically cover the kind or class of insurance in dispute, or where a statute, after enumerating certain classes or kinds of insurance which a company was authorized to make, proceeded specifically to deny the power to make other kinds of insurance." They contend that in the instant case there is no express or even implied prohibition against making all kinds of insurance on automobiles, but that on the contrary, there is a statute which expressly authorizes it, namely, Section 5905, R. S. Mo. 1939, as follows:

"All insurance companies authorized to transact fire insurance business

in this state may, in addition to the business which they are now authorized by law to do, insure any property against loss of damage by water or other fluid or otherwise, resulting from the breaking of or injury to sprinklers, pumps, pipes, or other apparatus, conduits or containers, used for the protection of property from loss by fire, arising from causes other than fire, by water or other fluid entering through leaks or openings in building or pipes or conduits, and against loss or damage to such sprinklers, pumps, pipes, apparatus, conduits or containers; also liability for loss or damage to property caused by overflowing, leaking or breaking of water supply equipments. Such companies shall have the right to insure against the loss or destruction of money, securities or other valuables; to insure property against loss or damage caused by flood, frost, freezing, drought, insects, vermin or forces of nature; to insure property against loss or damage caused by explosion, smoke, riot, insurrection, civil commotion, strikes, sabotage, vandalism or malicious mischief; to make all kinds of insurance on automobiles and other motor vehicles, airplanes and aircraft in general, including fire, theft, transportation, collision and also liability for loss or damage to property caused by automobiles and other cars and vehicles, airplanes and aircraft in general or by objects falling therefrom: Provided, that any company which confines its business to insurance upon automobiles and other cars and vehicles, shall also have the right to insure against liability for damages arising out of the ownership, operation

or use thereof, and also to insure against liability for damages arising out of the ownership or operation of automobile sales agencies, automobile garages, automobile repair shops and automobile service stations."

It is to be noted that said section authorizes all insurance companies authorized to transact fire insurance business in this state to make all kinds of insurance on automobiles and they reason that since town mutuals are authorized to do a fire insurance business they come within the very definition of the companies to which said section 5905, supra, refers.

The brief submitted goes to great length to show by statutory and historical background that their position is sound and that they come within the scope of Section 5905, supra. In view, however, of House Bill No. 345, passed by the 61st General Assembly, with an emergency clause, and approved by the Governor on July 29, 1941, repealing Section 5905, supra, and enacting a new section in lieu thereof to be known as Section 5905, their entire argument fails. The Legislature by said section definitely lays to rest the question of what insurance companies doing a fire insurance business may, in addition to the business which they are now authorized by law to do, make all kinds of insurance against loss or damage to property caused by automobiles. Said new section 5905 provides:

"All insurance companies authorized to carry on, do and transact fire insurance business in this state under the provisions of Article 6, of Chapter 37 may, in addition to the business which they are now authorized by law to do, make insurance against direct, indirect or consequential loss or damage to property by water or other fluid or otherwise, resulting from the breaking of or injury to sprinklers, pumps, pipes, or other apparatus, conduits or containers used for the protection of property from loss by fire,

arising from causes other than fire, and against loss or damage by water or other fluid entering through leaks or openings in buildings or pipes or conduits, and against loss of or damage to such sprinklers, pumps, pipes, apparatus, conduits or containers; and against loss of or damage to property caused by overflowing, leaking or breaking of water supply equipments. Such companies, in addition, may make insurance against the loss or destruction of money, securities or other valuables; and against loss of or damage to property caused by flood, frost, freezing, snow, hail, ice, weather or climatic conditions, including excess or deficiency of moisture, rain or rising of the waters of the ocean or its tributaries, drought, insects, vermin or forces of nature, and against loss or damage by disease or other causes to trees, crops or other products of the soil; and against loss of or damage to property caused by explosion, smoke, smudge, riot, riot attending strike, strikes, sabotage, civil commotion, vandalism or malicious mischief, or caused by wrongful conversion, disposal or concealment of an automobile or other motor vehicle, whether or not handled under a conditional sale contract or subject to chattel mortgage; and against intentional or other damage to or loss of property of any kind, real or personal, caused by or arising from war, whether formally declared or not, civil war, rebellion, insurrection, invasion, bombardment, military or usurped power, or by any order of the civil authorities meant to prevent the spread of conflagration or epidemic or catastrophe; also to make all kinds of insurance on automobiles and other vehicles, or airplanes, seaplanes, dirigibles and aircraft in general, including theft, transportation, fire and collision; and

to make insurance against loss of or damage to property caused by automobiles and other vehicles and airplanes, seaplanes, dirigibles and aircraft in general or by objects falling therefrom, including liability for loss of or damage to property caused by automobiles and other vehicles and airplanes, seaplanes, dirigibles and aircraft in general or by objects falling therefrom; also to make insurance against any other loss or damage to property or an interest in property, not otherwise delegated to another class or kind of company: Provided that any company which confines its business to insurance upon automobiles and other cars and vehicles and airplanes, seaplanes, dirigibles and aircraft in general shall also have the right to insure against liability for damages arising out of the ownership, operation, or use thereof, and also to insure against liability for damages arising out of the ownership or operation of automobile sales agencies, automobile garages, automobile repair shops and automobile service stations. Provided, further, that existing corporations which by their charters are authorized to do the business of fire, or marine, or fire and marine insurance, may, without amending their charters, make any one or more kinds of insurance now or hereafter permitted to such corporations."

Under said section there can be no longer any question of the intent of the Legislature to restrict the writing of ordinary automobile insurance contracts, designated as "comprehensive coverage," to fire insurance companies authorized to do business in this State under the provisions of Article 6, Chapter 37, R. S. Mo. 1939.

From the foregoing we are of the opinion that town mutual insurance companies organized under Article 16,

Hon. Ray B. Lucas

-12-

Aug. 13, 1941

Chapter 37 of the Revised Statutes of Missouri, 1939, may insure the automobiles of its members but such coverage must be specifically limited to damage or loss by fire, lightning and windstorm only.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG

STATUTE: Construing Section 8383, R. S. Missouri 1939.
INFORMATION:

October 24. 1941

Honorable A. L. Luther
Prosecuting Attorney
Scotland County
Memphis, Missouri



Dear Sir:

This will acknowledge receipt of your request
for an opinion which reads as follows:

"I would like to have an opinion from your office regarding the construction to be given Section 8383 of the Revised Statutes of Missouri 1939 and especially the words "careful and prudent manner". This section has been given various interpretations by those who read it and has been the basis for a large number of criminal prosecutions based on a charge of reckless and careless driving.

"The Missouri Digest under the topic of Reckless Driving gives no cases and I would like to know whether or not such a charge of Reckless and Careless Driving can be charged and prosecuted under the present law."

Section 8383, R. S. Missouri 1939, reads in part as follows:

"Every person operating a motor vehicle on the highways of this

state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive but not conclusive, of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools: * * * * *

* * * * *

You inquire whether or not a charge of reckless and careless driving can be charged and prosecuted under this law. Generally speaking it is advisable to follow the language used in a statute in charging an offense under the law. In State v. Dildine, 51 S. W. (2d) 1, 1. c. 2, the court said:

"* * * * Those forms, in order to be invulnerable against assaults of ingenious attorneys, are often so involved, prolix, and redundant that they are unintelligible to the lay mind, and, until explained by expert counsel, do not apprise the accused of the nature and cause of the accusation. State v. Anderson,

298 Mo. loc. cit. 391, 250 S. W. 68. We try to get away from such forms the best we can, with little legislative aid. We have ruled that an information, in the language of the statute describing the offense, if the statute states all the elements of the crime, is sufficient. That means a general statement without particulars is usually sufficient. Here the information is substantially in the language of the statute, and is therefore sufficient."

Also, see State v. Revard, 106 S. W. (2d) 906. However, there is an exception to the rule when such language is not sufficient to notify the defendant as to what he shall defend against as in State v. Maher, 124 S. W. (2d) 678, 1. c. 683.

"(4-7) As a general rule it is sufficient to frame the indictment in the words of the statute. State v. Newman, 152 Mo. App. 144, 132 S. W. 753; State v. Ferris, 322 Mo. 1, 16 S. W. 2d. 96; State v. Settle, 329 Mo. 782, 46 S. W. 2d 882. This is true only where the statute describes the entire offense by setting out the facts constituting it. But we do not think the rule can be applied to the statute above quoted. The rule does not apply if the statute creating the offense uses generic terms in defining the offense and does not individuate the offense with such particularity as to notify the defendant as to what he shall defend against. Under these conditions the indictment in the language of the statute is not sufficient. As stated by Judge Sherwood in the case of State v. Terry, 109 Mo. 601, 19 S. W. 206, 209, 'Following the general language of the statute will answer only in those instances where

all the facts which constitute the offense are set forth in the statute itself, which declares or announces or creates the offense.'"

It is well established that the exact language need not be used in describing the offense in an information but that language of similar import and not repugnant to the words of the statute are sufficient. In *State v. Carter*, 64 S. W. (2d) 687, 1. c. 688, the court in so holding said:

"(1-3) 1. The appellant contends that the information is fatally defective. The information alleges that the appellant 'did then and there, while in charge of an automobile in which he was then and there unlawfully transporting intoxicating liquor, * * * against the peace and dignity of the state.' It is the appellant's contention that the information does not comply with section 4517, supra. This section requires that the intoxicating liquor must be 'carried, conveyed or transported in violation of any provision of the laws of this state'. Webster's New International Dictionary gives 'violation of the law' as one of the definitions of the word 'unlawfully'. In *State v. Hoffman* (Mo. Sup.) 297 S. W. 388, loc. cit. 389, in an opinion by White, J., we said: 'The rule is that in a statutory offense it is not always necessary to use the exact language of the statute in describing the offense. It is sufficient if it uses language of similar import, not repugnant to the words of the statute. *State v. Harroun*, 199 Mo. 519, 98 S. W. 467; *State v. Tiemann* (Mo. App.) 253 S. W. 453; *State v. Standifer*, 209 Mo. loc. cit. 273, 108 S. W. 17.'"

October 24, 1941

Also, see State v. Rosenblatt, 185 Mo., page 114.

Section 8383, supra, provides that every person operating a motor vehicle on the highways of this state shall drive same in a careful and prudent manner. The word prudent is synonymous with the word careful. See Funk and Wagnall, New Standard Dictionary. The antithesis of prudent as shown by the same authority is the word "reckless." Certainly, we can also say that the word "careless" would be the antithesis of "careful."

Therefore, in view of the above decisions holding that the information or indictment shall follow the language of the word or words having the same regular meaning, or at least language of similar import, it is the opinion of this Department that the words "careless" and "reckless" negative the words "careful" and "prudent" and may be used in an information charging an offense under Section 8383, supra.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

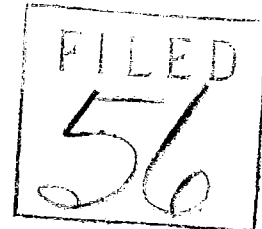
VANE C. THURLO
(Acting) Attorney General

ARR:BAW

COURT: Cannot loan surplus money from tax sales, as
FUNDS: school funds until 20 years elapse from date
of deposit in county treasury.

January 28, 1941

Miss Georgia Malony
Oregon County Treasurer
Alton, Missouri



Dear Madam:

This will acknowledge receipt of your letter of November 30, 1940, in which you request our opinion on the following question:

May the County Court loan, as school funds, the money derived from unclaimed surpluses resulting from the sale of real estate for taxes, that is placed to the credit of the school fund of the county?

Section 9959, Laws 1933, p. 428, is as follows:

"When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector

making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said over-plus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

Section 9243, R. S. Mo. 1929, provides, in part, as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto; the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; * * * "

We think a proper understanding of the provisions of these sections completely answers your question.

Under Section 9959, when the sheriff or collector sells land for taxes and it brings more than the amount due, which surplus is unclaimed, he must make a written statement to that effect, describing the lands sold and the amount of surplus money on hand from that sale. This statement must be presented to the County Court for approval, and when approved the surplus money is paid into

January 28, 1941.

the County Treasury. The statute then directs the treasurer to "place such moneys to the credit of the school fund of the county."

Section 9243 makes it the duty of the County Court to collect, preserve and invest all property "belonging to the county school fund." This statute further enumerates other items which go into, and make up said fund and provides that they "shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund."

Thus, it is to be seen that the only funds which the county court can invest under said Section 9243, are those "belonging to the county school fund," while under Section 9959, the money resulting from surpluses on tax sales is only "placed to the credit of the county school fund."

We do not think money placed to the credit of the school funds belongs to the school fund. The reason for this is found in other provisions of Section 9959, where it is provided that surplus money from tax sales deposited in the county treasury is "to be held in trust for the term of twenty years for the owner or owners or their legal representatives." This provision certainly does not indicate that said funds belong to the school fund, but to the contrary indicates that for this twenty year period the money is that of the true owner and is merely being held in trust by the county for him.

The next sentence of said section makes it doubly clear that, that is the meaning of the statute, because it provides that if "at the end of twenty years, * * * such fund shall not be called for, then it shall become a permanent school fund of the county."

CONCLUSION

It, therefore, is our opinion that a county court cannot loan, as school funds, the money derived from unclaimed surpluses resulting from the sale of real estate, that has been placed to the credit of the county school fund under Section 9959, Laws 1933, p. 428, until twenty years have elapsed from the date it was deposited in the county treasury.

Respectfully submitted,

APPROVED:

L WRENCE L. BRADLEY
Assistant Attorney-General

COVELL R. HEWITT
(Acting) Attorney-General
LLB/mc

11159-1984

COUNTY COURTS:
SALE OF BONDS:

The authority of the county court to pay
compensation to agent for selling refunding
bonds.

January 23, 1941

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

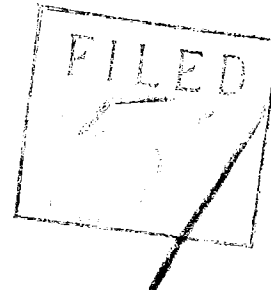
Dear Sir:

This is in reply to yours of recent date wherein
you submit the following question:

"In 1940, the county court entered into
a contract to refund some county bonds,
at a lower rate of interest. Under
this contract, the agent for the county
was to receive \$15.00 per thousand for
refunding the old bonds for the new
bonds at the lower rate of interest.
The old bonds were callable and were
called Feb 1, 1941. The refunding
agent wants his service fee for the
refunding. In the interest and sink-
ing fund of this original bond issue
there is enough surplus to pay this
service charge. There will be a sur-
plus therein for the next year at
least on account of the reduction
in the interest rate as between the
old bond and the new bonds.

"Is it permissible to use this sur-
plus in the interest and sinking fund
to pay this service charge on this re-
funding?"

Section 2892, as amended by Laws of Missouri, 1931,
at page 138, in so far as it applies to your inquiry,
provides as follows:



"The various counties in this state for themselves as well as in behalf of any township or parts of townships for which said counties may have heretofore issued any bonds, and the several cities, villages, incorporated towns, school districts and road districts in this state, are hereby authorized by their respective county courts and the said cities, villages, incorporated towns, school districts and road districts by their proper authorities, to fund or refund any part or all of their bonded or judgment indebtedness, including bonds, coupons or any judgment, whether based on bonded or other indebtedness, and for that purpose may make, issue, negotiate, sell and deliver renewal, funding or refunding bonds, and with the proceeds thereof pay off, redeem and cancel such judgments or old bonds and coupons as the same mature or are called for redemption, or such renewal, funding or refunding bonds may be issued and delivered in exchange for the judgments, bonds or coupons to fund or refund which the renewal, funding or refunding bonds were issued: Provided, that in no case shall the amount of the debt of any such county, township or parts of townships, or city, village, incorporated town, school district or road district be increased or enlarged under the provisions of this chapter, and provided also that no renewal, funding or refunding bonds issued under this chapter shall be payable in more than twenty years from the date thereof, and that such renewal, funding or refunding bonds shall be of the denomination of not more than one thousand dollars (\$1,000) nor less than

one hundred dollars (\$100) each, and shall bear interest at a rate not to exceed six per centum (6%) per annum, payable annually or semi-annually, and to this end each bond shall have annexed thereto interest coupons, and such bonds and coupons shall be made payable to bearer: Provided further, that nothing in sections 2892 to 2894, inclusive, shall be so construed as prohibiting any county, city, township, school district or road district from renewing, funding or refunding such debt without the submission of the question to a popular vote: Provided, however, that no indebtedness, judgment or claim founded on bonds or coupons issued in the aid of or in payment for the capital stock of any railroad company shall be funded, nor shall any bonds be issued in lieu thereof or in compromise therefor until authorized by a majority of the qualified voters of such county, city, township or parts of townships voting at an election held for that purpose pursuant to an order entered of record by the county court of such county or council or aldermen of such city on petition of at least fifty of the resident taxpayers of such county, city or township, after public notice by advertisement in some weekly newspaper printed and published in such county or city, if there be such paper, and if not, then in such paper nearest to such county or city, setting forth the object of the election, for four weeks, and in addition posting up ten written or printed handbills in public places in such county or city, before the time for such proposition to fund its said indebtedness shall be voted on, which said notice shall contain the

object and general nature of the proposition to fund said indebtedness. The election herein provided for shall be held in conformity with the statutes of the state covering state, county or municipal elections. And when such indebtedness has been once compromised and funded, the funding bonds issued in lieu thereof may again be refunded according to the other provisions of this article without such election."

Your question goes to the authority of the county court to pay out of the surplus in the interest and sinking fund the service charge for this refunding.

It will be noted by the underscored words in said Section 2892 that the General Assembly authorized the county court to negotiate, sell and deliver such bonds as you have described in your request. The lawmakers have expressly directed county authorities to perform a certain duty. By that direction all acts necessary to carry out this expressed direction are implied. One of the most recent announcements of this rule by our Supreme Court was in State on Inf. McKittrick, Attorney General, v. Wymore, Prosecuting Attorney, 132 S. W. (2d) 979 at 987:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes." 46 C. J. Sec. 301, p. 1035.

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient

exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, p. 515.

"Necessary implications and intendments from the language employed in a statute may be resorted to to ascertain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose. That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication'.

Said Section 2392, supra, does go into detail as to how the county court shall dispose of the refunding bonds, but it is a matter of common knowledge that such court, not being familiar with the bond markets, it would necessary for them, in order to carry out their duties, to negotiate with some person or firm who was familiar with such markets.

Similar questions have been before our court on various occasions, and we respectfully refer to the case of Church v. Hadley, 240 Mo. 680, in which brokers were allowed a commission for selling the state capitol bonds. The court, in effect, held in that case that the power to sell carries with it the usual means to secure such reasonable and proper assistance as may be necessary to bring about an advantageous sale of the bonds. At l. c. 700 in the Church case, supra, the court quoting from a New York case, 156 N. Y. 363, italicized the following words:

"* * The authority to sell water bonds, therefore, carries with it the authority

to secure such reasonable and proper assistance as may be requisite to bring about an advantageous sale of the bonds. *****"

Again at l. c. 704 of the Church case, supra, the court finally said:

"We are therefore of opinion * * *
* * * * (4) that the facts of this case show a full and adequate effort upon the part of the Board of Fund Commissioners to sell these bonds without outside assistance, and (5) that under such facts there is from the legislative acts, supra, a clearly implied power, which authorizes such board to enter into a contract with some financial agent to procure for such board a purchaser or purchasers who will take such bonds at their par value, and in such contract to agree to pay and pay such agent, out of the proceeds of the sale, a reasonable commission for the services rendered."

It will be noted from this case that the court authorized the Board of Fund Commissioners to take out of the proceeds of the sale of the bonds a reasonable commission for the services rendered by the bond salesman. It also found by subsection (4) of their findings that a full and adequate effort on the part of the Board of Fund Commissioners had been made before they sought the services of an outside agency.

We presume in your case that the county court found it was not able to sell these bonds without the aid of the outside agency. The case of State ex rel. v. Hackmann, 275 Mo. 636, held that the Fund Commissioners, being empowered to enter into contracts and to refund any part of the bonded indebtedness of the state, authorized them to make contracts for the sale of these bonds.

Hon. G. Logan Marr

(7)

January 23, 1941

This department is not passing upon the reasonableness of the fees because that is a matter for the county court and unless it acts arbitrarily or irregularly, then under the authorities hereinbefore set out the court may pay such compensation.

CONCLUSION

From the foregoing it is the opinion of this department that the county court, by virtue of its power to sell refunding bonds, is authorized to employ an agent and pay compensation therefor for any person or firm assisting or bringing about the sale of such funding bonds.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

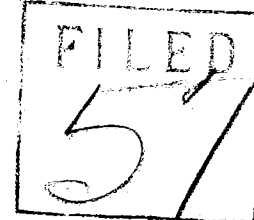
COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

CRIMINAL LAW: Testimony of a physician is not privileged
WITNESSES: communication as to his patient where the
facts testified to were not necessary for
him to prescribe for such patient as a
physician or do any act as a surgeon.

January 31, 1941

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion
dated January 29, 1941, which reads as follows:

"Please send me an opinion on this
question as soon as possible.

"A father is charged with incest on
his sixteen year old daughter, who is
in a family way and will have a child
in about a month. The father took
his daughter to an osteopathic physician
for examination. The doctor examined
the girl and pronounced her condition
as pregnancy. Then he asked the girl
who was the father and the girl said
that she had no boy friends, but that
she had always slept with her father
and he got her in a family way. Is
this testimony of the girl and the
father before this doctor admissible
in evidence, or is it a privileged
communication?

"The doctor did not treat the father,
but examined the daughter at the
request of the father. She is his
minor daughter, and the examination
was to determine the true nature of
her condition. The father and daughter
made an admission before the doctor
proving the crime."

Section 1731, R. S. Missouri 1929, reads in part as follows:

"The following persons shall be incompetent to testify: * * * * * ; fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon."

It will be noticed under the above request that the doctor first examined the girl and ascertained her condition. He then later asked the girl who was the father of the child. It was then that the father and girl made admissions which you desire to use as evidence by the testimony of the physician.

It will be noticed under Section 1731, R. S. Missouri 1929, that it specifically states, "* * * to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." In this case the physician had already ascertained and diagnosed the case and it would not have been necessary to have any statements either from the father or the daughter to prescribe for such patient. The question as to who is the father of the child was not necessary information for the physician to use in the treatment of the daughter.

In the case of State v. Lassieur, 242 S. W. 900, paragraph 5, the court said:

"Appellant makes numerous assignments of error with respect to the admission of testimony. One complaint is to the effect that the court permitted Dr. Drace to testify as to communications made to him by witness Janie Lassieur. State's counsel elicited from his witness that she became the mother of an illegitimate child shortly after the homicide, and upon inquiry by appellant's counsel she said that the

deceased was the father. The prosecuting attorney sought to impeach this testimony by showing that the witness had told Dr. Drace, the physician who attended her at the birth of the child that another was the father, and that such information had been given him, not to enable him to prescribe for her and to treat her, but for the purpose of gathering data for the state department of vital statistics. This communication was not privileged. State v. Carryer (Mo. Sup.) 180 S. W. 850; section 5418, R. S. 1919."

Also, in the case of State v. Carryer, 180 S. W. 850, paragraph 2, the court said:

"If, however, the objection had been properly made, and so preserved as to entitle it to review, the admission of the testimony in question would be held not to have been error. The limitation of the statute (section 6362, R. S. 1909) in regard to the competency of a witness who is an attending physician extends no further than to exclude information acquired by him from a patient while attending the latter professionally, and which information was necessary to enable him to prescribe for such patient as a physician, or to do some act for him as a surgeon. The inquiry here went no further than to ascertain whether the prosecutrix had given the physician, who was testifying, the required information. Not being in violation of any rule, it was in no sense prejudicial, and appellant will not be heard to complain. * * * * "

Hon. G. Logan Marr

(4)

January 31, 1941

CONCLUSION

In view of the above authorities it is the opinion of this department that the evidence of the physician who pronounced the condition of the daughter before any admissions were made by the father or daughter is not privileged communication. The reason that the evidence of this physician is not privileged communication is the fact that the statements which he heard after he had examined the daughter and pronounced her condition was not necessary to enable him to prescribe for such patient as a physician, or do any act for her as a surgeon.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

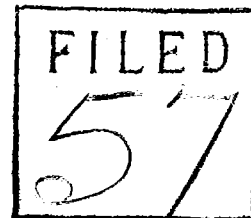
ROAD DISTRICT
TAXATION:

It is mandatory upon the county court to make a levy under Section 8526, R. S. Mo. 1939, and, upon the failure of the county court to make such a levy, mandamus will lie.

March 13, 1941

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

3-14



Dear Sir:

This will acknowledge receipt of your request for an official opinion, under date of February 4, 1941, and also your letter of March 7, 1941, supplementing your request.

You inquire if there is any provision under Article X, Chapter 46, R. S. Mo. 1939, under which your special road district is organized, which allows the commission of said road district to levy as it does in Section 8716, R. S. Mo. 1939. You further inquire if it is mandatory that your county court make a levy under Section 8526, R. S. Mo. 1939, and if the court fails to make such a levy under this section, is there any way the special road district may compel the court to make the levy.

Under Section 8526, R. S. Mo. 1939, the county court shall make a levy. It is a mandatory duty upon the county court, and they have no discretion as to whether or not a levy shall be made. The only discretion they may exercise is as to the amount of the levy. This provision no longer provides for a minimum levy but restricts the county court from making a levy in excess of twenty cents on the one hundred dollars valuation of property. Section 8526, R. S. Mo. 1939, reads as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal prop-

March 13, 1941

erty made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

(See State To Use of Covington v. Wabash Railway Co., 319 Mo. 302, 1. c. 306.)

Furthermore, the special road district is entitled to its proportionate share of the levy. (See two opinions of this department referred to in your original request.)

In support of the above statement that it is mandatory upon the county court to make a levy under Section 8526, R. S. Mo. 1939, we quote from State ex rel. Kersey v. Land & Cooperage Co., 317 Mo. 41, 1. c. 47:

"A consideration of the statutes above referred to forces the conclusion that the foundation of the finances for road purposes rests on these statutes authorized by Sections 1 and 10 as limited by Section 11 of Article 10 of the Constitution, for the reason the several counties must, since the enactment of Section 10595 (Laws 1911, p. 358), levy taxes for road purposes. Whereas, Section 22 of Article 10 of the Constitution expressly grants an absolute discretion to the county court to levy a tax or not to levy a tax for road purposes, as its judgment may suggest.
* * * * *

In State ex rel. Moberly Special Road District, Appellant, v. C. R. Burton, et al., Judges of the County Court, 283 Mo. 41, a writ of mandamus was filed against the County Court of Randolph County to require them to turn over to the Moberly Special Road District a ten per cent levy collected by the county court on all property

in Randolph County for road and bridge purposes which had been collected in the special road district. This levy was made in addition to a levy for special road and bridge purposes. The court held that under Section 36, Laws of 1917, page 457-458 (which is the same as Section 8526, R. S. Mo. 1939, except that there is no longer a provision relative to a minimum levy that the court shall make), that the county court shall place the ten per cent levy on property in the special road district made by the county court in the county treasury to the credit of the special road district. The court, as authority for this, quotes Section 37, Laws of 1917, which is the same as Section 8527, R. S. Mo. 1939, wherein it says, "All levies collected on property in a special road district shall be applied to credit of the road district." In so holding, the court said, l. c. 47:

"It will be observed from reading Section 36, in connection with the first proviso mentioned in Section 37 (placed in brackets by way of convenience), that all the tax which is collected from property lying within any road district, shall be paid into the county treasury, and placed to the credit of the said district, etc. That part of Section 37, contained in the above proviso, is valid to the extent of requiring all tax collected by virtue of Section 11 of Article 10 of the Constitution, under Section 36, supra, on property within the special road district, to be applied to the credit of the latter. Said proviso, however, cannot legally apply, to the special road district, to be applied to the credit of the latter. Said proviso, however, cannot legally apply, to the special road and bridge taxes, levied under Section 37, supra, and Section 22 of Article 10 of our Constitution, adopted in 1908, which reads as follows:

"Sec. 22. In addition to taxes authorized to be levied for county purposes under and by virtue of Section

11, Article 10 of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as state and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power.'

"Under this section of the Constitution, the county court had the right to levy, in addition to the ten cents described in Section 36, a special road and bridge tax of twenty-five cents on each \$100 valuation, under Section 37. Section 22 of the Constitution did not vest in the Legislature the power to compel the county court to levy said twenty-five cents or any part of same. On the contrary, the county court is given a discretionary power in respect to said matter. This, however, does not relieve the county court from levying a tax for road purposes, of not more than twenty cents, nor less than ten cents, on the \$100 valuation, which is to be collected from the property in the special road district, by virtue of Section 36 supra, under Section 11 of Article 10 of our Constitution." (Italics ours)

Also see Carthage Road District v. Ross, 270 Mo. 76, 192 S. W. 976.

In your request, you state that the county court in recent years has failed to make any kind of a levy under Section 8526, R. S. Mo. 1929. In view of this

fact, it is the opinion of this department that mandamus will lie against the county court to compel them to make a levy under this statutory provision.

In State ex rel. Covington v. Wabash Railway Co., supra, the court indicated that it is still mandatory upon the county court to levy under Section 7890, R. S. Mo. 1929 (same as Section 8526, R. S. Mo. 1939), even though there is no longer a minimum levy as provided before same was amended in the Special Session, 1921. In so holding, the court said:

"This brings us to the constitutional questions. The first to be considered is this: To what particular constitutional provision is amended section 10682 referable? Let us first set out the statute:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents nor less than ten cents on the hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the "county road and bridge fund."

"The prototype of this section was enacted by Laws Mo. 1899, p. 340 (section 9436, R. S. Mo. 1899) by which it was provided that county courts may levy a road tax of not less than five cents or more than twenty cents on the one hundred dollars valuation, to be deducted from the levy made for county purposes. The statute has come on down as section 19, p. 743, Laws Mo. 1909; section 10481, R. S. Mo. 1909; Laws Mo. 1913, p. 667; section 36, p. 457, Laws Mo. 1917; section 10682, R. S. Mo. 1919; and Laws Mo. 1921 (Extra Session), p. 172. The law of 1909 dropped

the 5 cent minimum imposed by the law of 1899, and also omitted the specific provision that the road tax be deducted from the levy made for county purposes. The 1913 law put back a minimum of 10 cents, which was carried in the statute until stricken out by the amendment of 1921. Now there is no minimum requirement, but the section during all this 20 years, nearly, has been regarded as a mandatory statute requiring the levy of a road tax within the limit (or limits) specified from time to time." (Italics ours)

Also, in Rolla Special Road District v. Phelps County, 342 Mo. 459, 1. c. 464, the court said:

"It would also mean that the county court had ignored the mandate of Section 7890, supra, which section has always been considered mandatory."

In State v. City of St. Louis, 1 S. W. (2d) 1021, 1. c. 1025, the court, in holding that a specific ministerial duty, mandatory in nature, imposed upon an officer, board or tribunal regarding the levy of taxes, will be enforced by mandamus, said:

"First, as to the legal propriety of mandamus to compel the performance of the duties here sought to be enjoined upon the respondents. The statute (sections 9009 to 9016, supra), hereinafter referred to as the 'Park Statute,' is in the nature of an enabling act. The power it confers and the duties it enjoins are clearly set forth therein; and a review of the same discloses that they are ministerial in their nature. Where a specific ministerial duty, which from its terms is mandatory in its nature,

is imposed upon an officer, a board, or a tribunal with respect to the levy, assessment, and appropriation of taxes or the expenditure of the same, mandamus will lie to compel its performance. The rule as to the application of the writ as above stated has been explicitly approved, in construing a similar statute (Laws 1907, p. 94) to that under review in the case of State ex rel. Bixby et al. v. City of St. Louis, 241 Mo. 231, 145 S. W. 801. This case, which involved the question as to the validity of an act providing for the levy and collection of a tax in the city of St. Louis for the establishment, maintenance, and extension of a museum of art, held that mandamus was the proper remedy to compel the performance of that duty. Earlier and later cases in this jurisdiction, while somewhat dissimilar in their facts to those in the instant case, give support to the rule as above stated. State ex rel. Haws v. Mason, 153 Mo. 23, 54 S. W. 524; Rutledge v. School Board, 131 Mo. 505, 33 S. W. 3; State ex rel. v. R. R., 86 Mo. 13; State ex rel. v. Nolte, 315 Mo. 84, 285 S. W. 501; Heather v. Palmyra, 311 Mo. 32, 276 S. W. 872."

Therefore, it is the opinion of this department that since the county court has failed to make a levy under Section 8526, R. S. Mo. 1939, and apparently has no intention whatever of making any such levy in the future, the writ of mandamus will lie against them to require them to make a levy in May, as provided by Section 8526, supra. However, this writ cannot be enforced against the county court to require them to levy any certain amount of money for the reason that the amount of levy the county court is required to make comes within their discretion, however not to exceed twenty per cent upon the one hundred dollars valuation of property in the special road district, and mandamus will not lie

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against an officer to exercise a discretionary duty.

It is the further opinion of this department that there is no statutory authority for the special road district commissioners of a road district organized under Article X, Chapter 46, R. S. Mo. 1939, to make such a levy as is provided in Section 8716, R. S. Mo. 1939.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARH:VC

TAXATION:

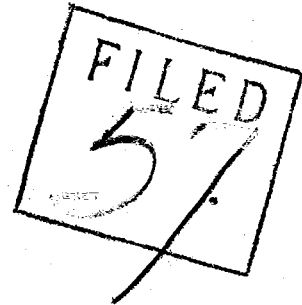
SPECIAL ROAD DISTRICTS:

The fiscal, calendar and financial year of a county begins on the 1st day of January and ends on the 31st day of December. Warrants accruing in 1939 cannot be paid out of the taxes assessed for 1940 unless a surplus over and above county expenses in 1940.

April 9, 1941

4/18

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of April 7, 1941, which reads as follows:

"The county court has been handling special road districts in this county in February in regard to the appointment of any vacancies on the board of commissioners and in regard to the settlement of accounts.

"Section 8699 states that settlements are to be made annually in August of each year.

"In February of each year after the taxes of the preceding year are collected, the apportionment is made to the specials.

"This has created some confusion as to when does the fiscal year actually begin and end.

"If the taxes are to pay current revenues, what year taxes are meant to pay the debts? For instance read section 8702-1939, which limits the debts to the annual yearly income and revenue.

"For instance, debts are made in 1940, and the 1940 taxes based on the June 1, 1939 assessment, and the levy of May

1940; yet the 1940 taxes are not paid over until February 1941. Is that apportionment paid in 1941 for 1940 debts or for debts of 1941?

"-1-

"When does the fiscal year actually begin and end?

"-2-

"What years taxes are meant in fixing a debt limit within the annual income and revenue of any one year?"

I presume you are referring in this request for an opinion to the eight-mile special road district as organized under Section 8673, R. S. Missouri 1939.

Section 8526, R. S. Missouri 1939, reads as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

It will be noticed under the above section that the levy for a road tax shall be collected and paid into the county treasury as other revenue, that is, this ordinary road tax is the same as the payment of state and county ordinary tax. It will also be noticed in this section that the levy is made in May and, of course, this levy is made for the collection of taxes to be used for road purposes in the following year and warrants drawn on the county

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treasury for road purposes in the following year shall be paid out of the taxes levied in May and collected in the previous year.

Section 8526, supra, is authorized under Section 12, Article 10 of the Missouri Constitution.

Section 8527, R. S. Missouri 1939, provides for an additional levy to that as levied under Section 8526, supra, but contains special provisions as to the allocation of that tax and special allocation of the tax levied and collected in certain districts.

Section 8527, R. S. Missouri 1939, is authorized by Section 22, Article 10 of the Missouri Constitution which reads as follows:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

It will also be noticed in the above section that this constitutional section specifically states "may in their discretion, levy and collect, in the same manner as state and county taxes are collected, * *"

Under Section 8699, R. S. Missouri 1939, the board of commissioners shall make an annual settlement.

This section does not mean that this date in August is the end of the fiscal, financial, or calendar year. This section will be touched upon later in this opinion in the case of Union Trust & Savings Bank v. City of Sedalia, 254 S. W. 28.

Section 8702, R. S. Missouri 1939, reads as follows:

"Such board may issue warrants on the treasurer of the board in payment of the expenses and obligations which the board are authorized to incur in behalf of such special road districts and such warrants may be issued in anticipation of the income and revenue provided for the year for which the debt or obligation for which the warrant is issued was incurred; but such districts or such board on behalf thereof shall not become indebted in any manner or for any purpose to an amount exceeding in any one year the income and revenue provided for such year: Provided, however, that this shall not prevent the incurring of indebtedness under bond issue as is or may be provided by law."

This section is authorized under Section 12 of Article 10 of the Missouri Constitution. Under this section warrants issued for 1940 can only be paid out of the money raised by assessment and collection of taxes made for the year 1940 but assessed in the year 1939. Taxes levied, assessed and collected in 1940 for the year 1941 can only be used for the payment of warrants accruing in the year 1941 and not for warrants accrued in the year 1940.

In the case of State ex rel. v. Johnson, 162 Mo. 621, 1. c. 631, the court, in passing upon this question, said:

"This section then had been the law of this State for twenty years before the adoption of the Constitution of 1875. Prior to that, it was not necessary that a county warrant should be drawn upon a special fund or that it should come to the holder during the year in which the indebtedness was created. What, then, was the effect of the Constitution upon this section? As was ruled in *Andrew County v. Schell*, 135 Mo. 31, and *State ex rel. v. Payhe*, 151 Mo. 670, that section was modified by the Constitution to the extent that thereafter the warrants drawn by the county court in any year to meet all the necessary and current expenses for that year must first be paid in full in the order of their registration, and if a surplus was left, then the section operated on all other warrants just as it had previous to the adoption of the Constitution of 1875. In a word, that section, in so far only as it conflicted with the provisions of section 12 of article 10 of the Constitution, became inoperative by force of the Constitution as soon as it went into effect, because inconsistent therewith. But with this exception there is no such repugnancy as requires us to hold it was absolutely repealed, the rule of construction being that before it shall be construed as repealed by implication only, the two must be so repugnant that both can not stand, and, we think, with the modification we have mentioned, both can stand. Such has been the opinion of the Legislature, we think, from the fact that this section has been preserved through three revisions since the adoption of the Constitution. We conclude that this surplus, after the cur-

April 9, 1941

rent expenses for the years 1895 and 1896 had all been paid, at once became subject to this general statute, section 3166, Revised Statutes 1889, which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 6771, Revised Statutes 1899, provides the rule of priority just as it did before its modification by the Constitution of 1875, and the surplus is not to be distributed pro rata."

The levy for ordinary road tax made in May in accordance with Section 8526, supra, is a levy made in the same manner as other taxes and is for the following year. If the levy is made in 1941, it is for the payment of road expenses in the year 1942.

The whole of your request depends on the answer to your two questions marked 1 and 2, which read as follows:

"-1-

"When does the fiscal year actually begin and end?

"-2-

"What years taxes are meant in fixing a debt limit within the annual income and revenue of any one year?"

In passing on the construction of Section 16, Article 10, Constitution of Missouri, and Section 8702, supra, the Supreme Court in *Hawkins v. Cox*, 66 S. W. (2d) 539, 1. c. 542, 334 Mo. 640, said:

"This road district is given authority under section 8065, R. S. 1929 (Mo. St. Ann. section 8065, p. 6857), to construct, improve, and repair highways and bridges and is enjoined to keep same in good condition, and to this end is authorized to 'employ hands and teams' and to 'rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work.'

"The question presented here is whether the road district in question exceeded its powers in this respect, under its then financial condition, in making the contract of purchase just referred to, and, if so, to what extent. We think the first question must be answered in the affirmative. Municipal corporations, such as are special road districts, are by our Constitution placed on what has been termed a cash basis. This has been accomplished by the provisions of section 12, article 10, of the Constitution, which provides that 'no county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue pro-

vided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose.' The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year,' but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in *Book v. Earl*, 87 Mo. 246, where this court said: 'The contracting of a debt in the future, by the county in any manner or for any purpose, in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters' is prohibited. '* * * The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.'

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It will be noticed in the above opinion that the court specifically states in any calendar year the income and revenue provided for such year. Calendar year, according to the decisions of our court in reference to Section 12, Article 10 of the Missouri Constitution, means from January 1 until December 31 where the question of the finances of a county or city is involved. It was so held in the case of Union Trust & Savings Bank v. City of Sedalia, 254 S. W. 28, 1. c. 30, par. 1, where the court said:

"Section 70 of the act of the Thirty-Seventh General Assembly (Laws of 1893, loc. cit. 77) pleaded in the petition and mentioned in the bonds, so far as applicable reads:

"The mayor and council shall also have the power, by ordinance, to issue bonds, payable in one year, to an amount not exceeding half the current revenue for the fiscal year, and also to issue bonds in renewal of other bonds of the city maturing for the requisite amount, and which the city has no fund to pay: Provided, however, that such renewal bonds shall not bear any greater rate of interest than did the original bonds, and shall not run for a longer time than ten years."

"We have italicized the words 'fiscal year' above, because around these hover all the troubles in the case. The statute must be read in the light of section 12 of article 10 of the Constitution if such provision of the Constitution limits the meaning of the words in this statute of 1893, which is now section 8275, R. S. 1919. The applicable portion of the constitutional provision reads:

"No county, city, town, township, school district or other political

corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.'

"It will be noted that the words used are 'exceeding in any year the income and revenue provided for such year.' The Constitution says nothing about a 'fiscal year.' The words used, and especially the latter words in the question last above, indicates what might be termed a 'revenue year,' or a 'debt-creating year.' The limitation is that the city cannot become indebted in any year in excess of the income and revenues provided for such year. Does this mean a calendar year, or will it permit a 'fiscal year' to be established which would cover a different twelve months?

"The qualifying word 'fiscal' is the thing upon which appellant hangs its hopes. Law writers and lexicographers have thus defined the word: In Black's Law Dictionary, fiscal is defined as 'relating to the fisc or public treasury; relating to accounts or to the management of revenue.' In Rapalje & Lawrence's Law Dictionary it is defined as 'belonging to the exchequer, revenue or public treasury.' Bouvier's Law Dictionary defines it as 'belonging to the fisc or public treasury.'

"The term 'fiscal year' is defined by the leading lexicographers as follows: Funk & Wagnall's New Standard Dictionary

defines the term 'fiscal year' as 'the financial year at the end of which the accounts are balanced.' Webster's International Dictionary defines fiscal year as 'the year by or for which accounts are reckoned, or the year between one annual time of settlement or balancing of accounts, and another.'

"The Constitution says nothing about a 'fiscal year.' It simply uses the term 'year.' As to counties, the word 'year' as found in section 12 of article 10, Missouri Constitution, which we have quoted supra, has been held to mean a calendar year, or a year beginning January 1st and ending December 31st. *Wilson v. Knox County*, 132 Mo. 387, 34 S. W. 45, 477; *State ex rel. Appleby*, 136 Mo. 408; 37 S. W. 1122; *State ex rel. v. Allison*, 155 Mo. 335, 56 S. W. 467.

"The *Wilson* case was the united opinion of our court in banc. No diverse opinion appeared until the *Allison Case*, 155 Mo. loc. cit. 335, 56 S. W. 467, wherein Gantt, C. J., and Burgess, J., dissented; Gantt, C. J., in an opinion filed. The majority opinion followed the *Wilson Case*, supra, in which opinion, Gantt and Burgess, JJ., then concurred. They departed from the rule, however, in the *Allison Case*, supra. So that, up to this date, the word 'year' in said section 12 of article 10 of the Constitution means a calendar year, so far as counties are concerned. Why not as to cities? But this question, and the alleged distinction between counties and cities, later."

Hon. G. Logan Marr

(12)

April 9, 1941

CONCLUSION

In view of the above authorities and especially the case of Union Trust & Savings Bank v. City of Sedalia, 254 S. W. 28, it is the opinion of this department that the fiscal year, financial year or calendar year as to the finances of the county such as is limited under Section 12, article 10 of the Constitution of Missouri and Section 8702, R. S. Missouri 1939, the year begins on January 1st and ends on December 31st, notwithstanding that the board of commissioners of the road district are compelled to make their annual settlement in August as set out in Section 8699, R. S. Missouri 1939.

It is further the opinion of this office that debts accruing in any one calendar, fiscal or financial year is only payable out of the money levied and collected in the previous year for the year that the debt accrued.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

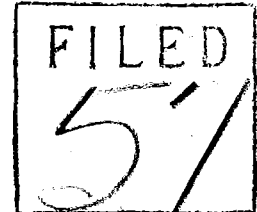
WJB:DA

CONSERVATION COMMISSION: Construing Section 74, House Bill No. 66.
STATE PARK BOARD :
APPROPRIATION :

May 16, 1941.

5-17.

State Park Board
Jefferson City,
Missouri



Attention: Mr. E. A. Mayes
Assistant Director.

Gentlemen:

This will acknowledge receipt of your request for an official opinion, under date of May 14, 1941, wherein you inquire as to the legality of expenditures heretofore made. Also commitments already made but not yet paid, and as to what expenditures may be legally made under the appropriation act as found in Section 74, House Bill No. 66, as passed by the 61st General Assembly of the State of Missouri. In this opinion we shall deal only with the latter request.

It is fundamental in the construction of statutes and appropriation acts that the object and purpose underlying their enactment is of primary importance.

This proposition of law is laid down in the case of *Cummings vs. Kansas City Public Service Company*, 66 S. W. (2d) 920, 1. c. 925. In that case the court said:

"* * * The primary rule of construction of statutes is to ascertain the law-makers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, * * *."

May 16, 1941.

It is believed that the object and purpose underlying the appropriation, here under consideration, is to be found in the language of the appropriation act. This is at once apparent by the use of the following language:

"There is hereby appropriated * * *
the sum of Twenty Thousand (\$20,000.00)
Dollars, or so much thereof as may be
necessary for the use of the State Park
Board, for the purpose of securing
Federal funds".

Particular attention is directed to the use of the language reading: "Twenty Thousand (\$20,000.00) Dollars, or so much thereof as may be necessary for the use, etc."

This language, it appears, emphasizes the fact that the Legislature knew that in order to secure the Federal funds it was necessary to make the appropriation. If this were not true, then why the use of the language reading, "for the purpose of securing Federal funds". It seems, therefore, to logically follow that it was necessary to make an appropriation of State monies in order to secure Federal funds.

While the above considerations clearly indicate that the object and purpose underlying the passage of the appropriation act was to secure Federal funds, nevertheless it is a matter of common knowledge that the State never actually receives Federal funds, but that Federal funds are expended by Federal agencies (C.C.C., W.P.A. and N.Y.A.) within the State of Missouri conditioned upon certain expenditures being made by the State authorities. Those expenditures would here be made by the State Park Board, as contemplated by the act hereunder reviewed.

Therefore, it logically follows that the Legislature was cognizant of this method of handling of Federal funds. From this it follows, in order that the intention of the Legislature may be clearly revealed, it is necessary to interpolate between the words "securing Federal" the words "the expenditure of", so that the appropriation act will read as follows:

May 16, 1941.

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund, the sum of Twenty Thousand (\$20,000.00) Dollars, or so much thereof as may be necessary for the use of the State Park Board for the purpose of securing the expenditure of Federal funds for construction work in State Parks, for the period beginning January 1, 1941 to June 30, 1941."

This construction of the statute is supported by the case of State ex rel. v. Moneyham, 212 Mo. App. 573, l. c. 580, 581, which reads as follows:

"* * * The rule to be observed by the courts in the construction of statutes, and the one to which all others are aids, is, that the intent of the Legislature, when ascertainable from the language used, construed in the light of the end sought to be obtained, must control.

"If the intent of the Legislature is reasonably clear then all grammatical errors and errors in spelling and punctuation are disregarded or corrected. The meaning of words may be limited, restricted or expanded by construction of the courts when it becomes necessary in order to make the law harmonize with reason and properly express what was in fact intended by the lawmakers in enacting the law. (St. Louis v. Christian Bros. College, 257 Mo. 541, 552, 165 S. W. 1057; Stack v. General Baking Co., 283 Mo. 296, 410-413, 223 S. W. 89.)

"To accomplish the same purpose words omitted may be read into the statute.
* * *"

May 16, 1941.

Now, we are concerned with the question as to just how much of the appropriation under Section 74, House Bill No. 66, may be expended by the State Park Board and what constitutes legal expenditures thereunder.

In the beginning we will say, this may not be the same in any two instances. The amount expended and valid expenditures, to a great extent, depend upon the agreement or contract entered into and approved by the Federal agency as well as the State Park Board.

Therefore, it is necessary that we carefully examine the Federal act, rules and regulations, authorizing an appropriation and expenditure on such projects in the State parks of Missouri, as well as the State appropriation act as found in Section 74, House Bill No. 66, supra. This appropriation act reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund, the sum of Twenty Thousand (\$20,000.00) Dollars, or so much thereof as may be necessary for the use of the State Park Board for the purpose of securing Federal funds for construction work in State parks, for the period beginning January 1, 1941 to June 30, 1941."

We have hereinabove held that the Legislature intended to include the following words after the word securing "for the expenditure of", for the reason the State nor the State Park Board actually received any Federal funds for such projects. Therefore, under the well established rules of construction, we have hereinabove ruled that such words may be read into the act. Therefore, hereinafter we shall refer to the State Appropriation Act as if same contained the words "for the expenditure of".

The question now is as follows: How to define the words "for securing the expenditure of Federal funds for construction work in State parks". In order to determine how this demand shall be fulfilled, it will require the examination of

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the Federal act, rules and regulations and other agreement or contract these parties enter into. For instance, such agreement or contract may only require such expenditure as is required to prepare a proposal and specification by engineers and draftsmen, or it may require the State Park Board to guarantee and assure the Federal agency that they will meet a certain percentage of the total expenditure and such guarantee may be necessary before the Federal agency will enter in such agreement or contract.

The 76th Congress of the United States enacted H. J. Resolution No. 544, as found in Chapter 432, page 608, U. S. Code Congressional Service. In this act, under Section 1 (a) an appropriation was made to the Works Progress Administration for the fiscal year ending June 30, 1941 for the purpose to continue to provide for work for needy persons on useful public projects.

Section 1 (b) of the same act provides, that these funds made available shall be used for the prosecution, among other things, of the work in State Parks. Other recreational facilities are subject to the approval of the President of the United States. It further provides, that preference should be given to projects which will contribute to the rehabilitation of individuals, forestation, reforestation and other improvements of forest areas.

Section 1 (c) limits the cost of such projects. This provision provides that costs, exclusive of administration expense and other than labor on any State project, shall not exceed the average for the fiscal year ending June 30, 1941 of \$6.00 per month per worker, and under no circumstances shall it exceed \$7.00 per month per worker and, further provides that such funds appropriated shall not be used for the purpose of any construction equipment or machinery in any case.

Section 1 (d) provides that the United States shall not furnish money to exceed three-fourths of the total costs of any non-Federal project to be undertaken in the states after June 1, 1940, and that not less than one-fourth of such total costs shall be borne by the State and its political sub-divisions.

Section 10 (c) further provides that no non-Federal project shall be undertaken unless and until this sponsor has made a written agreement to fulfill such part of the entire cost thereof as the head of the agency determines, under the circumstances, is adequate contribution. Also the head of the agency shall promulgate rules and regulations specifying the valuation of contributions, in kind, by sponsor for the use of sponsors and facilities, equipment and services of their employees.

Section 13 thereof further authorizes Federal agencies, receiving appropriations under this joint resolution, to prescribe rules and regulations as may be necessary to carry out the purposes for which such appropriations are made.

Section 24 provides that none of these appropriation funds, available under this act, shall be used "* * * (b) for the operation of any project sponsored solely by the W. P. A. * * *."

This is the usual procedure for the expenditure of Federal funds for construction work in State parks. The State Park Board prepares a proposal in the beginning containing the total cost of such project, specifications, etc., what material, equipment, technical services, etc. they shall furnish or what percentage of the cost they consider they can furnish. Such proposal is then presented for approval of the Federal agency. If said proposal meets with their approval, an agreement and contract is entered into by both parties.

From the foregoing Joint Resolution, it conclusively disposes of any thought that the State Park Board may secure the expenditure of Federal funds for construction work in State Parks in Missouri by merely furnishing a proposal and specification for a project.

This resolution specifically provides no such project shall be sponsored entirely by this appropriation. Further that the Federal agency shall not expend more than three-fourths of the total cost of such project; that the State or political sub-division shall furnish not less than one-fourth of the total cost of such project and; it further

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provides that no such project shall be undertaken unless and until the sponsor, in this case the State Park Board has made a written agreement to finance such part of the entire cost thereof as the agency shall determine is adequate. A copy of the certificate and agreement is hereto attached.

Further, it is a well established rule of construction that the Legislature, when it enacts a statute, knows the existing laws. In *Reed vs. Goldneck*, 84 S. W. 1104, 112 Mo. App. 310, 1. c. 313, the court said:

"This being the settled law at the time the statute was enacted, we must presume that the Legislature knew the law as it existed, and sought to make some change therein by statutory innovation".

Also in *Smith vs. Pettis County*, 136 S. W. (2d) 282, 1. c. 287, the court, in holding that a statute limiting the fees that a probate court might retain in a year, held that the reviewing court would assume that the Legislature was familiar with probate law and practice in a general way. In so holding the court said:

"The fees collected by probate judges are of public record. We must assume that the legislature was familiar with them when they adopted these provisos. We may also assume that the legislature was familiar with probate practice in a general way. For instance, that estates could not be finally settled until after a lapse first of two years and now of one year. Where there is litigation estates remain open for indefinite periods. Estates of minors under guardianship may remain open for almost twenty-one years; estates of insane persons much longer. Therefore, the collection of fees previously earned may be long postponed. It would be and is unlikely that sufficient fees

could be collected in the first years or perhaps during the entire four years of the term to reach the amount allowed. Moreover, a probate judge is specifically prohibited by this same section from collecting fees in advance. Before the limitation of these provisos was imposed probate judges would continue to collect fees long after the expiration of their terms. These matters all must have been considered. This court itself has judicially noticed the delays which ensue between the time a circuit clerk earns his fees and his actual collection of them in State ex rel. Emmons v. Farmer, 271 Mo. 306, 196 S. W. 1106."

Therefore, we must assume that the 61st General Assembly was familiar with the rules and regulations and acts of the United States, requiring the sponsor to agree and contract to pay their full share of the total cost of such projects and that same was a necessary prerequisite to securing the expenditure of Federal funds for such projects.

While it only goes to show the legislative intent, we have been assured by representatives of the Works Progress Administration, that they appeared before the chairman of both appropriation committees of the 61st General Assembly and that the sole reason for the Legislature enacting such appropriation act was because of the fact the Federal Government required the State of Missouri to assure them that such appropriation would be passed for the purpose of paying the sponsors full share of projects in the State parks in Missouri, or that they would be forced to discontinue such projects and this would naturally force many persons upon unemployment.

CONCLUSION

Therefore, it is the opinion of this department that for the State Park Board to comply with the requirement of Section 74, House Bill No. 66, supra, it will necessitate the State Park Board expending so much of the appropriation in Section 74, House Bill No. 66, as is necessary to require the Federal agency under the law to expend Federal funds in State parks, which amounts to the sponsors share of

State Park Board

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May 16, 1941.

the total cost of various projects in the State parks, which the State Park Board has already agreed and entered into a contract with Federal agencies.

In this opinion we shall not attempt to designate what expenditures are valid under such agreements. That will require an examination of each respective proposal, agreement and contract entered into by the respective parties thereto.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

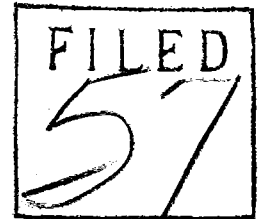
(Signed by)
General M. H. H. H.

ARR:LB

APPROPRIATION:
STATE PARK BOARD:

Trucks may be purchased under Section 74,
House Bill 66.

May 20, 1941



State Park Board
Jefferson City, Missouri

Attention: Mr. E. A. Mayes,
Assistant Director

Gentlemen:

This will acknowledge receipt of your request for an opinion under date of May 19, 1941, inquiring as to the legality of the State Park Board purchasing several trucks to be used for construction work now in progress in the state parks on Federal Works Progress Administration and paying for same out of the appropriation in Section 74, House Bill 66 as passed by the Sixty-first General Assembly.

A determination of this question will first require an examination of whatever agreement or contract entered into between the State Park Board and the Works Progress Administration to determine if the purchase of such trucks constitute a necessary expenditure for securing the expenditure of federal funds for construction work in state parks. If they are a necessary expenditure, then it is the opinion of this department that same may be made from the said appropriation act.

Under H. J. Resolution 544 in the United States Congressional Service Act of the 76th Congress, chapter 432, page 608, we find under Section 1 (c) the following language:

"* * Provided, That the funds appropriated in this section shall not be used for the purchase of any construction equipment or machinery in any case in which such equipment or machinery can be rented at prices

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determined by the the Commissioner to be reasonable, and his determinations, made in conformity with rules and regulations prescribed by him, shall be final and conclusive: * * * * *

Also, in Section 10 (c) of same resolution we find the following language:

"No non-Federal project shall be undertaken or prosecuted under appropriations under this joint resolution (except under section 3) unless and until the sponsor has made a written agreement to finance such part of the entire cost thereof as the head of the agency, if the agency administers sponsored projects, determines under the circumstances is an adequate contribution taking into consideration the financial ability of the sponsor. The head of the agency shall prescribe rules and regulations relating to the valuation of contributions in kind by sponsors of projects through furnishing the use of their own facilities and equipment and the services of their own employees, which shall represent an actual cash value, and such rules and regulations shall also allow credit only to the extent that the furnishing of such contributions represents a financial burden which is undertaken by the sponsors on account of Work Projects Administration projects, or other sponsored projects."

Therefore, it is evident that the Works Progress Administration never intended to purchase trucks or equipment on these projects but intended to allow reasonable rental per hour for the use of trucks and equipment owned by the State Park Board, the sponsor, which shall be credited to sponsor's share of total cost of the project. This, we understand, is the policy of the Works Progress Administration on all similar projects.

The State Park Board and the Works Progress Administration entered into a written agreement signed by Mr. E. A. Mayes, Assistant Director, and Mr. I. T. Bode, Director of the State Parks, on a Works Progress Administration form number 301, for the year 1941. It will be noted that on page one of this Master Proposal under number one (c) the sponsor, the State Park Board, has agreed to furnish equipment amounting to \$79,028.00, and the Works Progress Administration to furnish no equipment whatsoever. Attached to and made a part of the agreement we find the following list of the kind of equipment to be furnished, etc.:

Trucks	<u>Capacity</u>	<u>No. of Units</u>	<u>Rental Rate</u>	<u>Basis of</u>
	<u>1½ Tons</u>	<u>40</u>	<u>Per Unit</u>	<u>Rental</u>
			<u>\$1.25</u>	<u>Hour</u>
<u>Aggregate Rental</u>	<u>Federal</u>	<u>Sponsor</u>		
38,733		\$48,417.00		

all of which clearly indicates that the State Park Board has agreed to furnish trucks for construction work in state parks on federal projects and the amount hereinabove shown under sponsor is the amount of credit to be allowed the State Park Board for the use of their trucks which credit shall be applied against their proportionate share of the total cost of the projects in the state park.

Unquestionably it was the opinion of the State Park Board that it was a necessary expenditure for the Board to make in order that this federal assistance for the construction work in state parks be secured.

The word "equipment" as used in this agreement has various meanings, a few of which we will now mention. In United States Fidelity & Guaranty Co. v. Feenaughty Machinery Co. et al., 85 P. (2d) 1085, 1. c. 1089, "equipment" is defined in the following manner:

"The test of whether a given thing constitutes a supply or equipment is whether the article forms a part of the finished structure; and in addition if, although such things do not become a physical

part of the finished product, structure, or improvement, they are entirely consumed in the course of the construction they are supplies and not equipment."

In United States Rubber Co. v. Washington Engineering Co., 149 Pac. 706, 707, a contract was entered into by the city of Tacoma with the Washington Engineering Company. Under the terms of the contract the engineering company was to erect a vertical lift across a river. Under the Code the city took from the contractor a bond as surety, conditioned that the contractor should pay all laborers, mechanics, and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions or supplies for the carrying on of such work. In the above case the court said:

"* * * To determine, then, whether a given article furnished the contractor is or is not within the terms of the bond, it is necessary to distinguish between materials, provisions, and supplies on the one side and the contractor's working equipment on the other. To distinguish between materials and equipment is comparatively easy, since the term 'materials,' as we have defined the term in Gate City Lumber Co. v. Montesano, 60 Wash. 586, 111 Pac. 799, includes such articles only as enter into and form a part of the finished structure, or, it may be, such articles as are capable of being so used and are furnished for that purpose, while 'equipment' is, what the word imports, the outfit necessary to enable the contractor to perform the agreed service, the tools, implements, and appliances which might have been previously used or might be subsequently used by the contractor in carrying on other work of like character.

Standard Boiler Works v. National
Surety Co., supra. * * * * *

In *Dorsett v. State*, 289 Pac. 298, 1. c. 301, 302, the court held that automobiles are comprehended within the terms "equipment" and "machinery." In so holding the court said:

"It is well established by numerous cases long followed in this state that only such expenditures of public moneys are permitted and only such contracts made by public officers are enforced as are specifically or by inference and implication provided for by law. * * * * *

* * * * *

"There can be no question but that the state highway commission, when it deems expedient and for the best interests of their operations and for the efficient utilization of the personnel employed by it, is authorized to buy automobiles for the department of highways. This authority is implied even though not specifically mentioned. *Ensley Motor Car Co. v. O'Rear*, 196 Ala. 481, 71 So. 704; *Henry v. Rogers*, 19 Ala. App. 376, 97 So. 427; *Bice v. Foshee*, 19 Ala. App. 421, 97 So. 764; *Townsend v. Gash*, 267 Ill. 578, 108 N. E. 744; *Cain v. Borroughs Adding Machine Co.*, 180 Ky. 567, 203 S. W. 315; *Board of County Commissioners v. Isenberg*, 10 Okl. 378, 61 P. 1067. Statutes must be given their reasonable construction to effectuate the end proposed. *Board of County Commissioners v. Barr*, 68 Okl. 193, 173 P. 206. Automobiles are comprehended within the terms 'equip-

May 20, 1941

ment' and 'machinery' as well as in the term 'vehicles.'" (cases cited)

In Linde Air Products Co. et al. v. American Surety Co., 152 So. 292, 1. c. 293, the court said:

"* * * The contract was for the construction of a gas pipe line from Jackson to Hattiesburg. The bond contains a number of conditions, among which is 'that if the said contractor shall pay all persons, firms and corporations who perform labor or furnish equipment, supplies and materials for use in the work under the contract * * * this obligation shall be void; otherwise to remain in full force and effect.'

* * * * *

"The final contention of the appellee is that the word 'equipment' 'was used because certain of the items involved in the construction of the pipe line, used in the work of constructing the pipe line, might not be covered by the word 'materials,' and means 'equipment and supplies used in the pipe line itself, as a part thereof.' The word was unnecessary for that purpose, because under prior decisions of this court all material of every character that enters into the construction of a pipe line, either permanently or temporarily, is covered by the words 'supplies and materials.' The word 'equipment,' therefore, must be given its usual and ordinary meaning, which is, the outfit, i. e., tools, machinery, implements, appliances, etc., necessary to enable one to do the work in which he is engaged. Landau v. Sykes, 98 Miss. 495, 54 So. 3, Ann. Cas. 1913B, 197. * * * * *

State Park Board

(7)

May 20, 1941

CONCLUSION

Therefore, in view of the opinion this department recently rendered holding the State Park Board may expend any part of the appropriation under Section 74, House Bill 66 that was required to secure the expenditure of the federal funds in state parks, and in view of the agreement hereinabove mentioned between the State Park Board and the Works Progress Administration wherein the State Park Board agreed to furnish equipment, and further in view of the above definitions of "equipment," it is the opinion of this department that those trucks necessary to fulfill the hereinabove agreement may be purchased out of the appropriation in Section 74, House Bill 66.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THORLO
(Acting) Attorney General

ARR:DA

CRIMINAL LAW: Wife abandonment and failure to support
may be charged separately or conjunctively.

June 26, 1941

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Mr. Marr:

Under date of June 20, 1941, you wrote this office
requesting an opinion as follows:

"The facts in this criminal case were, that the family of a man and wife and one child under two years lived in Cooper County and moved to Morgan County on Friday, and with the intention of making Morgan County, Mo the permanent home. The following Wednesday he packed up part of the provisions, the best of the furniture and all the money and the baby, and moved back to Cooper County. The wife was away picking berries. She is seven months pregnant. On her complaint I filed a charge setting up one offense, the offense of abandoning the wife, without good cause.

"It is my understanding that the charges are in the disjunctive; one for abandoning and one for refusal to support bot with a criminal intent and both done or refused to be done without good cause. This theory is found in Miller v. Gerk, 27 S. W. (2) 444.

"Therefore, I filed just the single charge, and expect to be able to sustain the same.

"But the law seems to be confused and I am confused. Every time there is a charge of wife or child abandonment, there is also the charge in the information of the refusal to support, or the fact alleged that the wife has been left destitute.

"For instance in State v. Harrison, 17 S. W. (2) 935; l.c. 937, State v. Higbee, 110 S. W. (2) 789, and it seems from reading these cases that the failure to support, plus the present ability of the husband to support is also part of the single crime of abandonment.

"Do I have allege and prove in my information, failure to support along with the abandonment or do I have the right to cattually separate the offenses, and stand on the single and sole charge of abandonment?"

As you know, for many years the statute on wife abandonment provided that, 'if any man shall, without cause abandon or desert his wife * * * * * and shall neglect or refuse * * * * *,' Under this statute it was necessary to charge and prove both abandonment or desertion and the failure to support. In 1921 the General Assembly, by House Bill No. 334, repealed that section and enacted a new section which contained the provision we have today relating to wife abandonment. This is Section 4420, Article IV, Chapter 31, R. S. Missouri, 1939, and is as follows:

"If any man, shall, without good cause, abandon or desert his wife or shall fail, neglect or refuse to maintain and provide for such wife; or if any man or woman shall, without good cause, abandon or desert or shall, without good cause, fail, neglect or refuse to provide the

necessary food, clothing or lodging for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide the necessary food, clothing or lodging for such child, or if any man shall leave the state of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children, in the state of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children, with proper food, clothing or shelter, then such person shall be deemed to have abandoned said wife, child or children, within the state of Missouri, he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

As it was necessary under the old act to charge and prove both the abandonment and failure to support, a great many pleaders still follow that method as it permits a greater latitude in the introduction of evidence.

In your letter you mentioned the cases of State v. Harrison, 17 S. W. (2d) 935 and State v. Higbee, 110 S. W. (2d) 789, as indicating that it might still be necessary to charge both the abandonment and failure to support. In the case of State v. Higbee, 110 S. W. (2d) 789, this question was not raised, and apparently, the case of State v.

Harrison is in another volume, for at page 935 of 17 S. W. (2d) is State ex rel. Gary Realty Company v. Hall.

In the case of State v. Thomas, 240 S. W. 857, decided by the Springfield Court of Appeals May 8, 1922, the question was raised which you ask in your letter. We quote at length from that case:

"This information is assailed on the ground that it is multifarious; the claim being that two offenses -- abandonment and failure to support -- are charged in the same action. No motion to quash was filed, and no attack upon the information made before the trial and since the two charges, if they be considered as two separate offenses, are not repugnant to each other and entail the same punishment, the information must be held good after verdict. State v. Klein, 78 Mo. 627; State v. Harrison, 62 Mo. App. 112, 115.

"The information, however, is not open to the objection of being multifarious. The present statute (Acts of 1921, p. 281) makes it a misdemeanor for a man without good cause to abandon or desert his wife, or fail, neglect, or refuse to maintain and provide for her. It is contended that the abandonment without good cause constitutes one offense, and failure or refusal to support without good cause is another offense, and therefore the two cannot be joined in the same count. While the two acts of abandonment and failure to support are separate acts, and in one sense may be considered as separate offenses, yet they are both found in the same section of the statute, and both grow out of a man's disregard of his marital duty to his wife, and but

one punishment is provided in the statute defining the offense, and since the disjunctive 'or,' instead of the conjunctive 'and,' is used in connecting the two acts, it is clear that the Legislature meant that either act denounced by the statute would subject the offender to the punishment therein provided, and there is nothing in the act to warrant a duplicate penalty if he should commit both acts. He cannot therefore be charged in separate counts and a separate punishment assessed for each act, which could be done if appellant's contention should be upheld. Criminal statutes are to be strictly construed in favor of the accused, and where different acts are prohibited by the same section of the statute and but one punishment provided, it is usually, if not universally, held that but one offense is defined, and while a party may be convicted on proof of the commission of one of the forbidden acts only, yet if he be proven to have committed all of them, he is still guilty of but one offense, and cannot have more than one penalty assessed against him. State v. Murphy, 47 Mo. 274; State v. McWilliams, 7 Mo. App. 99; State v. Young, 163 Mo. App. 88, 98, 146 S. W. 70; State v. Miller, 188 Mo. 370, 377, 87 S. W. 484; St. Louis v. Theatre Co., 202 Mo. 690, 698, 100 S. W. 627."

We fail to find where this case has been overruled or criticized, and from the above quotation you will observe that there are two offenses, that either may be charged, or both may charged in the same count without rendering the information or indictment subject to be quashed for duplicity.

To the same effect is the case of *Miller v. Gerk*, 27 S. W. (2d), 444, although, in this case, the matter under discussion was abandonment and failure to support children instead of the wife.

In the case of *State v. Coffee*, 35 S. W. (2d), 969, a case brought under Section 3596, R. S. Missouri, 1919, which was the statute prohibiting a person from laboring on Sunday, or permitting his servants to work. The information charged that the defendant labored and permitted his servants to work and was not held to be duplicity in the following language:

"It is urged that the information charges two separate and distinct offenses in the same count, and should have been quashed for duplicity. The information is based on section 3596, R. S. Mo. 1919, which provides that 'every person who shall either labor himself, or compel or permit his apprentice or servant * * * to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity * * * on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.' It is evident that the information follows the language of the statute. It charges the defendant with both laboring himself and permitting his servants to work on Sunday. It is well settled, as urged by defendant, that an information charging two separate and distinct offenses in one count is bad for duplicity. *State v. Huffman*, 136 Mo. 58, 37 S. W. 797; *State v. Young*, (Mo. App.) 215 S. W. 499. However, it is equally well settled that, where a statute enumerates

offenses in the alternative and provides one and the same punishment therefor, if such offenses are not repugnant, an information charging all of such offenses conjunctively in one count is not open to the objection of duplicity or multifariousness. State v. Spano, 320 Mo. 280, 6 S. W. (2d) 849; State v. Currier, 225 Mo. 642, 125 S. W. 461; State v. Young, 163 Mo. App. 88, 146, S. W. 70; State v. Pittman, 76 Mo. 56; State v. Jenkins (Mo. App.) 255 S. W. 338; State v. Thomas, 210 Mo. App. 493, 240 S. W. 857; State v. Boyd, 196 Mo. 52, 94 S. W. 536.

"In the case at bar, the information charges the two offenses conjunctively. It is apparent the offense of laboring and the offense of permitting one's servants to labor on Sunday are not repugnant, and a violation of either or both constitutes but one offense under the statute. The trial court limited the jury by its instruction to the charge of defendant permitting his servants to labor, which was proper, for the reason there was no evidence that defendant himself performed any labor on Sunday. In any event, we find no error in overruling the motion to quash."

CONCLUSION.

It is the conclusion of this Department that, under Section 4420, supra, wife abandonment and failure to support are two separate offenses and a conviction might be had by

Hon. G. Logan Marr

(8)

June 26, 1941

charging either if the facts warranted. However, since there is only one punishment prescribed, it is permissible to charge both conjunctively in the same count, and the information or indictment would not be bad because of duplicity.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

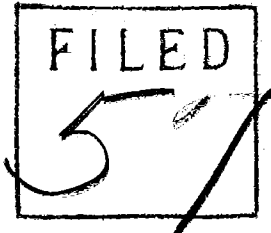
WOJ/rv

DEED: Interpretation of mineral reserva-
CONSERVATION COMMISSION: tion in deed.

August 18, 1941

8-18

State Park Board
Jefferson City,
Missouri



Attention: Mr. E. A. Hayes,
Assistant Director
of State Parks

Gentlemen:

This will acknowledge receipt of your request to construe the mineral reservation made in a deed wherein Julian Pickles and Laura Pickles, his wife, conveyed the following described property to the State of Missouri: The Northeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of Section 8, Township 40, North of Range 1, West of the 5th P.M.

The mineral reservation reads as follows:

"The said parties of the first part hereby excepting out of the following lands and reserving and retaining unto themselves, their heirs and assigns, all the lead, iron, coal, fire clay, rock and other minerals including the coaloils and natural gas in or on said land or rising or coming therefrom or that may hereafter be found therein or thereon with the right and privilege to mine and remove and take

August 18, 1941

out the minerals hereinabove referred to, storing the same, together with right of ingress and egress over and on said lands and to and from the public road leading to the most convenient market. The said road which is to be used for ingress and egress to be established over and on the most practical route. The said parties of the first part further reserve such timber as may be needed for mining purposes, and the timber so used to be taken from the lands hereinafter specified only. The said parties of the first part also reserve a water right-of-way to the Meramec River to be used in mining operations only, to wit:

"The North $\frac{1}{4}$ of the Northwest $\frac{1}{4}$,
The Southeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$,
and the Northwest $\frac{1}{4}$ of the Northeast $\frac{1}{4}$, of Section 8;

"The South $\frac{1}{4}$ of the Southwest $\frac{1}{4}$,
and The South $\frac{1}{4}$ of the Southeast $\frac{1}{4}$,
of Section 5; and

"The Northeast $\frac{1}{4}$ of the Southeast $\frac{1}{4}$
of Section 6; All in Township 40,
North of Range 1 West of the 5th. P.M.

"TO HAVE AND TO HOLD THE SAME,
unto the said party of the second
part and to its assigns forever.

"Covenants of Warranty and Defend,
excepting taxes for the year 1927
and thereafter.

Julian Pickles SEAL.
Laura Pickles SEAL.

STATE OF MISSOURI,)
) ss.
County of Franklin.)

On this 17th day of February, 1927, before me personally appeared Julian Pickles and Laura Pickles, his wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

My term exp. 9-9-1928. Hermann F. Hansen
Notary Public"

SEAL

The question arises, can the persons herein above named as owners of the mineral in and on this property remove the iron ore by the method known as strip mining? By such method the whole surface is removed down to the ore. This completely destroys all rights the owner of the surface has to the surface and top soil and after such mining is completed leaves the top soil in such condition as to be of no benefit, and leaves the ground in a hazardous condition.

It is our understanding that this kind of mining is now under progress on this property; that a large steam shovel has already located thereon and commenced operations, however, temporarily for some unknown reason such work has ceased.

Obviously, an interpretation of the above mineral reservation in this deed as to the proper method of mining permissible thereunder for iron ore, which is the ore now being taken out, will require the court to try and determine the intention of the grantor and grantees at the time the deed was made.

In Byron vs. Utah Copper Co., 178 Pac. 53, 1.c. 56, the court in construing a similar provision said:

"The evidence not being before us for review, we must presume

that the trial court in construing the deed from Hays to Earl, placed itself in the situation of the parties at the time of the execution and delivery of the deed. It is apparent from the findings of the trial court that, in order to enable it to do so, testimony was received in that regard."

The court in the above case further quoted from L. Lindley, on Mines (3d Ed.), Section 93, page 153; l.c. 56.

" ' In construing private conveyances it is apparent that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor, if it can be ascertained.' "

"If we understand appellant's contention, it is that the words 'mining operations', as used in the reservation, is confined to subterranean mining or operation beneath the surface. Assuming, without deciding, that the language employed in the deed is susceptible of that meaning, standing alone, yet, in a proper case, the trial court may receive testimony to establish that the intention of the parties was otherwise. Daly v. Old, 35 Utah, 74, 99 Pac. 460, 28 L. R. A.(N.S.) 463; 27 Cyc. 685."

Also in Kinder v. La Salle County Carbon Coal Co., 141 N. E., l.c. 540, the court likewise held to the same rule in construing such provisions and said:

"That language is quoted substantially in 18 R. C. L. 1094, in discussing the interpretation of grants of

minerals, and the author says:

"The most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor if it can be ascertained."

"We think that the reasonable rule, and it is supported by an abundance of authority.

"It is also proper to consider the construction the parties themselves have placed on the deed. Hollenbeck v. Hollenbeck, 232 Ill. 348, 83 N. E. 926; 18 Corpus Juris, 262."

In 40 C. J. Section 572, page 985, provides in part that the owner of mineral rights shall not use the surface in such a way as to destroy or injure the surface.

"The surface rights of a mineral owner are limited to so much of the surface and such uses thereof as are reasonably necessary properly to mine and carry away the minerals, and are also subject to the limitation that he does not use the surface in such a way as unnecessarily to destroy or injure it. But he is not limited by the fact that his acts may cause inconvenience to the surface owner. In the absence of an express grant or license, the mineral owner has no right to use appliances or facilities belonging to the surface owner, even though such use will cause the latter no inconvenience. Ordinarily a mine owner cannot justify the use of the surface for the lengthened keeping

of his mineral products, the long continued deposit of rubbish from the mine, the erection of buildings for the storage of materials, the housing of animals, or the use of artisans, unless such right is expressly granted; nor has he the right to use the surface of grantor's land for the transportation of minerals from adjacent lands, or to pollute a watercourse on the land.

"A right to construct and use a mining tunnel does not include the right to dump waste, rock, and debris on the surface of the grantor's land or claim, except to the extent that dumpage is required by the reasonable necessities of the situation, the reasonableness of the necessity for such dumping being a question of fact to be determined from the circumstances of the case."

In *Korneman v. Davis*, 219 S. W. 904, 281 Mo., 242-243, a fundamental rule in construing a deed is that all of the words within the four corners of the instrument must be considered together and given effect.

"It is true that when there is a latent ambiguity in a description of land, the circumstances and situation of the parties, and the construction they have put upon the deed by their acts, are admissible in evidence. (*Tetley v. McElmurry*, 201 Mo. 382; *Gas Co. v. St. Louis*, 46 Mo. 121; *Union Depot Co. v. Railroad*, 131 Mo. 291) * * * * *

"It is also ruled that in construing a deed all the words of the deed within its four corners

must be considered together and given effect and that words stating the estimated quantity or area are part of the description of the land and must be so considered in fixing the identity of the tract conveyed. In Davis v. Hess, 103 Mo. l.c. 36, Black, J., said: 'The rule of law is well settled that the call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain.* * * In deeds as well as in wills and contracts, we are to determine the intention of the parties thereto, and this is done by taking the instrument as a whole.'

In Kinder vs. La Salle County Carbon Coal Co., 141 N. E., l.c. 540, a mineral reservation was made in a deed and the court construed same to mean only such mining as could be done by underground method and not destroy the surface. In this case the appellants contended they had the right to mine the minerals even though such operation did destroy the surface. In so holding the court said:

"When Cowey conveyed to the Chicago Coal Company he was engaged in mining coal in the immediate vicinity of appellees' land, then owned by him. Coal was the only known mineral under the surface which had any commercial value. Cowey knew appellees' land was underlaid with some gravel and limestone. On parts of the land the limestone was on the surface, and on the rest of it was covered with loam, sand and gravel from a few inches in depth to a depth, in places, of 50 or 60 feet. Where the loam was of sufficient depth, the land was available for cultivation in

crops and was productive. Cowey knew the limestone was so near the surface that it could not be mined by underground methods without the practical destruction of the agricultural surface. To our minds it would be unreasonable to say his intention was to reserve only the agricultural surface above the limestone and convey to the grantee the limestone, with the right to remove it, and thereby destroy all he had reserved. The granting clause of the deed conveys only the coal, 'together with right to mine the same,' and the quit-claim clause of 'all minerals of every description' underlying the land described cannot reasonably be construed to embrace minerals other than such as could be removed by mining operations underground, which would not destroy the surface for agricultural purposes. It is altogether reasonable to presume that Cowey and his grantee had no thought of limestone, sand, and gravel as minerals. They knew those were on or near the surface and were of an entirely different nature from coal and oil-the minerals specifically mentioned in the deed and which could be mined by underground methods. Two years after Cowey made the deed to the Chicago Coal Company he conveyed the land in controversy to Kinder and Burrell, reserving 'all bituminous or stone coal and other minerals, as well as all petroleum oil, in, upon, or underlying said premises above described, together with the right to mine and raise the same.' By that reservation the grantor meant and intended to

except from the grant what he had conveyed to the Chicago Coal Company, and the words 'the right to mine and raise the same' show the reservation was intended to be limited to minerals which could be mined and raised by underground workings without destruction of the surface."

In Brady vs. Smith, et al., 73 N. E. , 963, a deed was made with the following proviso reserving certain mineral rights which in part reads as follows:

"Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away."

In construing the mineral reservation, the court said:

"Among other conclusions the trial court held and the judgment appealed from adjudges, that the defendant Louise J. Smith is the owner of four-thirty-fifths of the limestone bed on the 20.04 acres and that the defendant John J. Sullivan, by virtue of the agreement made by him with the defendant Smith, has the right to take and remove the limestone in question by means known as open quarrying; that the land may be sold subject to such rights. It is from this portion of the judgment that the appeal was taken to the Appellate Division, which resulted in an affirmance of the judgment of the Trial Term.

"We are of opinion that the construction placed upon the exception and reservation in question cannot be sustained.

"The case of *Armstrong v. Lake Champlain Granite Co.* (147 N. Y. 495) is relied upon by both parties, to some extent, on this appeal. The case cited involved the construction of a deed which conveyed 'All the mineral and ores (on the same premises), with the right to mine and remove the same; also the right to sink shafts and sufficient surface to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores; also the right of ingress and egress for mining purposes, and to make explorations for minerals and ores, saving reservations to the State of New York.'

"The question involved in that case was whether a bed of granite, overlaid by soil from four to six feet deep on land that was thickly wooded, could be removed by open quarrying. Andrews, Ch. J., reviewing the English and American cases, reached the conclusion that under the form of conveyance already quoted open quarrying was not permissible. The learned judge said: 'Upon the authorities we think we should not be justified in holding that granite was not embraced in the reservation or grant of "mineral" in the absence of qualification.* * * But the words do not stand alone, but are connected with the context which clearly indicates, in our judgment, that the parties had in view only such minerals as are to be got by mining in the ordinary sense of that term; that is, by underground and not by open workings.'* * * * *

"It may be well enough to quote once more the reservation to be construed: 'Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away.'"

"The first point to be observed is that the word 'minerals,' as used in this reservation, is coupled with 'mines' by the conjunctive- 'all mines and minerals.' This shows that the grantor had in mind the reservation of mines and their contents, to wit, 'minerals.' This is further emphasized by the word 'found'- 'which may be found on the above piece of land'. It appears in the findings that immense boulders and ledges of limestone crop out on the surface of these premises, and it would be a strained and unnatural construction to assume that the language commented upon above refers to stone lying open to the view, and that the same may be removed by open quarrying and blasting, destructive of the surface, under the reservation of 'All mines and minerals which may be found.' We have here qualifying words quite as persuasive and controlling as those that influenced the court in *Armstrong v. Lake Champlain Granite Co.* (supra)."

In the same case the court quoting approvingly from

Countess of Listowel v. Gibbings (9 Ir. C. L. Repts. 223), said in part:

"Usually, 'mine' imports a cavern or subterraneous place, containing metals or minerals, and not a quarry; and 'minerals' mean ordinarily metallic fossil bodies, and not limestone."

Also the court quoting from Darvill v. Roper (3 Drewry, 294) said in part:

"* * * under a reservation of 'mines of lead and clay and other mines and minerals,' it was held that limestone was not included within the reservation; it was further held that minerals meant substances of a mineral character, which could only be worked by means of mines, as distinguished from quarries.* * *"

In Murray vs. Allard, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A., 249, l.c. 251, the court said:

"In the most general sense of the term 'minerals' are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal ores of all kinds, clay, stone, slate, and coprolites. 'Surface' means that part of the land which is capable of being used for agricultural purposes.' * * * 'Mineral' originally signified that which is obtained from a mine; from underground workings, as distinguished from that which is quarried. The term is not limited to metallic substances, but includes salt, coal, paint-stone and similar substances. Citing on the last point Hartwell v. Camman 10 N. J. Eq. 128, 64 Am. Dec. 448."

It is our opinion that there is some ambiguity contained in this mineral reservation, in so far as by what method iron ore shall be removed from said property. As stated in Dunham vs. Kirkpatrick, supra, if the grantor had intended to reserve in the deed to the State a right to remove said minerals by strip mining then it would have been comparatively easy to have so stated in this deed that fact. We base our contention that the deed never did contemplate that these minerals should be taken out by the strip mine method for the following reasons: First, on the face of the deed in the reservation of minerals it specifically reserves the right to certain timber on certain lands for mining purposes. It is common knowledge that under the tunnel or subterranean method of mining at the time the deed was executed, which was practically the only method of mining within this State, that timber was as a rule reserved in deeds to reinforce the surface and permit the mining operations underground. But it will be conceded that little if any timber is used in the so-called strip mining operations.

Therefore, why would there be any need for making such a reservation. We think the court will take judicial knowledge of this fact. Furthermore, there is another provision included in this mineral reservation in this deed, and that is that a water right-of-way was reserved to the Meramec River for mining operations. Again, we think the court will judicially notice that in operating a steam shovel, as is now placed on this land, the water required for operations is practically nil. Usually, water for such purposes is taken from a pond or well since it only requires a very small amount of water. Therefore, there would have been no reason for reserving a water right-of-way to the Meramec River.

Another reason which we think important and the court can infer from the deed that the State of Missouri was purchasing this acreage for a State Park. While the deed does not so state it was purchased by the State Park Board for a State Park, it is now a part of the Meramec State Park. No one can reasonably believe that the State would ever purchase such land for such a purpose and with any reservation whereby strip mining should be permitted to any extent whatsoever. It would destroy the beauty of the park, be hazardous, and result

August 18, 1941

in finally segregating such land covered by these minerals from the rest of the park. It is not logical to even think the State would enter into any such agreement, or that either party would think such an agreement could be entered into at that time under the circumstances.

While the deed nowhere shows this, we think it important that this particular land has for sixty years been mined by underground tunnels and subterranean methods. This mining operation has been going on up to one year ago when this tunnel caved in. Furthermore, in this case one of the owners of the mineral rights was the owner of the surface and was the grantor to the State in this deed. Therefore, while the terms used in this reservation are very broad it is the opinion of this department that such mineral reservation will not permit the removal of iron ore by the strip mine method. But such reservation only contemplated, at the time same was executed, mining by underground method which was in force on the land at that time.

Respectfully submitted,

AUBREY R. HASKETT, JR.
Assistant Attorney General

APPROVED:

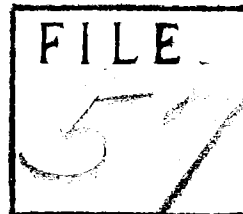
VANE C. THURLO
(Acting) Attorney General

ARH:BAW

RECORDER OF DEEDS: Clerk of circuit court and ex-officio
CLERK OF CIRCUIT COURT: recorder of deeds serves until his term
expires although by operation of law at
the next general election a recorder of
deeds must be elected.

August 23, 1941

Mr. Homer E. Martin
Circuit Clerk and Recorder
Texas County
Houston, Missouri



Dear Sir:

We are in receipt of your request for an opinion
under date of August 20, 1941, which reads as follows:

"As you know a law has just been
passed to lower the population from
20,000 to 19,000 in regard to the
separation of the Circuit Clerk &
Ex-Officio Recorder's Office which
effects Texas, Cass and Bates Coun-
ties.

"Will you please advise me what the
Circuit Clerk's salary will be?
When will this law become effective?
Is it absolutely necessary to sepa-
rate the offices until my term expires?
Will the Recorder receive as his salary
all the fees that he collects?"

Your first question is to the amount of salary a
circuit clerk in counties of your population. According
to the Decennial Census of 1940, the population of Texas
County is 19,813.

Section 13408, R. S. Missouri 1939, partially reads
as follows:

"The clerks of the circuit courts
of this state shall receive for their
services annually the following sum:
* * * * *
in counties having a population of
seventeen thousand five hundred per-

sons and less than twenty thousand persons, the sum of twenty-one hundred (\$2100) dollars; * * * * *

Therefore, the salary of the Circuit Clerk in Texas County will be \$2100.00.

Section 13435, R. S. Missouri 1939, provides that the clerk and his deputies be paid monthly out of the county treasury.

Your second question reads as follows:

"When will this law become effective?
Is it absolutely necessary to separate
the offices until my term expires?"

The law that you refer to as having been passed by the Sixty-first General Assembly is House Bill No. 367. It merely lowers the population of 20,000 inhabitants as set out in Sections 13147 and 13149, R. S. Missouri 1939, to read 19,000. The sections, as amended, read as follows:

"Section 13147. There shall be an office of recorder in each county in the state containing 19,000 inhabitants or more, to be styled 'The office of the Recorder of Deeds.'

"Section 13149. The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 19,000 inhabitants or more."

Article VI, Section 39 of the Constitution of Missouri provides for the election of the circuit clerk and reads as follows:

"The St. Louis Court of Appeals and Supreme Court shall appoint their own clerks. The clerks of all other courts of record shall be elective, for such terms and in such manner as may be directed by law: Provided,

August 23, 1941

that the term of office of no existing clerk of any court of record, not abolished by this Constitution, shall be affected by such law."

In compliance with Article VI, Section 39 of the Constitution of Missouri, supra, the Legislature enacted Section 13283, R. S. Missouri 1939, which reads as follows:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

This section provides for a term of four years for the circuit clerk so that your term does not expire until 1942. We find no exception as to the terms of circuit clerks that would change the time that their terms would expire.

In a recent case decided by the Supreme Court an exact question was passed upon as set out in your request. In the case of State v. Tennyson, 151 S. W. (2d) 1090, the court, on page 1090, said:

"* * Relator seeks to have respondent, the circuit clerk of Callaway County, ousted as ex officio recorder of deeds of said county. At the time of the general election in 1938 the population of Callaway County was less than twenty

thousand. (Census of 1930). At said election respondent was elected circuit clerk. Under the statute he became ex officio recorder of deeds. In 1940 the county had a population of 23,094, which fact was duly certified by the census bureau to the Secretary of State. On February 11, 1941, the Governor, assuming that a vacancy existed, appointed relator recorder of deeds of said county. It is admitted that he was duly commissioned; that he subscribed to the oath of office required by law; and that he tendered to the county court a statutory bond as recorder of deeds. The county court refused to approve the bond on the theory that a vacancy did not exist in the office. Relator made demand on respondent for the office, which was refused. * * * * *

The court further in its opinion said:

"The statute expressly creates the office of recorder of deeds in counties of twenty thousand or more population. Sec. 13147. It does not expressly create the office in counties of less than twenty thousand population. However, it provides that circuit clerks shall be ex officio recorder of deeds in such counties. Sec. 13149. It also provides that the circuit clerk in such counties, in addition to giving a bond as circuit clerk, Sec. 13285, Mo. St. Ann. Section 11666, p. 1800, shall also give a bond conditioned for the faithful performance of the duties of his office as recorder of deeds. Sec. 13150. Of course, a circuit clerk could not perform the duties of an office that did not exist. It follows that the change in the population of said county created no new office.

"Relator also contends that the absence of legislation expressly providing the time of separation of the offices of circuit clerk and recorder of deeds, on a statutory change in population, shows that the legislature intended an instant separation of the offices on official notice of said change.

"In this connection it should be noted that the courts indulge a strong presumption against a legislative intent to create a condition that might result in a vacancy in public office. 46 C. J. pp. 971, 972. It also should be noted that circuit clerks and recorders of deeds are elected at the same general election and each serve for a term of four years.

"The statute under consideration became effective June 24, 1933. On that date the offices of recorder of deeds and circuit clerk, ex officio recorder of deeds, came into existence. Even so, the legislature expressly provided that the office of recorder of deeds in counties of twenty thousand or more population, should not be filled until the general election in November, 1934, and every four years thereafter. Sec. 13155. It further expressly provided that a recorder of deeds in said counties shall continue in office until the end of the term, regardless of a change in population. Sec. 13154. These sections of the statute show that the legislature intended the question of a decrease in population to be determined as of the date of the election of recorder of deeds rather than determined at the time the census bureau notified the Secretary of State of a change in population.

"The legislature did not expressly

provide that, on a statutory increase in population, a circuit clerk should continue as ex officio recorder of deeds to the end of his term. However, a change in population does not affect the term of a circuit clerk. He continues as such until the end of his term. In this situation it must be ruled that, by clear implication, the legislature, on a statutory increase in population, must have intended the circuit clerk to continue as ex officio recorder of deeds until the end of his term. It is not conceivable that the legislature intended to avoid a vacancy on a statutory decrease in population, and, by the same enactment, to create a condition that might cause a vacancy on a statutory increase in population. It follows that the legislature intended the question of population to be determined as of the date of the election of circuit clerks and recorders of deeds rather than determined at the time the census bureau notified the Secretary of State of the change in population.

"There is no vacancy in the office of recorder of deeds of Callaway County, and the writ should be denied. It is so ordered."

Your third question is: Will the recorder receive as his salary all the fees that he collects?

Section 13426, R. S. Missouri 1939, reads as follows:

"Recorders shall be allowed fees for their services as follows:

"For recording every deed of instrument, for every hundred words .. \$0.10
In addition to the above fee for re-

ording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.

For every certificate and seal... .50

For recording a plat of survey, if not more than six courses..... .40

For every course above six of the same..... .02

For copies of plats, if not more than six courses..... .40

For every course above six..... .02"

The above section sets out the specific charge for each act of the recorder of deeds. The limitation of fees that can be retained by the recorder of deeds in Texas County is set out in Section 13187, R. S. Missouri 1939, which reads as follows:

"The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

Under the above section the maximum amount of fees to be retained by the recorder of deeds, exclusive of the salaries actually paid to his necessary deputies, shall not exceed four thousand dollars for any one year.

Mr. Homer E. Martin

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August 23, 1941

CONCLUSION

It is the opinion of this department that although the population of Texas County exceeds 19,000 at this time, there is no vacancy in the office of recorder of deeds.

It is further the opinion of this office that the offices of circuit clerk and ex officio recorder of deeds held by you shall not be separated until your term expires in 1942.

It is further the opinion of this department that at the next general election in 1942 a recorder of deeds must be elected.

It is further the opinion of this department that the recorder of deeds is limited to the sum of Four Thousand Dollars in the retention of fees, exclusive of salaries actually paid to his deputies as appointed by the county court.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

CRIMINAL LAW: Wife cannot testify against her husband
without his consent.
COSTS: Upon the dismissal of a rape charge, state
must pay the costs.

September 19, 1941

✓ 176
Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
dated September 12, 1941, which is as follows:

"The defendant committed statutory
rape and was apprehended. He was
bound over to circuit court on the
complaint and testimony of his
victim, the young girl. She is
pregnant. While the case has been
pending in the circuit court, this
defendant married the girl.

"What happens to the criminal prose-
cution? She is his wife, can he keep
her off the witness stand?

"If she is so reluctant to testify,
and the case in the circuit court
is dismissed, who will have to pay
the costs? Will the complaining
witness, the defendant, the county
or the state have to pay the costs?"

Section 4081, R. S. Mo. 1939, reads as follows:

"No person shall be incompetent to
testify as a witness in any criminal
cause or prosecution by reason of

being the person on trial or examination, or by reason of being the husband or wife of the accused, but any such facts may be shown for the purpose of affecting the credibility of such witness: Provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case: Provided, that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife."

A very similar statement of facts, as set out in your request, appears in the case of State v. Evans, 138 Mo. 116, 1. c. 121 and 125, where the court stated:

"And thereupon the court held and ruled that said witness, although the lawful wife of defendant, was a competent witness to prove the fact of carnal knowledge as charged in the indictment, and overruled said objections of defendant; to which action and ruling of the court the defendant then and there at the time excepted.

* * * * *

"We agree with counsel that both the rule and its exceptions are founded in public policy, but the legislature of this State

has announced the public policy of this State. With this subject before it for its consideration, it has declined to relax or change the common law so as to render the wife a competent witness against her husband in a criminal prosecution of this kind. It permits her to testify for him at his option, but not against him. R. S. 1889, sec. 4218. And they may testify against each other in suits for divorce. R. S. 1889, sec. 8918.

"The careful expression of these two cases in which a wife may testify excludes all other exceptions save those already enumerated and which descended to us with the rule itself.

"The court clearly erred in admitting the wife as a witness over and against the defendant's objections and exceptions."

Section 4223, R. S. Mo. 1939, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It has been held that a dismissal of a case is the same as acquittal, as set out in the above section. It was so held in State ex rel. Tudor v. The Platte County Court, 40 Mo. App. 503.

September 19, 1941

Section 4393, R. S. Mo. 1939, reads as follows:

"Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury."

Under the above section, the sole punishment is death or imprisonment in the penitentiary for a term not less than two years.

CONCLUSION

In view of the above authorities, it is the opinion of this department, under the facts as detailed in your request, that a wife cannot testify against her husband without his consent, and, upon a dismissal of the charge set out in your request, the state must pay the costs.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:VC

BUILDING & LOAN: Foreign associations advertising in newspapers are not doing business within this state.

March 4, 1941.

3-7



Honorable J. W. McCammon
Supervisor
Bureau of Building and Loan
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"Enclosed is file relating to recent activity of the United Building and Loan Association, Little Rock, Arkansas.

"Our records or files do not show any correspondence with the subject association. Our question is, therefore, whether or not a building and loan association not receiving a charter from this state or the United States government may solicit sale of its shares to residents of Missouri, by advertising in a Missouri newspaper without first meeting the requirements of the building and loan laws of Missouri.

"In the event you hold that the subject association has committed a violation of the Missouri statutes, what procedure should be properly taken by the Supervisor in this matter?"

March 4, 1941

The advertisement mentioned in your request is as follows:

" INSURED SHARES

4% CURRENT DIVIDENDS

"Now is the time to put your savings dollars to work earning a good yield in a convenient plan protected by an agency of the U. S. Government. Write or call for full details on Insured Shares.

UNITED BUILDING & LOAN ASSOCIATION
627 Pyramid Bldg., Phone 2-3464
Nathaniel Dyke, Jr., Sec.
Little Rock, Arkansas."

Section 8235, R. S. Missouri, 1939, provides in part as follows:

"Foreign building and loan associations doing business in this state shall conduct their business in this state in accordance with the laws of the state governing domestic associations and no such association shall do any business in this state until it shall procure from the supervisor of building and loan associations a certificate of authority to do so. * * *"

Section 8241, R. S. Missouri, 1939, provides in part as follows:

"It shall be unlawful for any foreign building and loan association to do business in this state without having first complied with the provisions of the preceding section of this chapter,

March 4, 1941

and any such association violating any of the provisions of said sections of this chapter, or failing to comply with any of said provisions shall be fined not less than fifty nor more than one thousand dollars, to be recovered by an action in the name of the state; and on collection paid into the state treasury, to the credit of the bureau of building and loan supervision fund in the office of the said state treasurer:
* * * * *

The question presented in your request is whether a foreign building and loan association which places an advertisement in a newspaper soliciting inquiries from the residents of the State of Missouri as to the stock of such association is "doing business" in the State of Missouri so as to bring them within the purview of the statutes quoted above?

As is said in 12 C. J. S. 551, "Whether associations are amenable to the statutes specifically requiring the performance of conditions precedent by a foreign building and loan association depends on whether they are 'doing business' within the state."

Moreover, as pointed out in 9 Am. Jur. 190, "The rules and principles which govern the operations of corporations generally outside the jurisdiction of their origin or domicil, apply for the most part to foreign building and loan associations."

While it is true that the rule in Missouri is that ordinarily a foreign corporation soliciting and accepting stock subscriptions is not doing business in the state. Myer v. Crossley, 264 S. W. 882, still if the sale of stock is the business of the corporation and not a mere incident, then it is doing business within the state of such sale. Booth v. Scott, 205 S. W. 633, 276 Mo. 1. However, in the Booth Case, supra, the foreign corporation had an office within this state and had several officers and agents within

Hon. J. W. McCammon

(4)

March 4, 1941

the state selling stock to the citizens of Missouri. From the facts in your request the association in question has no place of business or agent within this state.

We are unable to find any cases which hold that a mere solicitation in a newspaper advertisement constitutes the "doing of business" within the state.

In People's Building and Loan Association v. Berlin, 201 Pa. 1, 50 A. 308, the Supreme Court of Pennsylvania, which state has been called the birthplace of building and loan associations, said at l. c. 6:

"As we have already seen, under the articles of association and the by-laws, and as a matter of fact, the business of the association was done in New York. Its corporate functions were all exercised there. The applications for stock and for the loan were made and considered in New York, and there accepted. By the express terms of the by-laws, the money paid by the stockholders and borrowers was to be paid there, as was also the payment of the money to the defendant by the association in the completion of the transaction. In the completion of the law, the entire contract, from inception to the finish, was performed in New York."

In Neal v. New South Building & Loan Association, 100 Tenn. 607, 46 S. W. 755, the court held at l. c. 757:

March 4, 1941

"The loan secured by the mortgage executed by complainant to defendant company is payable in New Orleans, in the state of Louisiana, and each of the installment notes is so payable. The contract is essentially a Louisiana contract, and does not contravene any statute of this state. The defendant company, at the time this contract was made, was domiciled in the state of Louisiana, it had no local board or agency here, and was not carrying on business in this state in the sense of the statute. It was, therefore, not amenable to the statute requiring a foreign corporation to register its charter as a condition of doing business in this state."

In view of the above authorities it will be seen that the corporation in question is not doing business within this state and therefore does not have to comply with the provisions of Section 8235, supra.

CONCLUSION.

It is, therefore, the opinion of this Department that a foreign building and loan association which solicits inquiries as to shares in a newspaper of the State of Missouri, but which has no agents or office within this state, is not "doing business" within this state within the meaning of the building and loan statutes relating to foreign corporations.

Respectfully submitted,

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

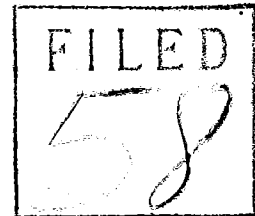
VANE C. THURLO
(Acting) Attorney General

AO'K/rv

BUILDING AND LOAN: Class B assets may borrow money from Class A.

March 7, 1941

3-21



Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"A request has been filed with this office by Ray W. Hunt, secretary, Sedalia Savings and Loan Association, Sedalia, Missouri, for the permission of the supervisor to allow the Sedalia Savings and Loan Association, a Missouri Corporation, to loan a portion of its cash on hand, upon the security of a note signed by directors, to the Class B assets of the Sedalia Savings and Loan Association.

"The Class B assets of the association represent assets segregated in 1937 by the directors of the association and placed in a participating reserve fund for the sole purpose of orderly liquidation under the direction and management of the Sedalia Savings and Loan Association's board of directors. This segregation was carried out under the terms and provisions of Section 5593, Laws of Missouri, 1935.

March 7, 1941

"The Class A assets of the association at the time of reorganization, by segregation, were acceptable to the Federal Savings and Loan Insurance Corporation and an insurance of share accounts certificate was issued to the Class A portion of the association. It is at this time a going concern.

"In the conducting of the liquidation of the Class B assets, the directors found it necessary to borrow money from a local bank to cover unpaid taxes on real estate owned. The insured portion of the association has cash on hand not now in use and the directors feel that they should be permitted to loan a reasonable amount to the Class B and receive the prevailing interest charge rather than have the Class B pay such charge to an outside agency.

"We have reason to believe a similar situation will develop in other cases of segregation where there is not a conveying of Class B assets to three trustees and we respectfully request your opinion as to whether or not such a loan could be made by the insured association to the Class B assets."

Section 8210, R. S. Mo. 1939, provides that a building and loan association in its by-laws may provide that any loans and other assets of doubtful value may be placed in a reserve fund, which fund shall remain separate from the other assets of the association and shall be liquidated. "Participating reserve shares" are issued to stockholders, representing their pro rata share in this fund.

Section 8213, R. S. Mo. 1939, provides that surplus funds of a building and loan association may be loaned "to others than stockholders on the security of prime unencumbered real estate."

Section 8227, R. S. Mo. 1939, provides by its by-laws that any building and loan association shall have the power to borrow not more than an aggregate amount equal to twenty-five per cent. of its capital. It will be seen that this reserve fund, while still a part of the assets of the association and still under the control of the directors, is a fund separate from other assets. The directors and officers are to liquidate this fund and are to conduct such liquidation separate and apart from the other business of the association. The question presented by your request is whether this reserve fund may borrow money from the Class A portion of the association which is a going concern. The closest analogy that we can find in law to this setup is where two corporations have common members on their board of directors, that is, the members of the board of directors of one corporation are the same as those of a second corporation.

In Fletcher on Corporations, Vol. 3, page 345, it is said:

"So in Missouri it is held that a sale of property by one corporation to another having the same directors cannot be complained of by the stockholders where the sale was for full value and in no way fraudulent."

However, as pointed out in Cummings v. Parker, 250 Mo. 427, 1. c. 440, 157 S. W. 629:

"It is uniformly held that directors of corporations stand in the relation of trustees to the corporate property. Hence when the issue on trial on complaint of a shareholder is whether a transaction should be avoided or profits accounted for in dealings between corporations having interlocked boards of directors, or in dealings with such directors anent corporate property, such dealings will be judicially eyed with jealousy and sternness to search out and correct lurking mischief."

March 7, 1941

In *Manufacturers Savings Bank v. O'Reilly*,
97 Mo. 38, 10 S. W. 865, the court said:

"The mere fact that these defendants were directors and stockholders in the selling and purchasing corporation did not make the sale absolutely void."

In view of the above authorities it will be seen that the trust fund or Class B fund may borrow money from the going association representing the Class A shares, if such transaction is in no way unfair or fraudulent. Such transaction is not void but only voidable and will not be set aside if it clearly appears to be just and fair in every respect. We wish to point out, however, that this loan must be on the security of prime unencumbered real estate as required by Section 8213, *supra*.

Conclusion

It is, therefore, the opinion of this Department that the reserve fund set up under Section 8210, R. S. Mo. 1939, may borrow money from the going association representing the Class A shares, if such transaction is just and fair in every respect, and such loan cannot be set aside unless it is shown that it was unfair or entered into in bad faith or that fraud was present.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

COUNTY CLERK: Not liable for donation to special road district made by county court if donation is legal, unless funds are taken from the five classes of the County Budget Act.

February 19, 1941

Mr. Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri



Dear Sir:

This department is in receipt of your letter of February 13th, wherein you make the following inquiry:

"As I understand the law, the county clerk has no authority to make a donation of the county's money to special road districts.

Now, in the event that they make a donation over the protest of the county clerk and treasurer, and the money is paid out, would the county clerk and the treasurer become liable under their bond?"

Under the facts as contained in your letter, we cannot determine whether you refer to the authority of the county clerk or the county court to make a donation of the county's money to the special road district. Under Section 8688 R. S. Mo. 1939, formerly Section 8039 R. S. Mo. 1929, the county court may in its discretion, out of the funds available to it for that purpose, aid and assist the commissioners of a special road district in constructing, maintaining and repairing bridges.

Section 8685 R. S. Mo. 1939, formerly Section 8036 R. S. Mo. 1929, pertains to the provision that the county

Mr. Emory C. Medlin

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February 19, 1941

court may make contribution for certain improvements. We mention the above sections merely for your consideration in determining whether the donation is legal.

In answer to the specific question as to whether or not the county clerk and treasurer would become liable under their bonds for such donation, it would be a question of whether the donation was legal. If legal, of course, they would not be liable. Another element which would enter would be the question of whether or not the money so donated came from the road and bridge or special road and bridge fund, or from the general revenue fund. It has been our construction that the road and bridge and special road and bridge funds do not come within the purview of the five classes of the County Budget Act.

Under Section 10917, Laws of 1939, Laws of 1933, page 340, the last paragraph in said section is as follows:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force or effect; and any county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

CONCLUSION

We are therefore of the opinion that if the donation is paid from any of the classes of Section 10914 R. S. Mo.

Mr. Emory C. Medlin

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February 19, 1941

1939, Laws of 1937, page 422, and otherwise contrary to the County Budget Act, the officers in question would be liable on their bonds under the above quoted section. It may be possible, if the donation is legal, it could be paid under Class 6 of the County Budget Act.

In any event, we are of the opinion that there is no provision in the law for the county clerk as such officer to make a donation of the county's funds to a special road district.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

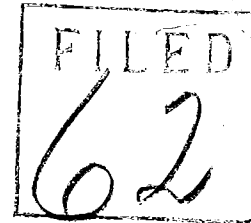
COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

3. GENERAL ASSEMBLY: Upon opening and publishing the returns of the election for state officers, may proceed to other business.

January 21, 1941 ^{1/}22

Senator George H. Miller
Senate Chamber
Jefferson City, Missouri



Dear Senator:

We acknowledge receipt of your request for an immediate opinion under date of January 10, 1941, which reads as follows:

"Will you please render me an opinion on the following question of law:

"In view of the fact that Section 3, Article 5, of the Constitution of the State of Missouri states, 'The returns of every election for the above named officers shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the House of Representatives, who shall, immediately after the organization of the House, and before proceeding to other business, open and publish the same in the presence of a majority of each House of the General Assembly, who shall for that purpose assemble in the hall of the House of Representatives. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more shall have an equal and the highest number of votes, the General Assembly shall, by joint vote, choose one of such persons for said

office,' is there any legal and constitutional way whereby the State Legislature may either by motion or resolution, and before Section 3, Article 5, of the Constitution has been complied with, appropriate, pay out, or in any way disburse public funds or order the Treasurer of the State of Missouri to do so, for the purpose of Old Age pensions, Aid to Dependent Children, or Direct Relief?

"Thanking you for an immediate opinion, I remain."

Article V, Section 3, of the Constitution of Missouri, relates to all state officers, and provides that:

"The returns of every election for the above named officers shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the House of Representatives, who shall, immediately after the organization of the House, and before proceeding to other business, open and publish the same in the presence of a majority of each House of the General Assembly, who shall for that purpose assemble in the hall of the House of Representatives. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more shall have an equal and the highest number of votes, the General Assembly shall, by joint vote, choose one of such persons for said office."

Section 10169, R. S. Mo., 1929, provides:

"After each election of governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney-general, and superin-

tendent of public schools, the secretary of state shall, immediately after the organization of the house of representatives, deliver to the speaker thereof the returns of the votes given for the last named officers, who shall thereupon immediately notify the senate of the same, and that the house is ready to receive the senate in joint session to open and publish the same, whereupon the senate shall immediately repair to the hall of the house of representatives; and the speaker of the house shall, before proceeding to other business, in the presence of a majority of the members elected to each house of the general assembly so assembled in joint session, open and publish the same. In case of an alleged mistake in any return, or when more than one return has been made for any of said officers from any county or city or precinct, the two houses shall, in joint session, correct such mistake, if any, and determine which is the true and correct return by a vote of a majority of the members present, and the same shall be counted by the speaker, under the direction and control of the two houses thus assembled. The person having the highest number of votes for any of said offices shall be declared by the speaker of the house to have been duly elected."

Under both the above constitutional provision and statute enacted pursuant to same (hereinafter referred to as "provisions") it is made the duty of the Speaker of the House, before proceeding to other business, to open the returns and publish the same in the presence of the majority of each House of the General Assembly.

The House Journal (figures refer to pages) for the Third Day, Friday, January 10, 1941, reveals that a

Joint Resolution was adopted (27) by the members of the House and Senate in joint session (21), naming a committee to canvass the votes cast for state officers in the last General Election as submitted to the Joint Assembly, and to report same to the body (22).

It is shown that thereafter (27):

"The Joint Committee to canvass the returns of the General Election held November 5, 1940, proceeded to perform its duty in the presence of a majority of the members of the Senate and the House of Representatives."

The Majority Committee report was adopted (32-33) by the members of the House and Senate in Joint Session (27), and is in part as follows (28,29,30):

"TO THE JOINT SESSION OF THE SENATE
AND HOUSE OF REPRESENTATIVES OF THE
STATE OF MISSOURI:

"Your Committee, duly appointed by resolution, by the Joint Session of the General Assembly of the State of Missouri, to canvass the votes cast at the last general election held in the State of Missouri, begs leave to report as follows:

"We find that a tabulation of the returns as reported to the Speaker of the House of Representatives, after having examined, canvassed and cast up all of said returns in the presence of the Honorable Morris E. Osburn, Speaker of the House of Representatives of the Sixty-first General Assembly, shows the following results of said election:

"(Hereinafter follows the results of the election for Senator in Congress for Missouri; for Lieutenant-Governor;

for Secretary of State; for State Auditor; for State Treasurer; and for Attorney-General.)"

The Committee further reported that it had carefully considered the returns and canvassed the votes cast at the election for the office of Governor and had in many instances found alleged mistakes in the returns and had been advised of various irregularities and violations of the law in connection with the election. That for said reasons they were unable to definitely and correctly ascertain and determine who had received the highest number of votes cast in the State of Missouri for the office of Governor.

The Committee further reported that a petition had been filed with the General Assembly alleging that the purported returns in so far as they pertained to the office of Governor were incorrect, and praying that the General Assembly investigate the election in order that the General Assembly might ascertain and determine who received the highest number of votes for the office of Governor.

The Committee further found that resolutions had been filed by the Democratic State Committee and by the Democratic Central Committees of 101 counties and the City of St. Louis, requesting a general investigation of the election in so far as it pertained to the office of Governor.

By reason of all these findings the Committee recommended that a general investigation be made of the general election held in the State of Missouri on November 5, 1940, only in so far as it pertained to the office of Governor, in order to determine what was the true and correct return of the votes for Governor of this State and ascertain the person who received the highest number of votes for the office of Governor.

The Speaker of the House, Honorable Morris E. Osburn, in the presence of a majority of each House of the General Assembly thereafter opened and published the returns (34,35):

"Gentlemen of the Session:

"The returns of the late election for State Officers having been opened and canvassed and cast up in accordance with the provisions of Section 3, Article 5, of the Constitution of the State of Missouri, I now have the honor to announce the results of said election, as follows:

"(Hereinafter follows the results of the election for Senator in Congress for Missouri; for Lieutenant-Governor; for Secretary of State; for State Auditor; for State Treasurer; and for Attorney-General.)

* * * * *

"Now, therefore, I, Morris E. Osburn, Speaker of the House of Representatives, declare that Harry S. Truman has been elected Senator in Congress for Missouri for a term of six years.

"That Dwight H. Brown has been elected Secretary of State for a term of four years.

"That Forrest Smith has been elected State Auditor for a term of four years.

"That Wilson Bell has been elected State Treasurer for a term of four years.

"That Roy McKittrick has been elected Attorney-General for a term of four years.

"They having received the highest number of votes cast for said offices, respectively, at the general election held on the fifth day of November, 1940, as shown by the returns of said election

just opened and published by me,
Speaker of the House of Representatives.

MORRIS E. OSBURN
Speaker. "

Funk and Wagnalls, New Standard Dictionary
defines the word "open" as follows:

"To impart freely the knowledge of;
reveal; disclose * * * * *

The word "publish" is defined generally in
51 C. J., 88, as follows:

"To make known; to make known generally;
to make known to people generally;
to make known what before was private;
to make public; to make publicly known;
to proclaim."

The Supreme Court of Missouri in the case of
In Re Publishing Docket in Local Newspaper, 266 Mo. 48,
187 S. W. 1174, 1175, defined the term "publish," in the
following manner:

"The word 'publish' ordinarily means
to make public."

By virtue of the above "provisions" it became
the duty of the Speaker of the House, as Constitutional
Agent of the General Assembly, to reveal the returns of
the election for all state officers and to make them
known to the members thereof. An examination of the
"provisions" discloses no prescribed method as to how
he shall make the returns known. The method is left to
his sound discretion, and it matters not whether he
makes them known by writing, speaking, publishing or
any other means of communication. The essential thing
is that he not keep the results of the returns in his
personal possession, but that he impart them to the
General Assembly. When he has therefore made same known
to the General Assembly he has completed his duty within

Jan. 21, 1941

the meaning of the "provisions," and the General Assembly may then proceed to exercise its legal functions.

Unimpeachable evidence that the returns of the election for all state officers, including that of Governor, were made known to the General Assembly, is shown by the report of the Minority Joint Committee, which failed of adoption (31).

The provisions herein set out make it a condition that the Speaker open and publish the returns before proceeding to other business. This was done. There is, however, no requirement that anyone be declared elected before the General Assembly proceeds to other business. The language of the "provisions" are so clear on this point there is no room for construction. *Keller v. State Social Security Commission*, 137 S. W. (2d) (Mo. App.) 989, 1. c. 990.

From the foregoing, we are of the opinion that the Speaker of the House of Representatives has opened and published the returns of the election for state officers in compliance with Section 3, Article V of the Missouri Constitution, and Section 10169, R. S. Mo., 1929, and therefore that the General Assembly may proceed to appropriate public funds for the purpose of old age pensions, aid to dependent children, direct relief, and proceed to any other business it may desire.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

MW:EG

FEES: SALARIES: Not entitled to mileage in addition to
SHERIFF AND DEPUTIES: salary in the performance of their of-
CONSTABLES AND DEPUTIES: ficial duties.
ST. LOUIS COUNTY:

February 18, 1941

Mr. Walter E. Miller, Clerk
St. Louis County Court
Clayton, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of January 18, 1941, which reads as follows:

"The County Court of St. Louis County has asked me to request your office for an opinion relative to the construction of Section 7, Page 681, Laws of Missouri, 1939.

"St. Louis County comes under the classification of counties having a population of not less than 200,000 inhabitants, and less than 400,000 inhabitants.

"The Sheriff has appointed his deputies, and the County Court has found the need for the appointment of these deputies, but a question arises as to the determination of the amount of the salaries to be paid them. The deputies, in performing their duties, must use automobiles and do a great deal of traveling, and are put to expense in making investigations and performing the duties of their office.

"Can the County Court set a definite amount as salary for each deputy and also an additional definite amount for the expense of the operation of their automobiles and other expenses incident to the performance of their duties.

"The County Court request an opinion on another matter. This relates to the salaries of the constables and their deputies. Taking into consideration Section 11777, page 683, Laws of Missouri, 1939, has the County Court any authority to provide compensation for the constables and deputy constables for the expense which they incur by reason of the use of their automobiles and other expense incidental to the performance of their duties."

We shall first answer your request:

"Can the County Court set a definite amount as salary for each deputy and also an additional definite amount for the expense of the operation of their automobiles and other expenses incident to the performance of their duties."

The Sixtieth General Assembly enacted a new provision establishing the salary and fees for sheriffs, other officers and their deputies in counties the size of St. Louis County. This act will be found on pages 679-683, inclusive, Laws of 1939. This act does not specifically repeal any former act.

Under Section 1, page 680, Laws of 1939, the legislature specifically designated a salary of Eight Thousand Seven Hundred fifty (\$8750.00) Dollars for the sheriff in all counties in the state having a population of not less

than two hundred thousand (200,000) or more than four hundred thousand (400,000), according to the last Federal Decennial Census:

"In all counties in this state which now have or may hereafter have a population of not less than 200,000 inhabitants and less than 400,000 inhabitants according to the last Federal decennial census, the following salaries shall be paid the hereinafter named officers, beginning with the term of office following the term for which the incumbent has been elected, or is serving at the time of the effective date of this act, to-wit; Clerk of the County Court, \$6750.00 per annum; Collector of Revenue \$8750.00 per annum; County Treasurer, \$6750.00 per annum; Recorder of Deeds, \$6750.00 per annum; Circuit Clerk, \$6750.00 per annum; Sheriff, \$8750.00 per annum; Coroner, \$5000.00 per annum; Assessor, \$8750.00 per annum."

Section 7, page 681, Laws of 1939, authorizes the appointment of deputies by the sheriff to properly perform the duties of his office. The salary of these deputies shall be determined by the county court. There is no specific limitation on the amount of salary such deputies shall receive. This is a matter within the discretion of the county court:

"It shall be the duty of the clerk of the county court, the assessor, the collector of the revenue, the county treasurer, the recorder of deeds, the sheriff of the county and the coroner to appoint deputies and clerks to properly perform the duties of their offices. The salary of the deputies

and clerks shall be determined by the county court of said county and made a matter of need by said court and paid out of the county treasury. The circuit clerk shall appoint his deputies and assistants and fix their salary with the approval of the circuit court and such deputies and assistants shall be paid out of the county treasury."

Now we come to the question--are the sheriff's deputies entitled to mileage while acting in the performance of their duties. This statute only refers to what salaries said deputies may receive.

Corpus Juris lays down the general principle regarding the right to compensation for expenses incurred by an officer. The officer claiming such expenses must place his finger upon the statute or Constitution authorizing such expenses. 46 Corpus Juris, page 1018, Section 246, in part, reads as follows:

"The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication, and the officer cannot recover compensation additional to the compensation fixed by statute for such expenses. * * * * *

In State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, l. c. 610, 611, there was an appropriation for expenses of warehouse commissioner and grain inspection department. Money for expenses included "traveling expenses." The court, in holding this, did not include trips to Washington, D. C. After examining the act creating the department and its duties, said:

"We do not mean to say that the expression 'travel within the State' is to be regarded as a legal fetich, or that such a requirement is to be wholly decisive of the liability of the State to pay traveling expenses. It so occurs here that the statutory duties of the warehouse commissioner, as at present defined, are such as in the very nature thereof cannot entail travel outside of the State. If, however, the statutory duties of an officer of this State be such as require, or entail in their proper performance, travel beyond the borders of this State, then such travel is as much a necessary expense, for which the State would be liable, as is travel within the State. (State ex rel. Lamkin v. Hackmann, 275 Mo. 47, 204 S. W. 513).

"If so it be that the crying exigencies brought about by a World War unforeseen and undreamed of when the act in question was passed had so altered national and domestic conditions when the trips in question were made as to make it absolutely necessary and praiseworthy for the relator to incur the expense in controversy in the first and second counts, we are yet forced, however much the situation may appeal to our personal sympathies to relegate this phase of the case to the Legislature. Our duty in the premises is done when we are unable to lay our finger on any existing statute which, when construed under the rules laid down, supra, will justify us in adjudging payment. We think the demurrer should be sustained and that our writ, so far as it went to counts one and two, should be quashed."

In Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860, the Supreme Court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Also, in the above case the court held that the general rule is that the rendition of services by a public officer is deemed to be gratuitous unless compensation is provided by statute:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing the same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656."

Also, it has been often held by the Supreme Court that the right to compensation by statute must be strictly construed against the officer. In Ward v. Christian County, 111 S. W. (2d) 182, 1. c. 183, the court said:

"It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which

is claimed to confer such right must be strictly construed.' State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655, 656. * * * * *

Another cardinal rule of construction is that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein.

In State ex rel. Wabash Ry. Co. et al v. Shain et al., 106 S. W. (2d) 898, 1. c. 899-900, the Supreme Court in banc said:

"* * * * The cardinal rule to be followed in the construction of statutes is to arrive at the legislative intent. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker." Sutherland on Statutory Const., section 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.'"

The Sixtieth General Assembly, in enacting Section 9, page 682, Laws of 1939 of the same act, specifically prohibited the deputies receiving mileage or other expenses:

"All the salaries mentioned in Section 1 hereinabove shall be in full of all services rendered by virtue of said officers and said annual salaries shall be paid in equal monthly installments out of the county treasury of said county.

None of the officers or their employees hereinabove enumerated shall retain any fees, fines, costs, commissions, penalties, or charges collected by virtue of their office under the laws of this state but all the fees, fines, costs, commissions, penalties or charges shall be paid into the county treasury and they shall be the property of said county. * * * *
(Underscoring ours).

The above provision obviously was intended to prohibit deputies from receiving any expenses whatsoever.

In State ex rel. Ben Selleck et al., Relators, v. John P. Gordon, State Auditor, 254 Mo. 471, the court held the sheriff was not entitled to certain fees for mileage in subpoenaing witnesses for the reason the statute providing for such mileage was enacted after the sheriff began his term of office and, therefore, it was in violation of Article XIV, Section 8, Missouri Constitution, which provides the compensation or fees of no officer shall be increased during his term of office. This decision construes mileage as fees. The court said, page 476:

"The only items of costs contained in said fee bill which are attacked on the ground that they are illegal and not properly taxable as items of cost in the cause are the two items of \$11 and \$12.25, claimed by sheriff Roland as fees for mileage in subpoenaing witnesses. Sheriff Roland's four-year term of office began about January 1, 1909. The statute authorizing sheriffs to receive fees for mileage in subpoenaing witnesses in criminal cases was first enacted in 1909 and after Sheriff Roland had begun his term of office. (Laws 1909, p. 505.) The sheriff was therefore not entitled to these fees for the reason that, if allowed, they would amount to an increase of his fees during his term of office. (Constitution of Missouri, art. 14, sec. 8.)

"It is therefore ordered that a peremptory writ of mandamus issue commanding the State Auditor to audit and allow all items of said fee bill except the two items for the sheriff's mileage."

Furthermore, another rule of construction is that the title of an act may be considered as a guide to the legislative intent if the language of the act is ambiguous.

In *Bowers v. Missouri Mut. Ass'n.*, 62 S. W. (2d) 1058, 1. cl. 1063, the court said:

"* * * Where certain terms of a statute are ambiguous, we are at liberty to go to the title of the act as a clue or guide to the intention of the Legislature. *Straughan v. Meyers*, 268 Mo. 580, 588, 187 S. W. 1159; *State ex rel. Bixby v. City of St. Louis*, 241 Mo. 231, 248, 145 S. W. 801. * * * * *

Also, in *re Graves*, 30 S. W. (2d) 149, 1. c. 151-152, the court said:

"We are confirmed in this conclusion by the application of another rule of statutory construction. When the language of a statute is ambiguous, recourse may be had to the title in order to ascertain the true meaning of the act. 25 R. C. L. p. 1031, section 267; *Straughan v. Meyers*, 268 Mo. 580, 588, 187 S. W. 1159; *Strottman v. Railroad*, 211 Mo. 227, 252, 109 S. W. 769; *State ex rel. v. Fort*, 210 Mo. 512, 527, 109 S. W. 737. * * * * *

While we can see no ambiguity in this act pertaining to deputies receiving mileage in the performance of their duties, it is unnecessary to look to the title. However, if this act should be ambiguous, which we do not contend, the title supports our opinion that the deputies shall not receive such expenses. The title reads in part:

"and providing for all salaries of
county officers and employees to be
in full and in lieu of all other fees,
commissions and emoluments, * * * *"

This provision obviously determines the question in that it provides that all county officers and employees shall receive a salary to be in full in lieu of all other fees, commissions and emoluments, which leaves no room for doubt that the Sixtieth General Assembly fully intended to place these deputies upon a salary basis in lieu of everything else.

Therefore, it is the opinion of this department that deputies appointed by the sheriff in St. Louis County are entitled to a salary as allowed by the county court but are not entitled to mileage in the performance of their official duties.

Your second request for an opinion reads as follows:

"The County Court request an opinion on another matter. This relates to the salaries of the constables and their deputies. Taking into consideration Section 11777, page 683, Laws of Missouri, 1939, has the County Court any authority to provide compensation for the constables and deputy constables for the expense which they incur by reason of the use of their automobiles and other expense incidental to the performance of their duties."

In answering this inquiry, the same rules of construction are applicable as hereinabove referred to.

Section 11777 of the Revised Statutes of Missouri 1929, was repealed by the Sixtieth General Assembly and a new section was enacted in lieu thereof known as Section 11777, found on pages 683, 684, 685, Laws of 1939. The fees which the constable and deputy constable shall collect are set out in this section on pages 683, 684. This is followed by a provision relative to constables and deputies in counties not having less than 200,000 or more than 400,000 inhabitants which is applicable to constables and deputies in St. Louis County, and reads in part as follows:

"* * * Provided further, that in any county which now has or may hereafter have not less than 200,000 and not more than 400,000 inhabitants, the Constables in such counties shall collect the fees authorized by law for their services, and shall at the end of each month file with the county clerk a report of all fees which they collected during said month, stating on what account or in what case such fees were charged and collected, together with the names of the persons paying or who are liable for same, which said report shall be verified by the affidavit of said constable. It shall be the duty of the constable upon the filing of the said report to forthwith pay over to the County Treasurer of such county all moneys collected by said constable or his deputies, and shall file with said moneys in the office of the Treasurer a duplicate of the report to the County Clerk, and shall receive from the County Treasurer a receipt in duplicate, a copy of which shall be filed in the office of the County Clerk, and every such Constable shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided. In lieu of all fees such constables shall receive a salary not to exceed \$2,700.00 per annum, payable pro rata at the end of each month out of the Treasury of said County and each Deputy Con-

stable as shall be approved by a majority of the judges of the circuit court shall be paid a salary not to exceed \$125.00 per month, the amount of compensation of the Constables and Deputy Constables shall be fixed by a majority of the judges of the circuit court within the limits herein before set forth. Provided However, No constable shall appoint any deputy constable as in this act provided except upon the approval of the majority of the judges of the Circuit Court who shall not approve the appointment of more than twenty-eight (28) deputy constables, and provided further that a majority of the judges of the Circuit Court shall approve at least two (2) deputies for each constable; and provided further that for extraordinary emergencies the Circuit Court may approve, subject to the provisions of this act the temporary appointments of such additional deputy constables as may be deemed necessary in the judgment of the majority of the court to meet said emergencies."

This act provides the constable may appoint his deputies with approval of the majority of the judges of the circuit court. This act further provides the constable shall collect all fees as prescribed by law for their services (Section 11777, supra). At the end of each month he shall make out a report showing all fees they collected and same shall be verified by the constable. It then becomes the duty of the constable to pay over all moneys collected by said constable and deputies to the county treasurer and shall file a duplicate of the report made to the county clerk with the county court and he shall receive from the county court a receipt in duplicate and copy to be filed with the county court. Then the pertinent part of Section 11777, supra, reads as follows:

" * * * In lieu of all fees such Constables shall receive a salary not to exceed \$2,700.00 per annum, payable pro rata at the end of each month out of the Treasury of said County and each Deputy Constable as shall be approved by a majority of the judges of the circuit court shall be paid a salary not to exceed \$125.00 per month, the amount of compensation of the Constables and Deputy Constables shall be fixed by a majority of the judges of the circuit court within the limits herein before set forth. * * "

Now applying the rules hereinabove referred to, the constable and his deputies are only entitled to such compensation as they can point out the statute authorizing such payment. (Nodaway County v. Kidder)

This section provides a salary for constables not to exceed a maximum of \$2700.00 per annum, and a salary for deputy constables not to exceed a maximum of \$125.00 per month. The amount of such compensation each of these officers is entitled to receive shall be determined by the majority of the judges of the circuit court not to exceed the maximum allowed by law. From all indications, the legislature intended to place the constables and deputies on a salary basis in lieu of all fees. In giving this provision, 11777, supra, the ordinary and usual meaning there is no ambiguity and, if not, the courts have all held there is no room for construction. If such a construction is considered inadequate, the general assembly is now in session and could consider an amendment allowing such mileage fees as considered necessary.

Mr. Walter E. Miller

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February 18, 1941

Therefore, it is the opinion of this department that neither constables nor their deputies in St. Louis County are entitled to mileage fees in addition to their salary as approved by the majority of the circuit court.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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U 1-12
TAXATION:
BONDS:

Railroad bonds on railroads in receivership
are subject to taxation.

August 11, 1941

Mr. Jesse A. Mitchell, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of August 7, 1941, in which you state:

"We submit herewith a statement of facts relating to certain railroad bonds and certificates of deposit belonging to the estate of G. Adolph Cramer of St. Louis County, which the executors of the estate claim are not assessable for taxation."

A brief statement of the facts submitted us is as follows:

"The executors of the estate of G. Adolph Cramer, which estate was in St. Louis County, Missouri, refused to list for taxation the following bonds:

"10 Central of Georgia 5s of 1945;
10 Chicago & Northwestern 6 $\frac{1}{2}$ s of 1936;
10 Missouri Pacific 5s of 1981, C.Ds;
10 New York, New Haven & Hartford
4 $\frac{1}{2}$ s of 1967;
10 St. Louis San Francisco 4 $\frac{1}{2}$ s of
1978 C.Ds;"

In accordance with Section 10950, R. S. Missouri 1939, the county assessor of St. Louis County added the actual valuation of said bonds to the tax roll against the estate of G. Adolph Cramer. The executors appealed to the County Board of Equalization who rejected the appeal. The reason given by the executors in not listing the above described bonds was that the railroads described

in said bonds were in bankruptcy, receivership or in a failing condition. The executors relied on their failure to list said bonds on that part of Section 10950, R. S. Missouri 1939, which reads as follows:

"* * eighth, an aggregate statement of all solvent notes secured by mortgage or deed of trust; ninth, an aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies; * * * * "

The sections of the statutes applicable to the statement of facts set out above will be referred to in this opinion.

Section 10940, R. S. Missouri 1939, reads as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Section 10950, R. S. Missouri 1939, partially reads as follows:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: * * * * * eighth, an aggregate statement of all solvent notes secured by mortgage or deed of trust; ninth, an aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies; * * * * *

all other property not above enumerated (except merchandise, bills and accounts receivable, and other credits of a merchant or manufacturer, arising out of the sale of goods, wares and merchandise, which have been returned for taxation, under sections 11309 and 11339, R. S. 1939), and its value; under this head shall be included all shares of stock or interest held in steamboats, keelboats, wharfboats, and other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all vehicles used in the transportation of persons (except of railway carriages), and all paintings and statuary, and every other species of property not exempt by law from taxation. * * * * *

It is very noticeable in the above partial section that it specifically states:

"* * take a list of the taxable personal property * * * * *

In regard to taxation the Legislature saw fit to define "personal property" in Section 11211, R. S. Missouri 1939, where it said:

"* * * The term 'personal property,' wherever used in this chapter, shall be held to mean and include bonds, stocks, moneys, credits, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, * * * "

The above definition does not say "solvent bonds" but merely mentions bonds.

In construing statutes it has been held that all statutes referring to the same subject matter should be read together. In the case of *In Re Rosing's Estate*, 85 S. W. (2d) 495, pars. 5, 6, the court said:

"All sections of an act must be construed together and harmonize if possible. * * * * *

In reading the definition of "personal property" as set out above in Section 11211, supra, and in reading Section 10950, supra, the question is in order that bonds be taxable that they should be worth their face value. It will be noticed under Section 10950, supra, that the specific terms are used "* * all other property not above enumerated * * and its value." It also further states "* * and every other species of property not exempt by law from taxation. * *"

Also, in reading another section of the statutes which bears upon the same matter, we find in Section 10981, R. S. Missouri 1939, the following:

"The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation. * * "

It further says in said section, Clause 6, "* * all moneys, notes, bonds and other credits, in a separate column; * * "

Nothing is said in the above section that the bonds must be worth their face value before subject to taxation.

Statutes should not be construed to make them lead to an absurd result. In the case of State v. Irvine, 72 S. W. (2d) 96, pars. 3,4, the court said:

"* * * The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation. * * * "

The executors of the above estate claim that since the property secured by the bonds described in the request are insolvent, the bonds are not solvent and are not subject to taxation for that reason. They claim that since one clause of Section 10950, supra, states, "solvent bonds"

that under the doctrine of *ejusdem generis* that the bonds would not be subject to assessment or taxation under any other clause in Section 10950, *supra*, for the reason the bonds are not worth their full value. If such a construction was given to Section 10950, *supra*, it would result in an absurdity; for instance, bonds would be given on property that if the property would be sold it would not bring more than one-half of the bonds even at the time the bonds were issued. Also, loaners of money could make the loan read more than the value of the property, and could it be said that such bonds or notes should not be listed on account of the eighth and ninth clauses of Section 10950, *supra*? The executors of the estate also claim the eighth and ninth clauses of Section 10950, *supra*, should come under the doctrine of "*expressio unius est exclusio alterius*." Section 10950, *supra*, does not come under the doctrine of express mention of one thing impliedly excludes the other for the reason the ninth clause of Section 10950, *supra*, does not contain the term "all solvent bonds only" but it does go further and says, "all other property not above enumerated," and further says, "every other species of property not exempt by law from taxation."

The exemption statute, as governed by Article X, Section 6 of the Constitution of Missouri, is a lengthy statute but we find no exemption as to bonds or notes being exempted for the reason they are not worth their face value. That this doctrine of the express mention of a certain thing or property is the exclusion of other similar property does not apply. We mention that certain conveying vehicles, such as automobiles, is set out for taxation but no mention is made of airplanes. Could it be said that the airplane is not subject to taxation for that reason?

In the case of *State of Mo., on petition of Taylor, Adm'r of Lee, v. St. Louis Co. Court*, 47 Mo. 591, 1. c. 603, the Supreme Court of this state, in passing upon this subject, said:

"Counsel for relator claims exemption of these bonds from local taxation because the law makes no special provision for taxing such securities, as is made by the Pennsylvania act under consideration in *Maltby v. Reading & Col. R. R. Co.*, 52 Penn. St. 140, to which case we have been cited by ap-

pellant. In order to reach all the bonds of a corporation, if the policy were to assess them for taxation without reference to where they were held, a similar provision would be necessary. We have made such provision in relation to the stock of corporations, but leave bonds to be taxed like other property where they can be reached, except that if the owner resides within the State they shall be taxed in the county of his residence. (Gen. Stat. 1865, ch. 11, section 9; Wagn. Stat. 1161.)"

As to the property being exempt for the reason that the bonds are not worth their face value, the court, in construing such exemptions in *St. Louis Lodge No. 9 B. P. O. E. v. Koeln*, 171 S. W. 329, 1. c. 330, said:

"* * * The only question presented for our consideration is whether or not the property in question is exempt from these taxes because it is used exclusively for purposes purely charitable within the meaning of that expression as used in section 6 of article 10 of our state Constitution..

"In construing this same section this court recently said:

"It must be conceded to the state that, whether a tax-exempting clause be viewed from the standpoint of the state down to the people, or from the standpoint of the people up to the state, there must be unbending and inviolate rules which, as sure words of the law, are always to be reckoned with; and those rules (from the standpoint of the state) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most

clear and unequivocal terms (Railroad v. Cass County, 53 Mo. loc. cit. 27); and from the standpoint of the people they are that equality is equity in taxation.' State ex rel. v. Johnston, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A. (N.S.) 171.

"The same rule is distinctly stated in the cases cited in that opinion, as well as in State ex rel. v. Casey, 210 Mo. 235, 248, 109 S. W. 1. It is a just and reasonable one, and whatever may be the doctrine of the adjudications in other jurisdictions must be taken as the well-settled law of this state."

In the case of State v. Gehner, 9 S. W. (2d) 621, 1. c. 622, the Supreme Court, in holding bonds taxable and not mentioning whether they were solvent or not, said:

"The relator brings this proceeding to quash the record of the board of equalization of the city of St. Louis. Relator in its statement for taxation, June 1, 1925, listed its taxable assets at \$288,145.01. The matter came before the board of equalization of the city of St. Louis, and the amount of taxable assets of the relator was found to be \$500,000, and it was assessed accordingly.

"On a hearing before the board of equalization, the classified schedule of assets of the relator was introduced, as follows:

* * * * *

"The assessment of \$500,000 increased the amount returned as assessable by about \$222,000.

"Among the assets returned as non-taxable on account of location, it will be noted, are the following:

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* * * * *

"These altogether would more than make the balance between the amount returned for taxation and the amount assessed. As pointed out in the State ex rel. American Automobile Insurance Co. v. Gahner et al. (Mo. Sup. No. 27492) 8 S. W. (2d) 1057, the money in bank and the municipal and other bonds claimed to be nontaxable on account of the location in other states are credits and are taxable at the domicile of the owner."

The executors of the estate in the above request rely upon the case of State ex rel. v. Lesser, 237 Mo. 310. But in that case it was not a question of bonds but it was a question of taxation of shares of stock held by a resident of this state in a foreign corporation whose property is not in this state and for that reason the shares of stock were not taxable in this state. The court in that case further said at page 319:

"* * * That tenth clause is as follows:
'Tenth, all other property not above enumerated (except merchandise) and its value; under this head shall be included all pleasure carriages of all kinds; all shares of stock or interest held in steamboats, keel boats, wharf boats and all other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all post coaches, carriages, wagons, and other vehicles used by any person in the transportation of mail (except railway carriages), all carriages, hacks, wagons, buggies and other vehicles of every kind and description kept or used by livery men; all carts, hacks, omnibuses and other vehicles used in the transportation of persons (except railway carriages), and all paintings and statuary, and every other species of

property not exempt by law from taxation.'

"That clause begins with the general term 'all other property not above enumerated' and ends with the even more general term 'every other species of property not exempt by law from taxation.' If by those two general terms the law maker intended to say that everything that a person might own or have any interest in, either direct or indirect, here or elsewhere, was to be listed for taxation, what was the use of specifying items either in that clause or in the preceding nine clauses? If shares of stock in a foreign corporation are 'property' within the meaning of that word as there used, so are shares of stock in steamboat companies, and so are printing presses and mills and wagons and paintings and statuary, yet all those things, and more, are especially mentioned in that tenth clause, while the preceding nine other clauses are also industriously specific of items to be listed."

Also, at page 321 the court said:

"Appellant refers also to section 11334, Revised Statutes 1909: 'For the support of the government of the State, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section.' The next section relates only to property exempt from taxation by the Constitution. Here again we have the general term 'all property real and personal,' and there is in that section no more authority for saying that it includes personal property outside of the State than that it includes real estate beyond our borders; if it includes one it includes both. It will be noticed that there is no tax levied by that section,

it is only a declaration that taxes shall be levied, the imposing of the taxes comes later, in section 11415, to wit: 'There shall be annually levied, assessed and collected on the assessed value of all the real estate and personal property subject by law to taxation in this State fifteen cents on each hundred dollars valuation for state revenue, 'etc. By the terms of that section there must be an assessment before there can be a levy. Provisions for the assessment are made in subsequent sections. By the terms of that section the property to be taxed is not all the real and personal property a man may own, but all that is 'subject by law to taxation in this State,' that is, property which is not exempt from taxation and which is designated by statute to be assessed for taxation. No property is taxable but that which is required by law to be assessed for taxation."

The above quotation was to the effect that the property must be subject by law to taxation in this state.

The reason of the holding in the above case was that since shares of stock in manufacturing corporations were excepted because the property of a corporation was to be taxed then the property of a foreign manufacturing company could not be taxed in this state unless the foreign company happened to own property here.

The Assessor of St. Louis County assessed the bonds on their market price as of June 1, 1940, in the amount of \$5100.00. In a brief filed before the State Board of Equalization at the Courthouse in St. Louis County, Missouri, where a hearing was had on July 28, 1941, in reference to this matter, the attorneys for the estate said:

"Moreover, the Appellants have shown that the Assessor has even erred with respect to the true market value of the bonds, in that he has assessed said bonds at the sum of \$5720.00

Mr. Jesse A. Mitchell

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instead of their true market value of
\$5100.00."

Section 11027, R. S. Missouri 1939, paragraph 7,
reads as follows:

"(7) To cause to be placed upon the
assessment rolls omitted property which
may be discovered to have, for any
reason, escaped assessment and taxation,
and to correct any errors that may be
found on the assessment rolls and to
cause the proper entry to be made there-
on."

The property involved in this litigation is property
that was omitted and escaped assessment and taxation. Under
paragraph 7 above the State Tax Commission may correct this
error, and it is a question of fact as to the true and actual
value of the property omitted. In this case attorneys for
the estate have admitted that the true value of the bonds is
\$5100.00.

CONCLUSION

In view of the above authorities it is the opinion
of this department that the bonds described in the above
request are subject to listing, assessing, and taxation in
this state at their true, actual cash value on June 1, 1940.
The value of the bonds is a question of fact to be decided
by the Tax Commission.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

TAXATION:

BOARD OF EQUALIZATION:

Construction of House Bill No. 328 with
reference to the duties of the State Tax
Commission.

August 13, 1941

State Tax Commission
Jefferson City, Missouri

Attention: Mr. Jesse A. Mitchell,
Chairman, State Tax
Commission



Gentlemen:

This is in reply to yours of recent date wherein
you request an opinion upon the following statement of
facts:

"This department has on file com-
plaints on assessments of property
under the assessment made as of June
1, 1940.

"House Bill No. 328, enacted by the
last General Assembly, seems to raise
the question of whether or not the
Tax Commission now has jurisdiction
to pass on these complaints. Will
you please furnish this department
with an opinion as to the status of
these complaints and the jurisdiction
of the Commission over them with
reference to the provisions of said
House Bill No. 328."

House Bill No. 328 amends Section 11381, R. S. Mis-
souri 1939, in so far as it applies to the question here.
It provides as follows:

"Section 11381. The county board of
equalization shall meet on the first
Monday of March and at such other time
as the board may deem necessary, and
shall observe the following rules:
First, it shall raise the valuation
of all such tracts or parcels of land
and any personal property, such as in

its opinion have been returned below their real value; but, after the board shall raise the valuation of such real estate or personal property, it shall give notice of the fact, specifying the property and the amount raised to the persons owning or controlling the same, by personal notice, through the mail or by advertisement in any paper published in the county, and advising and notifying the persons owning or controlling said property of a day certain, not less than ten nor more than thirty days from the date of said notice, on which day certain the board of equalization will meet to hear reasons, if any may be given, why such increase should not be made; Second, it shall reduce the valuation of such tract or parcels of land or any personal property which in its opinion has been returned above its true value compared with the average valuation of all real and personal property of the county. Provided, however, that prior to the third Monday of April each year, the tax assessment rolls shall be passed upon by the County Board of Equalization and Appeals to permit the further tax procedure provided by law, and on and after the third Monday of April each year the State Tax Commission shall have jurisdiction to act under the authority of Section 11028, and the county clerk and taxing authorities shall comply with the requirements of Sections 11382 and 11383."

This bill, by Section 2, also carries an emergency clause which it would appear that the lawmakers took into consideration the fact that the County Board of Equalization could not complete its work within the time now provided by law and, therefore, contemplated that the County Board of Equalization start the performance of its duties as provided by this bill.

Referring to this bill as it was originally introduced, it will be seen that it did not contain this proviso clause. The House Journal shows that this proviso clause and the emergency clause was recommended by the House Committee and adopted by the House when the bill was up for perfection. By the first part of this section it would seem that the lawmakers intended that the Board of Equalization could meet at any time on and after the first Monday of March up until the 31st of December of that year. Apparently they had in mind that this bill would not be practical and workable under our plan of assessment and valuation because the tax roll cannot be completed until the State Tax Commission has performed its duties under Section 11028, R. S. Missouri 1939. Therefore, the proviso clause seems to have been placed in the bill.

Then the question is: What effect does the proviso clause have on this bill? We have some rules of statutory construction applicable to proviso clauses which are applicable here. A number of cases are cited in Words and Phrases, Permanent Edition, No. 34, at page 700 et seq., and we particularly call attention to a statement pertaining to the Missouri case cited, *Regan v. Iron County Court*, 125 S. W. 1140, 1142, 226 Mo. 79, wherein the following statement is made:

"A "proviso" in a grant or enactment is something taken back from the power just declared. The grant or enactment is to read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bonds of the proviso."

This rule is further announced in *State ex rel. Bair v. Producers Gravel Co.*, 111 S. W. (2d) 521, 341 Mo. 1106, 1114:

"The terms of a proviso limit the general terms of the broad act and it can make no difference as to the force and effect of a proviso, whether its purpose is to limit the terms of a statute which grants rights, or whether it limits the powers of a statute which restricts

rights.' * * * * *

(Citing cases)

Referring to this proviso clause, it will be seen that this clause, by plain language, contemplates that the County Board of Equalization and Appeals shall have passed upon the assessment rolls by the third Monday in April. Of course, this construction is not in harmony with the first part of said Section 11381, supra, but under the rules of construction hereinbefore referred to if the proviso clause conflicts with the general provisions of the act then the proviso clause must prevail.

Another reason might be advanced why this proviso clause should prevail is that if a complainant resorted to the County Board of Equalization at a time so late in the year that it would be impossible for the State Tax Commission to perform its duties under Section 11028, supra, then the act would be in violation of the Fourteenth Amendment of the Constitution. The rule as to the constitutionality of such a provision is stated in State ex rel. Bair v. Producers Gravel Co., supra, 1. c. 1114, as follows:

"* * Does the law, or course of procedure in question operate alike on all questions in the same class? The unbroken rule is that if the law or course of procedure in question does operate alike on all in the same class, then the equal protection clause of Section 1 of the Fourteenth Amendment is not violated. * * * * "

The converse of this rule is that if the law or course of procedure for the assessment does not operate alike on all persons in the same class, then it violates the provisions of the Fourteenth Amendment.

CONCLUSION

Answering your request, it is the opinion of this department that the proviso clause in said Section 11381, House Bill No. 328, prevails over the general provisions of the act, and that the tax rolls shall be passed upon by the County Board of Equalization and Appeals prior to

State Tax Commission

-5-

August 13, 1941

the third Monday of April of each year and, therefore, the complaints on assessments of property under the assessment made as of June 1, 1940, which are now on file in your department, are before you for consideration, and that the Tax Commission has jurisdiction to pass upon these complaints.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:DA

TAXATION: Form of collector's notice of sale and certificate to proof of publication.

21-2
August 19, 1941

Mr. Jesse A. Mitchell, Chairman
Tax Commission
Jefferson City, Missouri



Dear Sir:

Following your oral request to this Department, which is as follows:

"Tax Commission requests from the Attorney General's Office form for notice of sale of delinquent lands for taxes by the collector, and form of certificate to publication."

we submit the following as our suggestions for the foregoing forms.

NOTICE OF TAX CERTIFICATE SALE

I, _____, Collector within and for _____ County, Missouri, hereby give notice, as provided in Article 9, Chapter 74 of the Revised Statutes of Missouri for 1939, that I shall offer for sale the hereinafter described lots and lands or so much thereof as may be necessary to discharge the taxes, interest and charges which may be due thereon to the State of Missouri for delinquent taxes on real estate, at the Courthouse door in _____ County, on the first Monday, the third day of November, 1941, commencing at 10 o'clock a.m. of said day and continuing from day to day thereafter until all are offered.

Said lots and lands situated in _____ County, Missouri, and described in forty acre tracts or other legal subdivisions, and the lots described by number, block, addition etc., and the aggregate amount of taxes, penalty, interest and costs, each year separately stated are as follows:

LANDS OFFERED FOR SALE

DESCRIPTION	Sec. Lot	Twp. Blk.	Rng.	Year Delinquent	Amount Taxes, Interest and Costs for Year	Aggregate Total for All Years
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Mr. Jesse A. Mitchell.

- 2 - August 19, 1941.

Here insert proof of publication.

COLLECTOR'S CERTIFICATE TO PUBLICATION

I, _____, Collector within
and for _____ County, Missouri, hereby certify
that _____ is a newspaper of general
circulation and published in _____ County,
Missouri; that I did cause the above list to be published
in such newspaper for three consecutive weeks, on the
same day of each week, one insertion weekly, before such
sale, and the last insertion at least fifteen days prior
to the first Monday, the third day of November, 1941,
to-wit on the _____.

I further certify that such newspaper is a
publication, which has been admitted to the Post Office
as second class matter in the City of _____,
and that the same has been published regularly and con-
secutively for a period of three years, and that it has
a list of bona fide subscribers voluntarily engaged as
such, who have agreed to pay a stated price for a sub-
scription for a definite period of time.

This the _____ day of _____,
1941.

Collector of Revenue of
_____ County,
Missouri.

Respectfully submitted.

TYRE W. BURTON
S. V. MEDLING
Assistant Attorney Generals.

APPROVED:

VANE C. THURLO
(Acting) Attorney General
TWB-SVM/mc

APPROPRIATIONS: Balance of moneys in various funds of
Department of Penal Institutions should
PENAL INSTITUTIONS: be transferred and credited to ordinary
revenue fund at the end of biennium and
after all warrants on such fund have
been discharged and the appropriation
has lapsed.

September 9, 1941

Honorable Loyd I. Miller, Director
Department of Penal Institutions
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein
you request an opinion from this department on the
following statement of facts:

"At the close of 1940 in our appropriation under Operation we obligated ourselves for \$11,822.08 more than was appropriated, although we had a balance as shown by the State Treasurer of cash on hand of \$53,322.91, but, of course, according to law the State Treasurer could not exceed the appropriation.

"We filed deficiency claim with the State Auditor showing that our appropriation was short \$11,822.08 of our expenditures, and naturally expected when the legislature passed the appropriation for deficiency that this amount would be paid out of Revenue or deducted from the amount of our balance with the State Treasurer under Earnings. We had no knowledge of how this was handled until we received draft from the State Treasurer for the deficiency \$11,822.08 showing that it had been paid out of our 1941 Earnings receipts, and in addition to this the State Treasurer notified us that they were transferring the balance that we had in our Earnings at the end of 1940 \$53,322.91, to the State Treasurer's Revenue Account to comply with the statutes.

"The same is true of the Industrial Home for Negro Girls at Tipton with the exception that Tipton had plenty appropriated in Operation Fund, but they were short \$416.12 in actual cash on hand. Up to date this deficiency has not been paid, but it is our understanding that if it is paid it will be paid out of Tipton's 1941 Earnings.

"We contend that the handling of both of these items is in error, and do not see how the State Treasurer can legally pay bills contracted in 1939 and 1940 out of 1941 Earnings."

Since your inquiry pertains to the "Earning Fund" of the Department of Penal Institutions, we refer to Section 9098, Revised Statutes of Missouri, 1939, under which this fund is created, and which is as follows:

"All moneys derived from the sales of any articles manufactured in any of said industries in this article referred to, shall be collected by said board and paid into the treasury of the state to the credit of the following funds: Said board shall ascertain and determine on the first of each month from the books, records and accounts kept showing the business operations of the penitentiary, the amount of money received each month due to the purchase of raw material for use and manufacture, and said sum when so determined shall be deposited in the revolving fund and said board shall further determine what part of said receipts are due to labor and other profits in the operation of said penitentiary, and said amount shall be deposited in the 'Earning fund;' and it is hereby made the duty of the treasurer of the state to carry on the books of his office as separate

accounts the said 'revolving fund' and said 'earning fund.' Said 'revolving fund' shall not be used in whole or in part for any purpose or purposes other than those named in sections 9095, 9096 and 9097. The money deposited in the 'earning fund' shall be used by the prison board for the use of support and maintenance of said prison, and such expenses as come under section 9052, and the treasurer shall pay same upon the warrant of the state auditor which shall be drawn on the requisition of the board."

This section would seem to prohibit the balances at the end of the biennium from being transferred to the ordinary Revenue Fund because it provides that this fund shall be used only for the purposes named in Sections 9095, 9096 and 9097.

In 1933 the General Assembly enacted a law providing for the deposit of balances in the ordinary Revenue Account. Laws of Missouri, 1933, page 415. This Act provides as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions

of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor: provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

In construing laws which are in conflict, the court, in State ex rel. McDowell v. Smith, 67 S. W. (2d) 50, 334 Mo. 653, held that it was the duty of the court to reconcile and harmonize conflicting statutes, if possible. Another rule of construction which would be applicable here is that where two Acts pertaining to the same subject matter are in conflict and cannot be harmonized, then the latter Act would be controlling because enacted at a later date. State ex rel. Greene County v. Gideon, 199 S. W. 948, 273 Mo. 79.

Under the Act of 1933, supra, it became the duty of the State Treasurer to transfer any balances which were in the "Revolving Fund" at the end of the biennium after all warrants against same had been discharged and after the appropriation had expired.

From your request, it appears that your expenditures for the last biennium exceeded your appropriation by the sum of \$11,822.08. Your request also indicates that your earnings to this fund were more than sufficient to meet this excess amount of expenditures.

The expenditures of the Tipton School Fund exceeded the receipts for the last biennium by the amount of \$406.12, although the appropriation for that period was sufficient to have met those expenditures had the earnings of that fund been sufficient. This appropriation was drawn on the "Industrial Home for Negro Girls." Laws of Missouri, 1939, page 90. Since there were not sufficient earnings for this fund to pay the expenditures, the shortage resulted. To meet this shortage in the earnings of the fund for the "Industrial Home for Negro Girls" at Fulton, the General Assembly in 1941 passed Section 12 of House Bill 582, which is as follows:

"There is hereby appropriated out of the state treasury, chargeable to Industrial Home for Negro Girls Fund the sum of Four Hundred Sixteen Dollars and Twelve Cents (\$416.12) for the purpose of paying accounts of Industrial Home for Girls for the year 1940, per accounts now on file in the office of the State Auditor."

Also, by Section 16 of the same Bill, the General Assembly passed the following deficiency appropriation:

"There is hereby appropriated out of State Treasury, chargeable to earnings fund, Missouri Penitentiary, the sum of Eleven Thousand Eight Hundred Twenty-two Dollars and Eight Cents (\$11,822.08) for purpose of paying accounts of Missouri Penitentiary for year 1940, per accounts now on file in office of State Auditor."

It will be noted that each of these appropriations is payable from a particular fund of the Penal Institutions.

It was necessary for the General Assembly to enact said Section 16, supra, because the appropriation for the last biennium was not sufficient by the above amount to equal to the expenditures for that period even though the fund had earned more. Regardless of the source of the fund and the amount that may be in it, moneys cannot be expended therefrom without an appropriation.

Under Section 19 of Article X of the Constitution of Missouri, it is provided as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The appropriation for the last biennium expired at the end of two years after the passage of the Act. At that time, and after all the warrants against these funds had been discharged, the appropriation lapsed, and then it was the duty of the State Treasurer to turn whatever balance there remained in this earnings fund into the ordinary Revenue Fund, as is required by said 1933 law above quoted.

September 9, 1941

In your letter you contend that the State Treasurer was not authorized to place this balance in the Earnings Fund in the ordinary Revenue Fund, nor is he authorized to pay 1939 and 1940 obligations out of 1941 earnings. We do not find any provision in the Constitution or Statutes which would prohibit such a procedure. However, we do find that by the Act of 1933, supra, the appropriation acts and the foregoing provision of the Constitution, that the Treasurer was required to place this balance in the Earnings Fund in the ordinary Revenue Account, and was directed by the Appropriation Bill to pay the deficiencies of 1941 earnings.

CONCLUSION

This department is therefore of the opinion that it was the duty of the State Treasurer to place any balance which remained in the Earnings Fund at the end of the biennium, and after all warrants have been paid, to the credit of the ordinary Revenue Fund, and that under the deficiency appropriation made in 1941, the Treasurer is only authorized to pay such deficiencies out of 1941 earnings.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:VC

TOWNSHIPS: A petition for change of boundary of town-
BOUNDARY LINES: ships should come from the voters of each
PROCEDURE: township affected.

September 11, 1941.

County Court
Ripley County
Deniphan, Missouri



Attention: Presiding Judge

Gentlemen:

This is in reply to yours of recent date wherein you requested an opinion from this department on the following statement of facts:

"Harris Township in Ripley County, Missouri, at last election voted a Stock Law in said Township. Since that time about one half of the citizens of said Harris Township petitioned to the County Court of Ripley County to make new Boundary lines through Harris Township, and this was being done by said petitioners to get from under the Stock Law that was then in force.

"Now in reading the statutes Article 3 Sec. 13700 seems to me to give the County Courts the right to change Boundary lines of Townships or create new Townships by their petition, but my understanding of reading said section in order to change the lines of Townships, that it should be a petition by each Township affected.

"What we wish to get settled on is that the part of Harris Township that wants the lines changed by their petition to the County Court did not have any petition from the Doniphan Township offered to the Court. So as Doniphan and Harris would be the two effected Townships and the only petition was by the Part of Harris Township to the County Court. I contend that it is not legal under the law, but the lawyers here say that it is, and please give us an opinion on this matter at your earliest convenience as I think your opinion will settle this matter for good."

Section 13700, R. S. Mo. 1939, and referred to in your request, reads as follows:

"Each county court may divide the county into convenient townships, and as occasion may require erect new townships, subdivide townships already established, organize better township lines, and may, upon the petition in writing, of not less than twenty-five per centum of the legally qualified voters of each township affected, as such vote was cast in the last preceding general election for the office receiving the greatest number of votes in the township or townships affected, consolidate two or more existing townships, into one township, or otherwise reduce the number of townships, or change the boundary lines thereof, as may be deemed advisable."

You state that a petition for change of a boundary line from only one township affected has been presented

to the county court, and that it is contended by some of the authorities that a petition from all townships affected is not necessary.

We find no authority for such a contention. In the case of State ex rel. Rose et al. vs. Job, 205 Mo. the question of notices and petitions for change of boundary line of a school district was considered. The procedure for such a change was prescribed by what is now Section 10410. In the Job case, l. c. 28, the court in discussing a provision of that section, which has some similarity to the provisions of said Section 13700 relating to the petition, said:

"It is next contended that the proceedings to organize the new school district were without force and effect, and therefore void, for the reason that the petitions were not signed by ten qualified voters residing in each district affected. Under the provisions of section 9856, Revised Statutes 1899, it is made a part of the duty imposed upon the State Superintendent of Public Schools to distribute copies of the law relating to schools, accompanied with instructions for the carrying into execution of such laws, all of which is required to be printed in a separate volume. In obedience to the requirements of that section, the State Superintendent sent out for the guidance of all the school districts in this State his interpretation of the particular provisions of section 9741, which is now in judgment before us, and doubtless numerous school districts of this State, whenever necessity required, have been guided by such interpretation. The instructions to the school districts upon the proposition now before us,

were as follows. 'When it is desired to form a new district or to change the boundary lines of two or more districts, the first step is the preparation of a petition clearly setting forth the change desired, which petition must be signed by at least ten qualified voters, "residing in any district affected thereby." It is not necessary that the voters all reside in the same district -- part may reside in each district, but every signer must reside in some one of the districts affected by the proposed change. As many petitions should be prepared (all alike) as there are districts affected, and one petition be presented to the clerk of each district affected. The law makes it the duty of the clerk, without any action of the board of directors, upon receipt of the petition to post a notice in at least five public places in the district of which he is clerk, fifteen days prior to the time of the annual meeting. A failure to do this subjects the clerk to a fine of not exceeding one hundred dollars.'

"Now, while it is true that the interpretation as given by the State Superintendent to this section would not be conclusive upon the courts who are called upon to interpret it in accordance with the well-settled rules of construction, yet we do say that the practical construction given this law by the officers whose special duties imposed upon them the proper administration of the school laws of the State, is entitled to great weight when the law which they have had occasion to construe is called in question before the courts. We have carefully considered this section and our conclusion is in harmony with the interpretation of the State Superintendent as herein indicated.

"It will be observed from the language employed in the section that it is not essential that the petition should be signed by ten qualified voters residing in each district affected. The section provides that 'when it is deemed necessary to form a new district, to be composed of two or more entire districts, or parts of two or more districts, etc., it shall be the duty of the district clerk of each district affected, upon the reception of a petition desiring such change, and signed by ten qualified voters,' not residing in each district affected, but 'residing in any district affected thereby.' It will be noted that when the lawmaking power was designating the person who should receive the petition, it designated the district clerk of each district affected, but when treating of the sufficiency of the petition which was received by such clerk it did not limit the qualification of the voters to sign the petition to residents of each particular district, but simply required, upon the reception of a petition signed by ten qualified voters residing in any district affected thereby, to give notice.

"We are unwilling to disturb the practical construction given this statute by those whose duties impose upon them the proper administration of the school laws of this State."

The rule in the Job case was based somewhat on an interpretation by the administrative official. We have no such interpretation here and no reason for such a ruling. The rule of statutory construction which should be applied here is stated in the case of *Trier Administrator vs. Kansas City, Clay County & St. Joseph Railway Company*, 286 Mo. 523, 1. c. 534 as follows:

"* * * The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. * * *"

Here we have a statute which states in plain language that the petition for change of boundary of a township must be signed by at least twenty-five percent of certain voters in each township affected.

It cannot be successfully contended that the township to which lands are added by such a change is not affected, while the township from which such territory is taken by such a change is affected, or vice versa.

CONCLUSION

It is, therefore, the opinion of this department that petitions in writing signed by not less than twenty-five percent of the legally qualified voters of each township affected, must be presented to the county court before the court is authorized to change the boundary lines of such affected townships.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TAXATION AND REVENUE: Appointment of an attorney for the collection of delinquent personal taxes.

✓ / ✓ 2
September 30, 1941

Honorable Stephen J. Millett
Prosecuting Attorney
Caldwell County
Kingston, Missouri

16-7
FILE

Dear Mr. Millett:

Your request for an opinion dated September 26, 1941, has been assigned to me. In said request you state as follows:

"The collection of personal taxes due the State and County has fallen down in this County (Caldwell County) badly since the enactment of the Jones-Munger Act. Our collections on real estate are good.

"The County Court desire to employ an attorney, Mr. O. C. Tee of Hamilton, Missouri, to collect the delinquent personal taxes for and on behalf of the Ex-Officio County Collector. The enclosed opinion of Mr. Tee states that there is no legal manner in which he can be paid or collect for such services since Section 9952, R. S. Mo. 1929 has been repealed.

"I believe this situation should be called to the attention of the Governor of Missouri and the State Legislature for correction.

"The question that we have before the County Court is how can the County Court and the Collector legally employ and pay an attorney to enforce the collection of delinquent personal taxes?

"The Prosecuting Attorney has enough to do as it is without attempting to do this additional work. In this County the Prosecuting Attorney is

Hon. Stephen J. Millett.

- 2 -

September 30, 1941.

not allowed any money to employ an assistant or clerical help by the County Court.

"Do you have any solution to this problem?"

Section 11112, Chapter 59, Article IX, R. S. Mo. 1939, relating to the appointment of an attorney for the collection of personal delinquent taxes is in part as follows:

" * * * Said actions shall be prosecuted by attorneys employed as provided in article 9 of this chapter of the general statutes, and the fees and compensation allowed in said article shall apply to the above actions: Provided, however, that in no case shall the state, county, city or collector be liable for any costs nor shall any be taxed against them or any of them. * * * "

The article referred to therein embodies Section 9952, R. S. Mo. 1929, which provides for the appointment of attorneys for the collection of delinquent taxes on real estate and their fees. No other section in said article relates to such subject. Said Section 9952, supra, is in part as follows:

"* * * and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court, or in such cities, the mayor thereof, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed ten per cent of the amount of taxes actually collected and paid into the treasury, and an additional sum not to exceed \$3.00 for each suit instituted for the collection of such taxes, where publication is not necessary, and not to exceed \$5.00 for each suit where publication is necessary, as may be agreed upon in writing, and approved by the county court, or in such cities, the

Hon. Stephen J. Millett. - 3 - September 30, 1941.

mayor thereof, before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided; * * * "

Senate Bill No. 94, Laws of Missouri, 1933, at page 425, commonly known as the Jones-Munger Act, which provides for a summary scheme for the collection of taxes on real estate, repeals the above Section 9952.

The question is: Would a section providing for the appointment of such attorney, but in a manner provided in a referred section, be nugatory when such referred section were repealed?

The court, in the case of Crohn v. Telephone Company, 131 Mo. App. 313, 320, 321, in discussing such a method of adoption by reference in statutes, said:

" * * * In Endlich on Interpretation of Statutes, section 85, it is said: 'An act adopting by reference the whole or a portion of another statute, means the law as existing at the time of adoption and does not adopt any subsequent addition thereto or modification thereof.' This rule is generally recognized. (Sutherland on Statutory Construction, section 257; 26 Am. and Eng. Ency. of Law (2 Ed.); 714; Postal Tel. Co. v. Railroad, 89 Fed. 190; Jones v. Dexter, 8 Fla. 276; Culver v. People, 161 Ill. 96; 43 N. E. 812; Darmstaeter v. Maloney, 45 Mich. 621, 8 N. W. R. 574; Matter of Main Street, 98 N. Y. 454; Commonwealth v. Kendall, 144 Mass. 357; Gaston v. Larkin, 115 Mo. 20.) Further it is said by the same author (section 492): 'Where the provisions of a statute are incorporated by reference in another (where one statute refers to another for the powers given or rules of procedure prescribed by the

September 30, 1941.

former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment.' To the same effect in *Caston v. Lamkin*, 115 Mo. 20, where the Supreme Court of this State said: "The general rule governing in such cases seems to be that where one statute refers to another for rules of procedure prescribed by the former, the former statute, if specifically referred to becomes a part of the referring statute, and the rules of procedure prescribed by the earlier statute so far as they form a part of the second enactment, continue in force, although the earlier statute be afterwards modified or repealed."

"Under these rules, that part of section 2864 relating to parties and procedure became by adoption an integral part of section 2866 to the same extent as though it had been written into the latter statute and neither a subsequent amendment nor repeal of section 2864 could affect the referring section."

Senate Bill No. 94, supra, was passed, without an emergency clause, on March 25, 1933, and approved April 7, 1933. House Bill No. 44, Laws of Missouri, 1933, was passed, with an emergency clause, April 1, 1933, and approved April 8, 1933.

Senate Bill No. 94, supra, purported to repeal the suit scheme and provide a scheme for delinquent taxes on real estate in a summary manner. House Bill No. 44, supra, in one section, (9952), purported to provide for the collection of such taxes by suit and for the appointment of attorneys and the fixing of their fees for the

Hon. Stephen J. Millett. - 5 - September 30, 1941.

prosecution of such suits in counties of 80,000 to 90,000 inhabitants.

Said House Bill No. 44 was held to be "nugatory, and as if never passed" by the Supreme Court en banc in the case of State ex rel. Karbe v. Bader, 336, Mo. 259, 269, in the following language:

"There was nothing in House Bill No. 44 in the nature of new legislation. Its sole object was to amend Section 9952 (the effective law at the time House Bill No. 44 was introduced) insofar as it related to back tax attorneys in counties of a designated population. It seems obvious, and we hold that the nominal reenactment of Section 9952 by House Bill No. 44 was not intended to, nor did it have the effect of impliedly repealing or otherwise disturbing the Jones-Munger Act. We think that by attaching an emergency clause to House Bill No. 44 the Legislature intended that it should be operative only until such time as Senate Bill No. 94 took effect, the latter measure not having received executive approval at the time the former was passed. But we must hold bad, as the parties tacitly concede, the emergency clause just mentioned because invalid on its face and, therefore, wholly ineffectual to make House Bill No. 44 operative upon being signed by the Governor, and so upon the happening of the latter event House Bill No. 44 became nugatory, and as if never passed. This ruling is in harmony with controlling canons of construction, and, as we believe, causes the true legislative intent to speak."

CONCLUSION.

Therefore, it is my opinion that House Bill No. 44, supra, being held by the court to be nugatory; and, Senate Bill No. 94, supra, repealing Section 9952, supra, after Section 9940 became effective, said Section 9952 became a part of Section 9940 to the same extent as

Hon. Stephen J. Millett. - 6 - September 30, 1941.

though it had been written into such statute, and that neither a subsequent amendment nor repeal of said Section 9952 could affect the referring section. That by reason of said premises, an attorney for the collection of said personal taxes should be appointed and his fees fixed under the provisions of said Section 9952 as it existed at the time of the effective date of said Section 9940.

Respectfully submitted,

APPROVED:

S. V. NEEDLING
Assistant Attorney General

VANE C. TIERLO
(Acting) Attorney General

SVM/mc

TAXATION:
MERCHANTS:
TAX COMMISSION:

Jurisdiction of State Tax Commission
over merchants' assessments.

October 2, 1941

Honorable Jesse A. Mitchell
Chairman
State Tax Commission
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion as follows:

"This Commission is being confronted with the request for review of assessment of merchants and manufacturers in Jackson County.

"Does the law provide for such review by the Tax Commission? This property is not equalized by the State Board and we wish to inquire whether it is our duty to review their assessments."

By Article XVIII, Chapter 74, Revised Statutes of 1939, a system for taxing merchants is provided. This plan is different from the plan prescribed by the Legislature for assessing and taxing real and personal properties. Under this plan, the merchant must obtain a license in the first instance. Failure to do so subjects him to prosecution. It also provides that the tax is paid on a basis of the goods in his possession or under his control at anytime between the first Monday in March and the first Monday in June of each year. It also requires the merchant, when he obtains the license, to give a bond, the condition of which is that he will pay before delinquent the tax due upon such license.

The Act also requires the merchant to furnish to the assessor of the county in which the license is granted

the statement showing the amount of goods, wares and merchandise which he may have had on hand at anytime between the first Monday in March and the first Monday in June. It provides for a special book to be obtained by the assessor in which is shown the valuation of such statement as equalized by the County Board of Equalization.

Under this Act, the County Board of Equalization meets as a merchants board on the first Monday of September in each year to pass upon the merchants assessments. After the board has passed upon these valuations, notice is given to the merchant if his assessment has been raised, and he is given an opportunity to appear before the board on the fourth Monday of September of that year. After the county board has completed these duties, the county clerk is required to extend on the merchants book these taxes at the rates levied on other properties in the county, and the county collector then is charged with the collection of these taxes as other taxes are charged.

It will be noted that there is no provision for an appeal from the action of the County Board of Equalization.

Under Section 11315 of this article, if the merchant has filed a correct statement and failed to pay the amount of revenue owing the board, he shall be deemed to have forfeited the bond given by him, and judgment may be rendered against him for double the amount of such revenue and costs.

Under Section 11316, if the merchant fails to file the statement at the proper time and in the manner required, the bond is forfeited and he is liable for damages to the amount of three times the amount of revenue which shall be found to be due for the year on his statement. If the merchant makes a false statement, the bond is deemed forfeited and judgment shall be rendered as damages in the amount of four times the amount of revenue found to be due for the year.

Section 11318 requires the collector of the county in which the merchant is doing business to institute a suit on the bond in case the merchant has committed any of the acts described in the three preceding sections hereinbefore mentioned.

These sections particularly referred to seem to set up a complete system and plan for the assessment and collection of merchants taxes.

In discussing this Merchants Tax Act and its provisions, the Supreme Court, in *State ex rel. Allen v. Railroad*, 116 Mo. 15, 22, said:

"The merchant is required to file a sworn statement with the county clerk, on the first Monday in June in each year, of the greatest amount of goods on hand at any time between the first Monday in March and the first Monday in June next preceding; and upon this statement the tax is directly levied. Revised Statutes, 1889, secs. 6896, 6899, 6900. The merchant's goods and stock in trade never go on the assessor's books at all, nor has the assessor anything whatever to do with it. Neither the assessor or the board of equalization ever act upon it in any manner."

And, at l. c. 23, the court further said:

"The tax of merchants and dram-shop keepers, although they are required to pay an ad valorem tax on their stock in trade, is in the nature of a license tax, and the property upon which the taxes are thus paid do not go into and form a part of the general wealth of the county within the meaning of the revenue laws upon which taxes are levied for revenue purposes. No such property is listed by the assessor. The county court is required to fix the rate of taxation and make the levy at the May term (Revised Statutes, sec. 7663, supra), while merchants' statements

are not to be filed until the first Monday in June of each year. The tax on merchants constitutes a separate and distinct class of itself.

* * * * *

"And the tax on merchants constitutes a separate and distinct class of itself. The state board of equalization meets in February, and the county board on the first Monday of April of each year, to correct and adjust the assessment of all property, both real and personal. The state board of assessment of railroad property meets on the third Monday of April each year, showing conclusively that the last annual assessment for state and county purposes is to be complete before the county court is required to fix the rate and make the levy at the May term.

"But it is contended by counsel for defendant that the same argument which would sustain the exclusion of merchants' statements for 1887, would also exclude the valuations of railroad and telegraph property from the commutation of taxable property for the purpose of fixing the rate for county taxes. It would seem to be a sufficient answer to this contention that the law requires the state board of equalization to meet on the first Monday of April of each year for the assessment and equalization of railroad property; and that section 7731, Revised Statutes, supra, requires that the county court, upon receipt from the auditor of the certificate of the action of said board of assessment and equalization, the returns of the county assessor, etc., shall at the regular term of said court, if in session at the time, if not at an adjourned term, called for that purpose, ascertain and levy the taxes for state,

county and other purposes on the railroad property in such county, at the same rate as may be levied on other property, and shall make an entry thereof in the records of said court. This section of the statute expressly provides that in respect of railroad property, the levy shall be made by the county court, the evident intention of the legislature being thereby, that such property should go into and become a part of the general wealth of the county for revenue purposes. The statute contains no such provision in regard to merchandise and stock in trade owned by merchants. * * * "

From this opinion it will be seen that the court treated the merchants tax more in the nature of a license than a property tax. Also, it will be noted that the merchant's stock does not go into and become a part of the general wealth of the county for revenue purposes. This system of taxation is a special plan, whereby the lawmakers have sought to obtain public revenue from the merchants. In Volume 61 C. J., page 81, Section 10, the rule as to the mode of taxation by the Legislature is stated as follows:

"The taxing power of the state is exclusively a legislative function, and taxes can be imposed only in pursuance of legislative authority, there being no such thing as taxation by implication. Subject to the fundamental or organic limitations on the power of the state, the legislature has plenary power on the matter of taxation, and it alone has the right and discretion to determine all questions of time, method, nature, purpose, and extent in respect of the imposition of taxes, the subjects on which the power may be exercised,

and all the incidents pertaining to the proceedings from beginning to end; and the exercise of such discretion, within constitutional limitations, is not subject to judicial control. Where the legislature has covered the whole subject of taxation, there is no room for exercise of authority by local authorities, and a town has no power to make a contract concerning the subject."

Under this rule, the Legislature may prescribe any mode it sees fit for the raising of revenue, provided such plan does not violate the provisions of the Constitution, and, if the Legislature has by such a plan covered the whole subject of such taxation, there is no room for exercise of authority by local authorities.

We think this rule might be applied here in view of the fact that the Legislature, by the foregoing article, has covered the entire subject of assessing and taxing of merchants, and there would be no need to impose any authority on the Tax Commission to review the action of the County Board.

This merchants tax was before the Supreme Court in the case of State ex rel. Horton Land and Lumber Company, 161 No. 664, and the court, in speaking of a suit on a bond given under the provisions of the Act, and speaking of the nature of the suit, said, l. c. 671:

"This is not an action for the recovery of the taxes of 1896, nor for the recovery of damages under section 6904, for failure to pay the amount of the taxes for that year, levied in accordance with a correct statement filed by the lumber company as required by law, but for damages under section 6905, for the failure of the lumber company to file the statement required by law, whereby

such taxes might have been assessed, levied and collected in the manner provided by law. The character of the action is determined by the facts stated in the petition and not by the prayer for relief. The bond covered not only damages under section 6904, for failure to pay such taxes, when so assessed and levied, but also damages under section 6905, for failure to file the proper statement whereby they might have been so assessed, levied and collected. * * "

The sections referred to in the foregoing opinion relating to merchants tax are the same as Sections 11315 and 11316, supra. It will be noted from the case reported that actions for the enforcement of the merchants tax have been brought on the bonds given by the merchant.

Your inquiry goes on to question whether or not the Commission is required and authorized to review the return of the merchants' assessments made by the County Board.

The Act creating the Tax Commission was passed in 1917, Laws of 1917, page 542. The Act pertaining to the taxation of merchants was in force for many years prior thereto.

The powers and duties of the Tax Commission are well stated in State ex rel. Laclede Land and Improvement Company v. State Tax Commission, 243 S. W. 887, 888:

"The state tax commission is a non-descript when it comes to the assessment of property. The power to assess property is fixed in named officers under the law, and, unless the Tax Commission Act repeals that law, such commission cannot assess property. To rule that such Tax Commission Act (article 4 of chapter 119, R. S. 1919)

repealed the law as to whom the duties were imposed on as to the assessment of property would be preposterous. No agency of the state has considered that such commission has been given such power. The language of the act itself (save some loosely drawn sections, or parts of sections) indicates no such purpose. After the assessment the law provides that there shall be certain county agencies to fix and determine the wrongs committed by the assessor. To hold that these agencies were disturbed or superseded by the Tax Commission Act would likewise be preposterous.

"The Tax Commission Act contemplates that such commission may, in a proper manner, see that these several agencies empowered to assess property perform their duties, but it does not contemplate that such commission perform their duties for them. True it is that such commission may take evidence as to inequalities of assessments, but this is for the sole purpose of advising the state board of equalization. What information, that the tax commission gathers by authority of law, it can give, and should give, to the state board of equalization. The state board of equalization cannot act upon individual discrepancies in the official work of its subordinate officers, nor can the tax commission (a mere advisory commission for the state board of equalization) go further. The tax commission may gather facts to assist the state board of equalization in determining whether or not the county property has been assessed properly as in comparison with other counties in the state. The decision of the state board of equalization is the finality of an assessment. This because the Constitution (article 10, Section 18)

so lodges it. No law can deprive this board of its constitutional right to ultimately determine the equalization of property assessments as between the counties. If, after the state board had acted (as in this case), the tax commission could change the assessments, then the constitutional board must yield to a mere statutory board. This is unthinkable. Be it remembered that in this case the relator is asking the tax commission to act after the state board of equalization has acted, because relator avers the previous action of the state board of equalization.

"The act creating the tax commission will be read in vain, if the view is to be taken that it contemplated an interference with the previous methods of assessing and equalizing the assessments of property. In the act there is no indication that the lawmakers intended that property should be assessed other than by assessors named by previous laws, nor is there in the act intimation that such commission should be the final judicatory to pass upon the individual cases of irregular or wrongful assessments. The tax commission was formed for a purpose, as indicated by the law. Its purpose was advisory as to taxation, and as to other things not here necessary to discuss. It was authorized to see that the laws pertaining to revenue were enforced, but it was not authorized to assess, or equalize assessments. These were left (where the Constitution contemplates) with the local agencies, giving to the commission the power to see that the laws were enforced. Giving the commission the power to see that the laws were enforced does not mean that it can usurp any of the functions of the bodies over which it has supervision. The assessment of property has a fixed meaning

in our laws. It includes the act of the assessor, and the boards thereafter authorized to review his acts. Ultimately, when these agencies are through with their work, the state board of equalization (constitutional in authority) completes the assessment. We conclude that there is no authority in law for this tax commission to interfere with any of the agencies of assessment, from the assessor to the state board of equalization. They can gather information for the information of the latter board, and see to the enforcement of the laws, but not otherwise. As a personal unit in the assessment of property, such board has no power. We would rather put this case upon the broad ground than upon the more restricted one. The acts of this tax commission in all cases are merely advisory, and not otherwise. It recommends matters to the Legislature, but they are not binding. We need not discuss these, because legislative power is fixed by the Constitution." (Italics ours)

Referring to the statutes pertaining to the duties of the Commission, which are found in Article IV, Chapter 74, Revised Statutes of Missouri, 1939, and specifically Section 11027 thereof, it will be noted that the first paragraph of this section states that the Commission shall have certain powers and duties "subject to the right of the state board of equalization, finally to adjust and equalize the values of real and personal property among the several counties of the state."

Under Subsection 3 of this section, it seems that the General Assembly has provided that the Commission shall receive complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, and it is required to investigate the same and to institute such proceedings as to correct the irregularity complained of, if any irregularity be found to exist. Under this subsection, the Commission

might be authorized to hear such complaints and require the officers, whose duties it is to administer the Merchants Tax Act, to perform their duties, but we do not think this would authorize the Commission to review the assessment made by the County Board of Equalization.

Subsection 8 of this same paragraph authorizes the Commission to raise or lower the assessment of any real or personal property under certain conditions, but, from the ruling announced by the court in the Allen case, supra, this merchants tax is not personal property tax, but is more in the nature of a license tax.

Under Section 11028, Revised Statutes of Missouri, 1939, after the various assessment rolls required by law to be made shall have been passed upon by the several boards, it seems that the Tax Commission has jurisdiction to hear and review complaints pertaining to such rolls. However, it will be noted that this section provides as follows:

"The action of the commission, or member or agent thereof, when done as provided in this section, shall be final, when approved by the state board of equalization."

Therefore, it would seem that the complaints referred to in this section are those over which the State Board of Equalization has jurisdiction, and since the State Board of Equalization does not have jurisdiction over the merchants' assessments, then we do not think that this section would apply to merchants' assessments. Neither under the Constitution nor under the statutes do we find that the State Board of Equalization has any jurisdiction over merchants' assessments.

Again, in State ex rel. Thompson v. Jones, 41 S. W. (2d) 393, 396, the court, in discussing the question of the duties and powers of the Tax Commission and the Board of Equalization and the opinions of the courts therein, said:

"But in the later case of Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 323 Mo. 180, 19 S. W. (2d) 746, 751, we have ruled otherwise and said:

"The state tax commission is given general supervision over all the assessing officers of the state, with power to enforce its orders; it has all the powers of original assessment; it may receive complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, and apply the proper corrective measures; it can raise or lower the assessed valuation of real or personal property either in specific instances or by class; and it has authority, on the complaint of any taxpayer and after the various assessment rolls have been passed upon by the several boards of equalization, but before the delivery of the tax rolls to the proper officers for collection, to hold hearings for the purpose of determining whether any property subject to taxation has been omitted from the assessment rolls and whether any property thereon has been improperly valued, and to make such changes with respect thereto as shall be necessary to make the assessment rolls conform to the facts as found by them.

"It is no doubt true that the state tax commission was not intended to supplant local assessing officers and boards, but very clearly it is given full and adequate power, not only to supervise, but to review, their work, and where it finds assessments which were not made conformably to law to revise them -- and this by inserting where necessary, after a hearing, its own valuations in lieu of those made by the local authorities.

It is also true that its revision of the assessments as made by county assessors and boards, in so far as it affects the equalization of the values of property among the respective counties of the state, whether such revision be made before or after the state board has acted, is subject to the approval of that board. And in this connection it should be said that, even though the action of the state board of equalization in the first instance completes the assessment judgment, that fact does not preclude a revision of such judgment by the tax commission, subject to the board's final approval.* * *

We are further supported in our views herein by the fact that the officers administering the Merchants Tax Law seem to have resorted only to the Act in the enforcement of the same. It will also be noted that all of the actions for the enforcement and collection of the tax have been brought by a suit on the bond, and in not one of those cases has the question been raised that the party complaining of the tax could have proceeded in any other manner or should have referred his complaint to the Tax Commission for review and investigation.

The statutes having failed to provide for the merchant to appeal from the County Board of Appeals, he cannot appeal to the Tax Commission or any other taxing body. State ex rel. Orschlein Bros. Truck Lines, Co. v. Public Service Commission of Missouri, 98 S. W. (2d) 126.

CONCLUSION

From the foregoing, it is the opinion of this department that the Merchants Tax Act and the Tax Commission

Hon. Jesse A. Mitchell

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Act do not provide for a review by the State Tax Commission
of the assessments of merchants and manufacturers.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

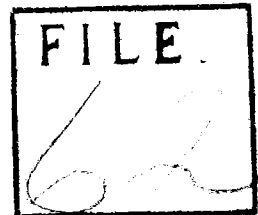
TWB:VC

TAXATION: Taxpayer who pays a tax for the
PAYMENT: purpose of getting benefits of
APPEAL AFTER PAYMENT: reduction on account of early
payment, waives his right to appeal
to the State Tax Commission for
relief, even though he pays such
tax under protest.

October 3, 1941

Honorable Jesse A. Mitchell
Chairman
State Tax Commission
Jefferson City, Missouri

10-6



Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts:

"We find on various pieces of property for which petition for review of assessment was filed that the taxes for the assessment in question have been paid. They were paid under protest in order to receive the benefit of the 4% reduction on city taxes.

"Does the payment of taxes conclude their appeal?"

Under Section 11028, R. S. Mo. 1939, taxpayers may apply to the Tax Commission for relief in cases where they think their property is not legally and properly assessed. This section provides in part as follows:

"After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the

commission, or by any member of duly authorized agent or representative thereof, and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. * * * "

From our conversation with you, and from your correspondence, we understand that complaints have been filed in proper time, as is provided by Section 11028, supra, but the only question here is whether the complaint should be entertained by the Commission since the tax has been paid under protest and in order to receive the benefit of the four per cent reduction in city taxes.

We think the question of whether or not such a payment is voluntary would have some effect on this matter. In other words, if a person voluntarily pays a contested tax, then he waives any irregularity in the assessment, levy and collection of same, and cannot even maintain an action to refund taxes so paid.

In the case of State ex rel. v. Chicago & Alton Railway Company, 165 Mo. 597, the court, in considering a suit which had been brought for refund of taxes, said, l. c. 611:

"In its petition to the county court in 1893 to refund the tax so paid, the defendant based its claim solely on the ground that the tax had not been levied in accordance with the requirements of section 7654, above referred to. There was no claim made that the tax was not levied to pay a just obligation of the townships, for which all the taxable property in the township was liable, but only that the procedure prescribed by law had not been followed.

"Whilst that would have been a perfectly valid defense to a suit to collect the tax, it is not a foundation for a suit to recover the money voluntarily paid in conformity to the assessment. Taxes paid voluntarily, under those circumstances, can not be recovered. (Walker v. City of St. Louis, 15 Mo. 563; State ex rel. v. Powell, 44 Mo. 436; Couch v. Kansas City, 127 Mo. 436; Robins v. Latham, 134 Mo. 469.)"

By the same reasoning, the taxpayer could not maintain his action before the Commission if he has voluntarily paid the tax.

On the question of whether or not these taxes have been voluntarily paid, even though it is claimed they were paid under protest, we find the rule to be that this is determined by the facts and circumstances connected with such payment.

In Dillon on Municipal Corporations, Volume 4, Fifth Edition, Section 1620, the following principle is clearly stated:

"The coercion or duress which will render a payment of taxes involuntary must in general consist of some actual or threatened exercise of power possessed, or assumed to be possessed by the party exact-

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ing or receiving the payment over the person or property of another, from which the latter has no other means or reasonable means of immediate relief except by making payment."

Where taxes were paid in order to obtain a rebate or discount, they were held to have been voluntarily paid in the cases of Atchison T. & S. F. R. Co. v. Atchison County, 47 Kan. 722, and Lee v. Templeton, 13 Gray (Mass.) 476, and in a number of other cases cited in 64 A. L. R., page 47.

In order to show that the tax was not voluntarily paid, the taxpayer in Missouri must show that he paid the tax to avoid arrest or seizure of his property. This rule is stated in Robins v. Latham, 134 Mo. 466.

Since it appears that these complainants have paid their taxes in order to receive the benefits of reduction for the early payment, under the cases hereinbefore referred to, they have voluntarily paid same, and since the payments are voluntary, the complainants have waived their rights to appeal to the Tax Commission for a hearing on the tax which they have so paid.

CONCLUSION

From the foregoing, it is the opinion of this department that parties who have paid taxes under protest for the purpose of receiving the benefits of a reduction on account of early payment of same, have waived their rights for a review of the assessments made for such taxes so paid.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:VC

TAXATION: Extension lines of telephone should be
TELEPHONE: considered as a part of the right of way
EXTENSION LINES: of a telephone company for allocation of
wire companies for taxation purposes.

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October 3, 1941

Honorable Jesse A. Mitchell
Chairman
State Tax Commission
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the following statement of facts:

"In the matter of allocation of wire companies, should the extension line which runs from the main line to the residence of owner be considered as right of way?"

Section 11295, Revised Statutes of Missouri, 1939, provides in part as follows:

"All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe

lines, gas pipe lines, gasoline pipe lines, interstate bus and truck lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; * * * "

From this section it will be seen that we must look to cases in which the railroad tax statutes have been construed in order to pass upon your question.

In the case of State ex rel. v. Stone, 119 Mo. 668, the court had before it the question of the apportionment of railroad property and the length of the road, and said, l. c. 676:

"After the board has ascertained the value of this thing made up of tracks, depots, water tanks, turntables, rolling stock, etc., known in common parlance, and denominated in this statute as a railroad, they are to apportion that value among the several municipalities of the state, in which any part of this whole thing is located by a certain standard in length -- a mile -- a mile of what? There can be but one answer. A

mile of that thing called a railroad, made up of the items mentioned, in section 7718, the value of which as a whole is to be apportioned for such purpose. The number of miles of the railroad in this state, or within any municipal subdivision thereof is not to be measured by the length of its main tracks or of its main track and side tracks combined, any more than it is to be measured by the combined length of its main tracks, side tracks, rolling stock and the other property which go to make up the road value to be apportioned. It is the length of the whole thing, a railroad, which these several constituents, in place, go to make up, that is to be measured. Its length between its terminal points in this state, and its length in the several municipal subdivisions of the state is to be ascertained, and its value apportioned to each of said municipalities in the ratio that its length in the municipality bears to its whole length in the state. This is the obvious meaning of the statute, and the construction that has been placed upon it by the board of equalization from the beginning."

Applying this statement of the court to the case of the telephone system, the length between terminal points and its length in the several subdivisions of the state is to be ascertained. In other words, the length of the easements of the telephone company, regardless of the number of wires strung along or under same, constitute the mileage. So, if the wire company has an easement over which extensions are made to a private residence, that distance should be considered as a part of the wire mileage of the wire company for allocation purposes. By easement, we do not think the law would

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require that it be a written conveyance, but any authority whereby the wire company would be authorized to extend its lines would be considered an easement for the purposes herein mentioned.

CONCLUSION

From the foregoing, it is the opinion of this department that in the matter of allocation of wire companies, the extension lines which run from the main line to the residences of owners should be considered as a part of the right of way.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:VC

TAXATION:

STREET RAILWAYS:

ALLOCATION:

Miles of street traversed on regular routes
by busses owned by street railways should be
used in allocation for tax purposes.

October 8, 1941

Mr. Jesse A. Mitchell, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Mitchell:

This is in reply to your letter of recent date wherein
you request an opinion from this department based upon the
following statement of facts:

"In St. Louis and Kansas City the Public
Service Company (which is the street car
system) are constantly removing miles of
street car track and supplanting bus ser-
vice over the same route."

"Should the miles of street traversed on
regular route by busses be considered in
the matter of allocation the same as where
the electric cars operate on tracks?"

Sections 11249 to 11251, R. S. Mo. 1939, pertain to
the assessment and taxation of street railways. These sections
are as follows:

"Sec. 11249. Street car companies to make
statement. -- On or before the first day of
January in each year, the president or other
chief officer of every street railroad
company in every city of this state whose
line is now or shall hereafter become so far
completed and in operation as to run horse
cars, electric cars, cable cars or cars pro-
pelled by any other device for the trans-
portation of passengers, shall furnish to
the state auditor a statement, duly subscrib-
ed and sworn to by said president or other
chief officer, before some officer authorized
to administer oaths, setting out in detail
the full length of the line, so far as
completed, including branch or leased lines,



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the entire length in this state, the length of double or sidetracks, the length of such line located upon real estate to which such company may have title as right of way, the length of such line located upon the public streets or thoroughfares of any city, together with all cars, motors, grip cars, live stock, electric trolley wires, cables, cable conduits, power houses, stables and all other property, real, personal or mixed, owned, used or leased on the first day of June, which may be used in or incident to the operation of such street railroad, the length of such line in each county, municipal township and city through or in which it is located, and the cash value of the several items embraced in the statement."

"Sec. 11250. Taxes to be levied. -- The said property returned to the state auditor, as by section 11249 required, shall be subject to taxation for state, county, municipal and other purposes to the same extent as the real and personal property of private persons, and the same shall be assessed, apportioned, certified and the taxes thereon levied and collected at the time and in the manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property."

"Sec. 11251. Purpose of certain sections. -- It being the purposes of the two preceding sections to make the property of street railroads in cities assessable and taxable in the same manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property all laws and parts of laws inconsistent or in conflict therewith are hereby repealed."

By an opinion from this department dated January 10, 1941, written for the State Tax Commission, we said:

"In view of the above authorities, it is the opinion of this department that the chief officer of the St. Louis Public Service Company should, for taxation purposes, make

a return of all motor busses and other property incidental to the transportation of passengers and used in connection with the regular and permanent street railway to the State Tax Commission and not the local assessor."

"It is further the opinion of this department that Section 10018, R. S. Mo. 1929, when it mentions "propelled by any other device for the transportation of passengers," includes motor busses."

In State Ex. Rel. V. Metropolitan Street Railway, 161 Mo. 188, the Supreme Court in construing the state railway statutes said (l.c. 197-198):

"* * * By the law for the assessment and taxation of other railroads (Art. 8, Cap. 138, 2 R. S. 1889), the property of such railroads for the purposes of taxation is divided into two classes. One, consisting of the roadbed, rolling-stock and other movable property, may, for convenience, be designated as distributable property. This class is returned by the company to the Auditor, assessed as an entirety by the State Board of Equalization, and the value thereof apportioned to the several counties, cities, towns, villages and municipal townships in which such railroad is located, and the assessment certified to the county courts. (Secs. 7718 and 7727.) The other class, which may be designated as local property, embracing all other property of such railroads and which is not returned to the Auditor, is assessed by the local authorities as other local property is assessed. (Sec. 7728.) Upon these assessments the county courts levy the taxes authorized by law."

"Now by the first section of the Act of March 11, 1897, all the property of a street railroad is required to be returned to the auditor, and this is the property which by this act the State Board of Equalization is required to assess, apportion and certify to the county courts, in the manner provided by law, for the assessment of other railroad

property. The only manner provided by law for that board to assess the property of other railroads was that prescribed for the assessment of the distributable property of such railroads, and that is necessarily the manner required by this act for the assessment of the whole property of a street railroad. The defendant's railroad was assessed, the assessed value apportioned and certified to the county court in that manner, and hence assessed in accordance with the requirements of the act. Prior to this enactment the whole property of a street railroad was subject to assessment for taxes, by the local authorities. The effect of this act in that respect was simply to change the assessing authority from them to the State Board of Equalization, and we know of no reason why this might have not been done.* * *

This case may not be very pertinent to your question, but it does show that the state board does assess all taxes of street railways, and the same are taxed as the distributable property of railroads are taxed.

After the enactment of the State Tax Commission Act, these returns were made to the State Tax Commission. In *State v. Cairo Bridge and Terminal Company*, 100 S. W. (2d) 441, 443, the court said (2-4):

"In the year 1917, the state Legislature created a State Tax Commission. See Laws 1917, p. 542, etc., Mo. St. Ann. para. 9819 et seq. p. 7916 et seq. Section 19, subd. 5, of Laws of 1917, p. 547, now subdivision 5 of section 9853, R. S. Mo. 1929, Mo. St. Ann. para 9853, subd. 5, pp. 7929, 7930, provides in part as follows: 'All statements of property or other reports, relating to assessment and equalization, required by law to be made to any state officer, shall hereafter be made to the state tax commission on blanks prescribed by the commission. (R.S. 1919, para. 12846.)' The Legislature, by the law creating a State Tax Commission, imposed upon it certain duties with reference to the assessment of property for taxation purposes. By that act the whole scheme of making such assessment of public utility property embraced

within the act was revised and materially altered. Subdivision 5 of section 9853, supra, expressly provided that the statements of property theretofore filed with the State Auditor, as provided in section 10066 and 10012, were to be filed with the State Tax Commission. Appellant was, therefore, no longer required to file such statements with the State Auditor.

* * * * *

Referring to the question of what effect changes from cars operated on rails to busses have upon the mode of assessment of the street railways, we find in the case of Russell et al v. Kentucky Utilities Company, 22 S. W. (2d) 289, 66 A. L. R. 1238, in speaking on this question, the court said (1.c. 1243):

"The purpose and object of the franchise involved in this case was to provide for the rapid and convenient transportation of the public. That was the basic right granted. The motive power or method of propulsion of the vehicle is subordinate or subsidiary. It is but the means of making the franchise effective. * * * "

In the case of In re International Railway Company, 275 N.Y.S. 5, wherein the question of the substitution of motor busses for cars running on tracks was before the court, the court said (1.c. 8):

"This application deals both with the substitution of motor busses for cars upon tracks and the running of busses over new lines supplemental thereto. Leave to substitute busses for cars on a line already operated is not granting of a new right or franchise to use the streets. It is rather a modification of the old franchise permitting a change in the method of operation."

In our research of cases wherein motor busses have been substituted for cars running on tracks, we find that there are very few cases reported at this time, however, it will be noted that such a change does not affect the franchise, but only affects the mode of operation. We think the rule of statutory

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construction enacted in State ex rel. Ferguson-Wellston Bus Company v. Public Service Company of Missouri, 58 S. W. (2d) 312, 313 would be applicable here. It is:

"In order to correctly interpret a statute it is most important to ascertain the purpose for which it was enacted. "

These tax statutes herein referred to were enacted for the purpose of assessing and collecting taxes from street railways in the same manner as distributable property of railroad companies are taxed. To rule that the mode of assessment and allocation of taxes for street railways would be changed because of the facts that the company had been permitted to change its service from cars operating on tracks to busses would destroy the purpose for which the foregoing tax sections were enacted. In other words, each mile of street over which the street railway has been granted a franchise should be considered as mileage of such street railway, for the purpose of allocating taxes.

CONCLUSION

From the foregoing it is the opinion of this department that the miles of street traveled on regular routes by busses belonging to street railway companies should be considered in the matter of the allocation for tax purposes the same as are such street railway cars operating on tracks.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

6

TAXATION: Jurisdiction of Tax Commission over
TAX COMMISSION: assessment rolls after the same have
been delivered to proper officers for
collection of the taxes.

✓ 1 ✓ 2
October 8, 1941

Hon. Jesse W. Mitchell, Chairman
State Tax Commission
Jefferson City, Missouri



Dear Sir:

This is in reply to your request, which is as follows:

"Does the State Tax Commission and the
State Board of Equalization have authority
to add omitted personal property to the tax
rolls after they have been turned over to
the collecting officials?"

Section 11028, R. S. Mo. 1939, provides in part as
follows:

"After the various assessment rolls required
to be made by law shall have been passed upon
by the several boards of equalization and
prior to the making and delivery of the tax
rolls to the proper officers for collection
of the taxes, the several assessment rolls
shall be subject to inspection by the com-
mission, or by any member or duly authorized
agent or representative thereof, and in case
it shall appear to the commission after such
investigation, or be made to appear to said
commission by written complaint of any tax-
payer that property subject to taxation has
been omitted from said roll, or individual
assessments have not been made in compliance
with law, the said commission may issue an

order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. * * * * *

As a basis for the foregoing request a personal property owner returned his list to the assessor for property which he owned as of June 1, 1940. This person died and his estate is now in the process of administration. It has been definitely ascertained that the person owned other personal property and the question now submitted is whether or not the State Tax Commission, with the approval of the State Board of Equalization, may add this property to the assessment rolls.

A rule for the construction of tax statutes is stated in State ex rel. Ford Motor Co. v. Gehner, 325 Mo. 24, 1. c. 29, 27 S. W. (2d) 1:

"It is well established that the right of the taxing authority to levy a particular tax must be clearly authorized by the statute and that all such laws are to be construed strictly against such taxing authority. (Hannibal ex rel. Bassen v. Bowman, 98 Mo. App. 103, 71 S. W. 1122; In re Estate of Clark, 270 Mo. 351, 1. c. 362, 194 S. W. 54; State ex rel. Insurance Company v. Hyde, 292 Mo. 342, 1. c. 352, 241 S. W. 396.)"

In the discussion before the State Board it was suggested that as a matter of equity the State Tax Commission and the State Board of Equalization should be permitted to make this assessment. We think this suggestion is met by the statement

made by the St. Louis Court of Appeals in the case of City of Hannibal ex rel. Bowman, 98 Mo. App. 103, 1. c. 108, as follows:

"There is, therefore, no such thing as an equity in a county or in a city that will authorize an assessor, after he has completed his assessment and turned over his books to the proper officer and after his assessment has passed the boards of equalization and of appeals, to repossess himself of the assessor's books and enter therein personal property, which by accident or intention was omitted from the list furnished by the taxpayer and which escaped the notice of the assessor. He can only proceed at the time and in the manner pointed out by statute and to justify his assessment he must be able to put his finger on the statute that gives him the authority to make it. * * * * *

From these two statements announced it will be seen that the taxing authorities must be able to put their fingers on the statute authorizing the assessment of a tax and that equity cannot enter into the question.

Referring back to said Section 11028, supra, it will be seen that this section plainly provides that any action which the State Tax Commission and the State Board take on an assessment of omitted property must be done before the delivery of the tax rolls to the proper officers for the collection of the taxes, unless the clause "or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll" would not be included in the provision that the addition of the omitted property must be made before the tax rolls are turned over to the proper officers for collection of taxes. In our research we fail to find where this question has been raised and passed upon by the courts. Referring again to this section it seems that the proper construction to be placed on it would be that the Tax Commission may add omitted property on two occasions; first, if the Tax Commission or its agent, upon inspection of

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the tax rolls finds that property has been omitted, or, second, if it be made to appear to the Commission by a written complaint of a taxpayer that property has been omitted or individual assessments have not been made in compliance with the law, then the Tax Commission may take jurisdiction of the assessment. However, with this construction in either of the events above stated, the plain language of the first part of the section would require such acts to be done prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes. The latter part of said section 11028 provides: "The action of the commission, or member or agent thereof, when done as provided in this section, shall be final, when approved by the state board of equalization." This language would indicate that the State Board of Equalization would not have jurisdiction of any such assessment except to approve the action of the State Tax Commission.

CONCLUSION.

We are, therefore, of the opinion that the State Tax Commission would not have jurisdiction over assessment rolls for the purpose of adding omitted property in cases where such tax rolls have been delivered to the proper officers for collection of taxes. We are further of the opinion that this rule would apply even though it be made to appear to the Commission by a written complaint that property subject to taxation has been omitted from said roll or individual assessments have not been made in compliance with the law.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

TWB:CP

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TAXATION: Railway express building owned by Terminal Railroad
RAILROADS: Association of St. Louis should be assessed as
DEPOTS: distributable property of railroads.

October 13, 1941

Mr. Jesse Mitchell, Chairman
State Tax Commission
Jefferson City, Missouri



Dear Mr. Mitchell:

This is in response to an oral request of the State Board of Equalization and the State Tax Commission on the question of "whether or not the Railway Express Building owned by the Terminal Railroad Association of St. Louis, Missouri, should be assessed as distributable property by the State Tax Commission or assessed as local property by the Assessor of the City of St. Louis, Missouri."

The distributable property of railroads is returned for taxation by virtue of the provisions of Section 11243, R. S. Mo. 1939, which provides as follows:

"On or before the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof."

The local property of railroads is assessed by virtue of Section 11256, R. S. Mo. 1939, which is as follows:

"All property, real, personal or mixed, including lands, machine and workshops, round-houses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

Neither of these two sections mention particularly express buildings, so it seems that if the building in question is taxable as distributable property, it would be because it comes within the classification of "depots", which are mentioned in said Section 11243, supra.

The evidence which was submitted to the Tax Commission on a hearing of this assessment showed that the Express Building, and land upon which it is situated, belongs to the Terminal Railroad Association and is operated by a lessee that the building is within a short distance of the Union Station and that express is transported between the Union Station and this building through tunnels. The term "depot" has been defined has been defined as follows: (Words and Phrases, Perm. Ed., Vol. 12, pp. 182, 183.)

"'Depot' is generally understood to be the place where a carrier is accustomed to receive merchandise, deposit it, and keep it ready for transportation or delivery. *Maghee v. Camden & A. R. Transp. Co.*, 45 N. Y. 514, 520."

"Railroad being charged with duty, as public carrier, at its 'depot,' of receiving and transporting all freight tendered for transportation, in extending yards to accomplish this result was discharging public duty as regards right of landowner to recover damages

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therefor, 'depot' meaning a place where carrier is accustomed to receive merchandise, etc. Chesapeake & O. Ry. Co. v. Ricks, 135 S. E. 685, 688 146 Va. 10."

"In a mortgage given by a railroad company of its franchises, real estate, right of way, and depots, the term 'depots' is not necessarily limited to a place provided for the convenience of passengers while waiting the arrival or departure of trains. It applies also to the buildings used for receipt and storage of freight which when received is to be safely kept until forwarded by the cars of the company, or delivered to the owner or consignee. Humphreys v. McKissock, 11. S. Ct. 779, 781, 140 U. S. 304, 35 L. Ed. 473."

"One definition of 'depot' is a 'railroad station.' The term, as used in the statute directing railroads receiving goods for transportation into their warehouses or depots to forward them in the order in which they are received, and making them liable for losses occasioned by a failure to do so, embraces the entire station of the railroad, so that a railroad must forward property received for shipment in the order in which it is received though merely received on a platform used for handling that kind of property. Hill & Morris v. St. Louis Southwestern R. Co. of Texas, Tex., 75 S. W. 874, 876."

"The term 'depot' * * * may mean a house for the storage of freight and the accomodation of passengers, or it may mean a place where railroad trains regularly come to a stop for the convenience of passengers and for the purpose of receiving and discharging freight, or it may include all these things." The maintenance of a freight depot passenger traffic being transferred to the depot of another company in the same town, was a sufficient compliance with a stipulation in a railway bonus note that a depot should be maintained in the town. Fayetteville Wagon, Wood & Lumber Co., v. Kenefick Const. Co., 88 S. W. 1031, 1032, 76 Ark. 615, Quoting and adopting the definition in Arkansas Cent. R. Co. v. Smith, 71 S. W. 947, 71 Ark. 189."

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From the definitions which are hereinbefore quoted, it will be seen that the word "depot" as used under the railroad sections was intended to be a place where freight shipped on the railroad may be deposited and which may be used by the passengers.

The Terminal Railroad Association has taken the position that it is necessary for it to provide a building such as the Railway Express Building in order to meet the requirements of the law as a railroad operator. Section 5174, R. S. Mo. 1939, provides in part as follows:

"Every railroad corporation in this state which now is or may hereafter be engaged in the transportation of passengers or property shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads and at the several stopping places, * * * * * .
Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the first day of July 1885, shall for each day said corporation or railroad refuses, neglects or fails to comply therewith after said day, forfeit and pay a sum of twenty-five dollars, which may be recovered in the name of the state of Missouri to the use of the school fund of the county wherein said crossing is situate; * * * * * ."

This section indicates that primarily the duty of the railroads such as the Terminal Railroad Association is to keep and maintain facilities sufficient for the handling of the traffic of all kinds which includes express freight. If such a duty necessitates the erection and maintenance of a building, then the railroads must do so.

From an examination of cases from different states in which questions similar to the one here involved were considered, it seems that there has been no set rule whereby the question could be answered. In the case of Milwaukee & St. P. R. Co. v. Milwaukee, 34 Wis. 271, it was held that a freight depot or warehouse was not subject to local taxation under the Wisconsin statute since it was "necessarily used in operating" the

railroad. In that case the court stated:

"It is of no importance that they were to some extent, in charge of the agents of the propeller lines, who stored in them some goods received from propellers and consigned to parties in Milwaukee, and in some cases collected storage charges thereon. Notwithstanding these facts, the structures were used principally for a purpose necessary to the operation of the railroad. We have seen that in such case it is quite immaterial that the structures were also used exceptionally, for other and private purposes."

In the case of Re; Long Dock Co., 75 N. J. L. 325, it was held:

"Where a ferry building used by a railroad company in transferring its passengers between its trains and its ferry was used by persons who were not passengers on its trains but who desired to use the ferry, and where, during an average month. 1,000,500 railroad passengers passed through the ferries, as against 295,000 local passengers, and 72,000 trucks, 42,000 of which were connected with railroad business and 30,000 were of local character, passed over the ferries, it was held that the main and principal use of the property was in connection with the railroad traffic, and hence that it was not locally taxable."

It is difficult to determine what the courts would hold in respect to the question of whether or not this property is taxable by the State Tax Commission. This question might be determined by the fact that the State Board and the City of St. Louis had, up until very recent years, considered it as distributable property.

In view of the provisions of said section, 5174 supra, and the different definitions of the word "depot", and the use to which depots are generally put, we think it ^{not} ~~would~~ be straining the definition of the word "depot" to include a building such as the Railway Express Building, which is used for handling freight express.

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CONCLUSION

From the foregoing, it is the opinion of this department that the Railway Express Building, owned by the Terminal Railway Association of St. Louis, Missouri, should be assessed as distributable property by the State Tax Commission.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

- 201
- TAXATION AND REVENUE: (1) Rights of a holder of a certificate of purchase issued by the treasurer of a city of the first class.
- (2) When county court may redeem lands from such sale.

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10-22

Honorable John W. Mitchell
Ass't Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Mr. Mitchell:

This is in reply to your letter of October 14, 1941, requesting an official opinion of this Department based upon the following letter:

"I should like your opinion as to the following matter:

"If property covered by a School Fund Mortgage is sold by the city of St. Joseph for delinquent taxes and thereafter the School Fund Mortgage is foreclosed and the property bid in by the county, does the holder of the tax sale certificate issued by the city of St. Joseph have an enforceable lien against the property; and is the county legally justified in redeeming the property from the tax sale?"

We presume, from the context of your letter, that the two year period of redemption has not expired since the sale by the city. Also that the county court purchased the property at foreclosure for the use and benefit of the Capitol School fund, under the provisions of Section 10389 Revised Statutes of 1939.

Section 6328, Revised Statutes of Missouri, 1939, relating to the lien on real estate for taxes due a city of the first class is in part as follows:

"On the first day of September in each year the unpaid taxes shall become delinquent, and shall bear interest from that date at the rate of twelve per centum per annum, and taxes upon real property are hereby made a perpetual lien thereon against all persons. The city treasurer is hereby authorized and directed to collect the delinquent taxes by the sale of the real property upon which the taxes are levied. The city treasurer shall continue to receive taxes after they become delinquent until collected by distress or sale."

Under the provisions of Article 2, Chapter 38, Revised Statutes of Missouri, 1939, cities of the first class have a complete scheme of procedure in the collection of delinquent taxes on real estate, which was unaffected by the enactment of Senate Bill 94, Laws of Missouri, 1933, commonly known as the Jones-Munger Law.

Redemption sections, under the statutory scheme relating to cities of the first class, are Sections 6342 and 6347, which are as follows:

"Section 6342. Real property sold under provisions of this article, or any interest in such real property, may be redeemed by the owner, his agent or attorney at any time within two years from the first day on which such real property was advertised for sale, or at any time before the execution and delivery of the tax deed to the purchaser at the tax sale, his heirs or assigns, by the payment to the city treasurer of the amount for which such real property was sold, and ten per centum of such amount immediately added as a penalty, with twelve per cent interest per annum on the whole amount thus made from the day of sale; and also the amount of all taxes, state, county or municipal, general or special, paid by the purchaser, his heirs or assigns, after the date of the cer-

tificate of purchase, and a like penalty of ten per centum added as before on the amount of each of such payments, with twelve per cent interest per annum on the whole of such amount or amounts from the day or days of payment."

"Section 6347. Any person desiring to redeem any real property bid off for the city for delinquent taxes at any tax sale may redeem the same by the payment to the city treasurer of all taxes, interests and costs due thereon. In any case where any person shall redeem more than one parcel of real property at the same time, he may require the city treasurer to include the same in one certificate of redemption."

Section 6350 therein, providing for a deed to be made if the property is not redeemed in two years, is in part as follows:

"If any real property sold for taxes under the provisions of this article shall not be redeemed within two years from the first day on which it was advertised for sale, it shall be the duty of the city treasurer, on presentation to him of the certificate of purchase, to execute, in the name of the city, under his hand and the seal of the city, to the purchaser, his heirs and assigns, a deed of the real property described in such certificate of purchase remaining unredeemed, as shown by such certificate of purchase, and shall acknowledge such deed and deliver the same to the grantee, which deed shall vest in the grantee an absolute estate, in fee simple, in the real property described therein, free from any and all encumbrances of whatsoever kind or nature, subject, however, to all unpaid taxes which are a lien thereon."

The rights of a certificate holder and redemptionor, under the summary Jones-Munger law, was determined

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by the court en banc in the case of the State ex rel:
City of St. Louis v. Baumann, 153 S. W. (2d) 31, 34,
in the following language:

"We have previously passed on the office of a certificate of purchase and held that it alone did not pass title for the obvious reason title to land sold for taxes under the law of this State remains in the owner during the period of redemption. See Donohoe v. Veal, 19 Mo. 331; Kohle v. Hobson, 215 Mo. 213, 114 S. W. 952. In Wilton v. Smith, 134 Mo. 499, 33 S. W. 464, 466, 35 S. W. 1137 the period of redemption had elapsed but the holder of the certificate of purchase had never called for a deed and in interpreting the statute there under consideration in order to determine who was included within the term owner, we held that only a record owner was intended. We did say 'after the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector.' Granted that he has this right, there must be some interest vested in him to sustain it. * * *

"Under the act we are considering, a holder of a certificate of purchase is qualified to take a deed when the period of redemption has run. In effect the act vests the holder of a certificate of purchase with an inchoate or inceptive interest in the land which may ripen into such an estate as would entitle him to a deed. After the period of redemption has passed without the owner redeeming, upon producing his certificate, the holder is such an owner as may call in the legal title. All that is necessary for him to accomplish this is to pay such taxes as are then against the land. He has already paid the purchase price as his

certificate of purchase evidences.

"The right to call in the legal title ordinarily presupposes an equitable title in the person who may exercise the right.
* * * The act permits the application of this rule in this case. Therefore, the City is now vested with the equitable title to the land and the land is not subject to taxes. " * * *

The reasoning of the court in the above decision, based upon a summary law for the enforcement of delinquent state and county taxes on real estate, is applicable to the summary procedure provided for cities of the first class under the statute.

Under the above statutory provisions, land and lots may be redeemed within two years, and such right could be exercised by the county court as trustee of school funds if it were given the right and power of redemption under the statute creating its trusteeship for such fund.

Section 10389, Revised Statutes of Missouri, 1939, is as follows:

"Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained; the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of

the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be re-sold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools, and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

In discussing the relation of the county court to the school funds and its powers and duties in relation thereto, the court in the case of *Ray County, to the use of the Common School Fund v. Bentley et al.*, 49 Mo. l. c. 242, said:

"* * * The county is not the owner of the fund; the title is simply vested in it as trustee, for convenience, to carry out the policy devised by the law-making power for the appropriation and distribution of the fund. In the care, management and control of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State law, independently of the county. Where it acts, for and binds the county

Hon. John W. Mitchell.

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it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. * * *

In Walker v. Lynn County, 78 Mo. 650, the court held, that a contract of insurance on county buildings, procured by an agent, verbally appointed by the county court, is a valid contract, when subsequently ratified, adopted and approved by an order of the county court entered of record.

The Supreme Court in the case of Morrow v. Pike County 189 Mo. 622, recognized the right of the county court to employ counsel to aid in protecting a public school fund in the following excerpt:

"The county court properly placed the burden of protecting this fund upon the fund itself and this arises from the following propositions: the public school fund does not belong to the county in a technical sense. It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund (Ray County to use vs. Bentley, 49 Mo. l. c. 242); it may not divert the general county revenue to its protection, and, on the other hand, it cannot apply the school fund to the payment of ordinary county debts. (Knox County vs. Hunolt, 110 Mo. l. c. 75.) But it is fundamental that, conceding the right to make the contract in question, the burden of protecting the trust fund shall fall upon the fund itself on well-recognized equitable principles."

In that case there was no claim that there was any statute which expressly gave the county court power to employ such an attorney in such capacity but the court held that the county court had implied authority to order

such expenditure to protect the funds of the school district and further held that the payment for such services must be made from the school funds.

In the case of Township Board of Education v. Boyd, 58 Mo. 276, the county court was trustee for the care and management of the school fund of the township. It instituted certain injunction proceedings for the protection of the fund and gave an injunction bond signed by J. K. Boyd and J. B. Johnson, two of the justices of the county court. Upon dissolution of the injunction a judgment was issued against said obligors, one of whom, paid the same, and by a court order he was reimbursed out of the township school fund. In this case the court said:

"The County Court was a trustee for the 'care and management' of the school fund of the township. In this capacity, and in the exercise--for aught that appears to the contrary--of its soundest judgment and discretion, it instituted certain injunction proceedings for the protection of the fund. The law required personal security for the purpose, which was given. A judgment against the surety following, which judgment he was bound to pay, and did pay, it would be strange if the law should refuse to indemnify him for the interest which his suretyship had so served at a sacrifice."

There being no statute expressly giving the county court, as trustee for such school money, the power to redeem from a tax sale, lands and lots which it repossessed under the provisions of Section 10389, supra, subsequent to the sale, the question is, whether said court would have such implied right and power as may be necessary to carry out or make effectual the purposes of the authority expressly granted.

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A trustee always has the implied right to protect the corpus of the property or funds under their control and in such cases the court would have the right to take necessary steps to enjoin the stealing of timber from valuable wooded land belonging to a school district and not rely on the criminal statutes for a remedy; to employ an attorney to replevy timber wrongfully taken from such premises and the like.

In the case of Lincoln County v. Magruder, 3 Mo. App. 314, the County Court brought a suit of ejectment for the possession of land which had been bid in and purchased by said court, for the use of the townships whose school funds were secured by the mortgage. The court held;

"We see no reason why the County of Lincoln should not bring ejectment for real estate which it owns and holds and in which it is entitled to possession."

In the case of Drainage District v. Metlage 231 Mo. Ap . 355, 366, the court held that a county court had no implied right for and in behalf of a drainage district organized under such county court, to redeem lands and lots sold at a general state and county tax sale.

The rationale of such decision is as follows:

"The fact that in 1927 the Legislature by amendment added Section 10766, conferring such power upon circuit court districts without granting similar power to county court districts, denies, by implication, the right of county court districts to redeem from sale for State and county taxes. Especially is this true since prior to said amendment circuit and county court drainage districts had almost identical powers.

Sec. 1102, Vol. II, Revised Statutes Missouri 1929, cited by appellant, reads in part as follows: 'Drainage or levee districts heretofore or hereafter incorporated under any of the drainage or levee laws of this State where lands are offered for sale for their own taxes (italics ours) or assessments due thereon, shall be and are hereby authorized to buy such lands at not to exceed the amount of such taxes, assessments, interest, penalties and costs.'

"It also further provides, among other things, for the sale of lands so purchased, but nowhere does it say anything whatever about the right to redeem from State and county taxes. Since this section confers power to bid at a sale for the district's own taxes, but is silent as to the right to bid at a sale for State and county taxes, the presumption is that the Legislature intended that the district should not have the power to bid as to State and county taxes. (Deitrich v. Jones et al., 56 S. W.(2d) 1059; Chilton v. Drainage District No. 8, 63 S.W. (2d) 421.)

"As insisted by respondent, the maxim 'Expressio unius est exclusio alterius,' is applicable. (Keane v. Stroetman, 18 S. W. (2d) 896.) Applying the maxim to the facts in the case before us, the conclusion follows that the grant of the right to bid at sales for taxes due Drainage District No. 23, by implication, excludes the right of the district to bid at a sale for State and county taxes, or to redeem therefrom."

The quoted decisions, preceding the Drainage District case, clearly construed the legislative intent to vest in the county courts implied rights, with reference to the Capitol School fund, although it seems to restrict such implied rights to the protection of the corpus of the property or funds under their control.

Hon. John W. Mitchell.

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Therefore, the maxim expressio unius est exclusio alterius is certainly inapplicable to the right of action of a county court in using its soundest judgment and discretion in protecting the corpus of the property or funds under its control as trustee of the Capitol School fund.

CONCLUSION

Therefore, it is the opinion of this Department that the holder of a tax certificate of purchase issued by the city treasurer of a city of the first class - wherein the City of St. Joseph is classified - has an inchoate or inceptive interest in and to the property described therein "which may ripen into such an estate as would entitle him to a deed." That the county court, in the exercise of its best judgment and discretion, may, within the redemption period, redeem such lands for and in behalf of the school fund, if such action be necessary for the protection of the corpus of the property or funds under its control.

Respectfully submitted,

S. V. MEDLING

Assistant Attorney General

APPROVED:

VANE C. THORLO

(Acting) Attorney General

SVM/mc

JUDGMENT: (1) Statute of limitations applies for the reason that net proceeds go to the school funds in the county.
RECOGNIZANCE (2) The three-year lien upon the real estate of the defendant, as provided in Section 1270, R. S. Mo. 1939, immediately attaches upon rendition of judgment.
OR BAIL BOND: (3) Such judgments may be revived by scire facias or suit upon the judgment as in other civil cases.

October 30, 1941

Honorable J. W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

We are in receipt of your request for an official opinion, dated August 26, 1941, which is as follows:

"We would appreciate it if you would let us have at your earliest convenience your opinion as to whether or not the lien of a judgment forfeiting a bail bond in a criminal case expires at the end of three years, as in the case of ordinary civil judgments."

"After further search, we have been unable to find any authorities on this question, except the one cited in our letter files, July 31."

From a reading of the request, we assume that Article VIII, Chapter 30, R. S. Mo. 1939, has been complied with and a final judgment has been duly taken on the bail bond referred to in your request, and we proceed with this opinion on that assumption.

It may be contended that the general rule is that statutes of limitations do not operate against the sovereign or the government, whether state or federal. In answer to this contention, we call attention to the case of *Payette v. Marshall County*, 180 Iowa 660, in which the State of Iowa attempted to collect a judgment for fine and costs on a judgment wherein the defendant was convicted for maintaining a liquor nuisance. The court, in disposing of this contention, had this to say, 1. c. 663:

"It is true that the judgments were entered in actions prosecuted in the name of the State of Iowa, but a judgment in a case of that nature and the money collected thereon do not belong to the state, but to the county for the use of its temporary school fund. The state's interest, if any, is merely nominal, and it is settled in this jurisdiction that, where the state stands in a merely representative capacity and not in the exercise of its sovereignty, its exemption from the statute of limitations is not effectual. * * * "

Turning to the Missouri decisions which throw light upon the Missouri courts' disposition on the above contention, we cite the case of *Gross v. Atchison County*, 320 Mo. 332, wherein the court stated as follows, l. c. 339, 340:

"If an action had been rendered necessary to enforce the payment of the surety's liability it would not have partaken of the nature of a criminal proceeding, although having its origin in a prosecution for a crime. It would simply have been an action by the State on a forfeited recognizance which did not involve the guilt, innocence, conviction or acquittal of any person. It would, in short, have been a suit to enforce the surety's contract with the State, executed by the former when the recognizance was entered into. Possessing this characteristic its determination must rest largely upon the principles of the law applicable to suits on contracts, rather than the laws in regard to criminal prosecutions. * * * "

* * * * *

"The Constitution (Sec. 8, Art. XI) prescribes that the 'clear proceeds of all penalties and forfeitures . . . shall belong to and be securely invested and sacredly preserved in the several counties as a public school fund.' The 'several counties' referred to must, in reason, mean the counties in which the proceedings were had out of which the funds originated. While suits for the recovery of penalties and forfeitures are required to be brought by the State because the obligation is made to the State, the amounts recovered belong to the counties, and it would involve an unnecessary formality upon their recovery to require them to be paid into the State Treasury and subsequently apportioned to the counties.

* * * * *

"Especially is this true where, as we have shown, whatever proceeding is had or action taken in the forfeiture of the recognizance at bar, is purely civil in its nature."

It will be noted from reading this case that our courts have held that in suits brought upon recognizance or bail bonds, the determination must rest largely upon the principles of the law applicable to suits on contracts rather than the laws in regard to criminal prosecutions, and the constitutional provision in Missouri obtains as pointed out in the Iowa case, supra, that the proceeds of all penalties and forfeitures must go to the school fund. It is further pointed out by our courts that proceedings on forfeitures are purely of a civil nature.

It will be observed from a reading of the case of *Emery v. Holt County*, 132 S. W. (2d) 970, that the common law maxim "nullum tempus occurrit regi" did not apply to political subdivisions of the state, and applied only to the state. Judge Gantt, in the *Emery* case, supra, has this to say in interpreting the effect of this maxim in Missouri, 1. c. 971:

"Under the common law the maxim 'Nullum tempus occurrit regi' did not apply to political subdivisions of the state. It applied only to the state. (Cases cited) In Callaway County v. Nolley, 31 Mo. 393, 397, we ruled as follows:

"'Here then was a lot whose legal title was vested in Callaway county, in trust for the inhabitants of the town of Fulton. Callaway county was as competent twenty years ago to bring an action as it was at the time of the institution of this suit. In fact it is nothing more than a body politic, acting as trustee for the inhabitants of the town of Fulton. It is subject to the statute of limitations, as was held in the case of the County of St. Charles v. Powell, 22 Mo. 525 (66 Am. Dec. 637). Property held by individuals or bodies politic in trust is as much subject to the statute of limitations as that owned by individuals.' (Cases cited)

"Defendants cite State v. Fleming, 19 Mo. 607. That was an action by the state to recover school lands. We ruled that the maxim 'Nullum tempus occurrit regi' applied and that the statute of limitations did not apply to the state. We did not rule that the maxim applied to political subdivisions of the state.

"Furthermore, at an early date the maxim 'Nullum tempus occurrit regi' was abolished in this state. Sec. 10, Art. II, p. 75, Laws of Mo. 1848-49. It is now Sec. 888, R. S. 1929, Mo. St. Ann., Sec. 888, p. 1171, which follows:

"'The limitations prescribed in articles 8 and 9 of this chapter shall apply to

actions brought in the name of this state, or for its benefit, in the same manner as to actions by private parties.'

"In State ex inf. Attorney General v. Arkansas Lumber Co., 260 Mo. 212, 285, 169 S. W. 145, 168, we ruled 'that this section makes applicable to the state every general limitation in our law.'

"Defendants argue that it should be against public policy to permit school funds to be lost by negligence or misfeasance of officers.

"The legislative enactments of this state and the decisions of the courts construing the same determine the public policy of the state. In this situation the argument here made as to public policy should be addressed to the legislature.

"The cases from other jurisdictions cited by defendants are ruled under the statutory and constitutional provisions of those states. For that reason they should not be followed in determining the question under consideration. We think the limitations provided in Sec. 865 apply to a county school fund mortgage. The judgment should be affirmed.

"It is so ordered."

It will be noted from this case that maxim does not apply in Missouri to actions brought in the name of the state for the use and benefit of political subdivisions.

We must therefore conclude that the statute of limitations would apply in actions brought upon recognizance or bail bonds in Missouri.

Now, passing to the effect of the three-year statute of limitations upon a judgment or a bail bond or recognition, we call attention to the following sections of the Revised Statutes of Missouri, 1939, which we set out in full and which we think are applicable upon this contention.

"Sec. 1236. Judgment defined. -- A judgment is the final determination of the right of the parties in the action."

"Sec. 1269. Lien of judgment in court of record. -- Judgments and decrees rendered by the supreme court, by any United States district or circuit court held within this state, by the Kansas City court of appeals, the St. Louis court of appeals, the Springfield court of appeals, and by any court of record, shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held."

"Sec. 1270. The commencement, extent and duration of lien. -- The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof, as to that which was owned when the judgment or decree was rendered. Such liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees, the lien shall commence on the last day of the term at which they are rendered."

"Sec. 1271. Scire facias to revive, may issue, when. -- The plaintiff or his legal representative may, at any time

within ten years, sue out a scire facias to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgment, no scire facias shall issue."

"Sec. 1277. Judgment of revival, when. -- If upon the service of the scire facias or publication as aforesaid, the defendant, or any of his creditors, do not appear and show cause against reviving the judgment or decree, the same shall be revived, and the lien continued for another period of three years; and so on, from time to time, as often as may be necessary."

In the case of Vitale v. Duerbeck, 92 S. W. (2d) 691, 1, c. 696, the court had this to say:

"A judgment is a debt, a property right which goes, upon the owner's death, to his personal representative, regardless of what may have been the cause of action upon which it was obtained. (Cases cited) It has been well stated that, 'after the giving of the judgment, the controversy is over the judgment, and not over the original wrong.' Powden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 P. 178, 179."

In this case it will be noted that the court emphatically held that after the giving of the judgment, the controversy is over the judgment and not over the original wrong. Therefore, everything is merged in the judgment. Of course, the judgment can only be obtained after a hearing is had in a court of record wherein the rights of the parties are fully adjudicated.

•

In the case of State ex rel. National Lead Co. v. Smith 134 S. W. (2d) 1061, the court said, l. c. 1069:

"And, a judgment can be lawfully rendered only after hearing and trial. All judicial proceedings without such hearings are invalid and without binding force and effect. Ex parte Irwin, 320 Mo. 20, 6 S. W. 2d 597, 600."

Having determined that the statute of limitations does operate upon judgments obtained on recognizance and bail bonds, we now turn to the application of Sections 1269, 1270, 1271 and 1277, supra.

We find that the court said in the case of State v. Murmann, 124 Mo. 502, l. c. 507:

"But recognizances are a part of the proceedings in the exercise of a criminal jurisdiction and it is a fundamental rule of law that where jurisdiction of the main question attaches, every incident necessary to enforce that jurisdiction follows as a matter of law. A recognizance is a matter of record and the scire facias is the process for carrying it into execution. And while it is sometimes denominated a suit, it is only so to the extent that the defendant may plead to it. It is judicial rather than original in its nature, for when final judgment is rendered the whole record is considered as one.

"A scire facias upon a recognizance in a criminal prosecution is not a civil proceeding, so as to entitle a party to remove such a cause to a federal court under the judiciary act and the constitution of the United States. Respublica

v. Cobbet, 3 Dallas (Penn.) 467. The universal rule at common law was that recognizances must be prosecuted in the courts in which they were taken. The cognizors by entering into a recognizance submitted themselves to the jurisdiction of the court, and a forfeiture was a conditional judgment."

In the case of City of St. Louis v. Wall, 124 S. W. (2d) 616, the court had this to say, l. c. 618:

"Of course it is the judgment itself, and not the execution (as in the case of an execution to be levied upon personal property), that constitutes the lien upon real estate."

In the case of State v. Streutker, 288 Mo. 156, the court said, l. c. 158:

"The reason why this court has assumed jurisdiction of proceedings by scire facias to forfeit bail bonds and recognizances where the amount is less than seven thousand five hundred dollars, is stated in the case of State v. Hoeffner, 137 Mo. 612, l. c. 614-615, where the court said:

"If the charge was a felony then the proceedings in that case would be a continuation of the prosecution for felony, and this court would have jurisdiction to make effective, that charge, on the familiar principle of law that where jurisdiction of the main question attaches, every incident necessary to make that jurisdiction effectual follows as a matter of law."

"In the case of State v. Epstein, 186 Mo. 89, Judge Gantt expressed it in this way, l. c. 98:

"'As an appeal upon the main charge of felony must be heard in this court, so also must the auxiliary proceeding thereon be heard in this court on appeal.'

"The above cited cases were approved in the late case of State v. Wilson, 265 Mo. l. c. 10. It will be noticed that the reasons given by this court for retaining jurisdiction of such cases is because it is auxiliary to a felony of which it had jurisdiction, not because the case in itself confers jurisdiction. The court which has jurisdiction of the felony case must retain authority to enforce any judgment which is rendered in that felony case.

"The judgment fixes no punishment and requires no appearance of the judgment defendant. In form it is a money judgment for which execution may issue, not against the person of the defendant but against his property. In effect and form it is a civil case."

From a reading of the cases, supra, we must conclude that a judgment obtained upon a recognizance or bail bond is a money judgment for which execution may issue, not against the person but against his property. In effect and form, it is a civil case. Therefore, upon obtaining the judgment, a lien would immediately attach to the real estate owned by the defendant, as is provided in Section 1270, supra, which lien would be effective for a period of three years, as is provided for in said section, and the judgment would be good for a period of ten years. (See Section 1038, R. S. Mo. 1939, which section we do not include for the sake of brevity.) However, such judgment would be subject to revival either through scire facias or a direct suit upon the judgment.

In the case of Excelsior Steel Furnace Co. v. Smith, 17 S. W. (2d) 378, the court had this to say, l. c. 379, 380:

"Defendants are mistaken in supposing that the only way in which a judgment may be saved from the destructive effect of the statutes of limitations is by revival on scire facias.

"In the cases of Houck v. Swartz, Parry v. Walser, and Wood v. Newberry, it was stated that there was good reason why the second action should be maintained, thus intimating that the limitation exists in Missouri. Whether the limitation exists or not, it certainly is a good excuse for maintaining the second action that the former judgment is about to become barred by the statute of limitations. In this case the action was instituted on May 22, 1928, and the judgment would have been barred on May 31st of the same year."

We also call attention to the case of Goddard to use v. Delaney, 181 Mo. 569, wherein the court stated, l. c. 575, 577, 578:

"Thus the writ as affecting personal judgments accomplishes under our statute two objects, the revival of the judgment and the continuation of the lien, and it is of proceedings under that writ, prosecuted with those two purposes, that our statute says the judgment 'shall be revived, and the lien continued for another three years; and so on, from time to time, as often as

may be necessary.' The natural meaning of that language is that the process may be repeated as often as may be necessary to keep the judgment alive and the lien in force. The words 'continued for another period of three years' refer to the lien only, not to the judgment. The life of the judgment is ten years, the life of the lien three years; the judgment is revived, the lien continued. Therefore, when the statute says the judgment is revived and the lien continued it means that a new life of ten years is given to the one and of three years to the other, and the words 'and so on from time to time as often as may be necessary' apply as well to one as to the other.

"We hold, therefore, that a scire facias may issue to revive a judgment at any time within ten years from the date of its rendition or that of its last revival.

* * * * *

"The suing out of the writ of scire facias is not considered in all jurisdictions in the same light. In 18 Ency. Pl. and Pr., 1059, it is said: 'While a scire facias has been called an action for some purposes, and by some decisions has been apparently treated as a new action, even where its object is the revival of a judgment, the better opinion, and that supported by the weight of authority, is to the effect that a proceeding by scire facias to revive a judgment is not an original proceeding, but a mere continuance of the former suit. It is merely a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment, and upon such proceeding the merits of the original judgment can not be inquired into, and a judgment rendered in such a proceeding is not

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a new one for the debt and damages but merely an order that execution shall issue. It may be said, however, that in all cases it is in the nature of an action, in that the defendant may plead thereto."

CONCLUSION

We are of the opinion that the state's interest, if any, is merely nominal, and said state acts merely in a representative capacity and not in the exercise of its sovereignty in a judgment procured on a recognition or bail bond. Therefore, a statute of limitations may be effectual. We are also of the opinion that the three-year lien immediately attaches to the real estate upon the rendition of the judgment, as provided in Section 1270, R. S. Mo. 1939, and that such judgment can be revived through scire facias or a suit upon the judgment.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:VC

TAXATION:

INTER-STATE BUS AND TRUCK LINES: The State Board of Equalization does not have jurisdiction to assess Inter-State Bus and Truck Lines because the statute authorizing same has been repealed.

November 5, 1941

Mr. Jesse W. Mitchell, Chairman
State Tax Commission
Jefferson City, Missouri



Dear Mr. Mitchell:

This is in reply to your request made pursuant to our telephone conversation and the letter of the Hon. William L. Igoe to the State Tax Commission dated October 31, 1941, regarding the assessment of taxes on inter-state bus and truck lines. It is my understanding that this matter is now before the State Board of Equalization for assessment of inter-state bus and truck lines and the question has now been raised as to whether or not the State Board has jurisdiction.

The law authorizing the taxing of inter-state bus and truck lines was repealed by the General Assembly in 1941, Laws of Mo. 1941, page 694. It did not have an emergency clause, therefore, did not go into effect until ninety days after the adjournment of the General Assembly. The rule as to the effect of a repeal of a statute is stated in State ex rel. v. Hackman, 272 Mo. 600, 607 as follows:

"I. As a general rule, a statute expressly repealed is thereby abrogated and all proceedings commenced thereunder which have not been consummated are rendered nugatory unless the repealing act is modified by a saving clause. * *

* * * "

There was no saving clause to the repealed section of 1941.

The inter-state bus and truck lines are to be assessed as railroads. The assessment of property owned by these carriers on June 1, has not yet been completed. Under Article 14, page 74, R. S. Mo. 1939, this assessment, if the property can be assessed, would be before the State Board of Equalization for consideration. The rule as to the effect of the repeal of a statute is also stated in 59 C. J. 1185, Section 722 as follows:

"The general rule against the retrospective construction of statutes does not apply to repealing acts, and, in the absence of a saving clause or other clear expression of intention, the repeal of a statute has the effect, except as to transactions passed and closed, of blotting it out as completely as if it had never existed, and putting an end to all proceedings under it. * * * * *

In Ann. cases, 1912, B, page 1148, l. c. 1151, the case of Merchant's Insurance Company v. Ritchie, 5 Wall 541, 18 U. S. (L. ed.) 540, the following statement is made:

"It is declared that while jurisdiction depends wholly on a statute, suits brought during the existence of the statute fall with its repeal."

In discussing the effect of the repeal of a tax ordinance, the Supreme Court of the United States in the case of Flannigan v. the County of Sierra, 196 U. S. 559, 49 L. ed. 597, 598, said:

"The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland, Stat. Const. para. 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon, Abr. 226. This doctrine is oftenest illustrated in the repeal of penal provisions of statutes. It has, however, been applied by the supreme court of the state of California to the repeal of the power of counties to enact ordinances for revenue."

CONCLUSION

From the foregoing rules, we are of the opinion that the State Board of Equalization does not at this time

Mr. Jesse W. Mitchell

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have jurisdiction to assess inter-state bus and truck lines because the statute authorizing such assessment has been repealed and the repeal is now in full force and effect..

Respectuflly submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

PENAL INSTITUTIONS: MISSOURI TRAINING SCHOOL FOR BOYS: The Commission of Penal Institutions has the power to authorize boys at the Missouri Training School for boys to do work outside the institution for private individuals.

November 14, 1941

Mr. Loyd I. Miller, Director
Department of Penal Institutions
Jefferson City, Missouri



Dear Mr. Miller:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts:

"The Superintendent of the Missouri Training School for Boys at Boonville informs me that he has been contacted by Mr. E. H. Weir of the Missouri State Employment Bureau in regard to the possibility of using about twenty (20) boys from his institution to pick turkeys for a produce house located at Pilot Grove, Cooper County, Missouri. Mr. Weir stated to the Superintendent that the labor supply in Cooper County had been exhausted, and that the produce house had to turn away turkeys that were brought to them for slaughter. He also assured the Superintendent that no labor problems would be involved in case the request is granted.

"Mr. Riley proposes to use the money earned by the boys for the purpose of buying much-needed equipment for their athletic department, such as basket ball uniforms and other equipment, which, due to our limited appropriations, we are unable to supply at State expense. After these purchases are made, he will submit to the Penal Board a receipt showing the amount expended for this purpose, and any balance in the fund will be disposed of in any manner approved by your office and the office of the State Auditor.

"Because of the appeal from residents of Cooper County, we feel that this situation

might be termed an emergency, and if your office can see fit to render us an opinion immediately as to whether or not we are within our legal rights in permitting these boys to work for a private concern for a limited time (approximately seven days), we will abide by your decision."

The only section of the statutes which we find that would prevent the Commission from contracting the labor of inmates of said Training School, is Section 8991, R. S. Mo. 1939, which is as follows:

"Except as in section 8988, hereinabove provided, the leasing or contracting of convict labor in any form or manner, directly or indirectly, is hereby prohibited."

Under the Juvenile Acts, certain boys are committed to the Missouri Training School for Boys, but we do not think that these persons could be classified as convicts, and for that reason there is no question that Section 8991, supra, would apply to such boys. Under Section 8988, R. S. Missouri 1939, boys of certain ages are committed to the Missouri Training School for Boys for the commission of felonies and misdemeanors. Section 8994 authorizes the Commission of the Department of Penal Institutions to adopt rules and regulations not inconsistent with the law and the management of the institution.

We think the convicts referred to in Section 8991, supra, was intended to mean those persons who are confined in the penitentiary.

From a reading of Article 2, Chapter 48, which relates to the Missouri Training School for Boys, it will be seen that the purpose of this chapter is to provide for the rehabilitation of such boys that are sent to that institution. This statement is supported by the provisions of Section 8999 which authorizes the Governor to commute the sentence of a person under twenty-five years of age, who has been sentenced to the penitentiary, to this training school. It further provides that if a person between the ages of seventeen and twenty-five is sent to the Intermediate Reformatory and such person is found to be incorrigible and not

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amenable to the reformation by the opportunities and advantages afforded him in such institution, then the Governor may direct that such person be transferred to the State Penitentiary.

As stated above, this is a clear indication that the lawmakers have not intended the Training School to be a penal institution so much as they intended that it be more in the nature of a training school. For that reason, we think that the section of the statute authorizing the Commission of the Department of Penal Institutions to make by-laws and rules and regulations was proper. In this particular case which you have submitted, we think that if the Commission of the Department of Penal Institutions thinks that it would be to the best interests of certain inmates in the Missouri Training School for Boys to permit them to perform the services suggested in your request, the purpose for which the institution exists would be furthered. However, we do call your attention to the fact that the provisions of the Child Labor Laws would be applicable in cases of such employment.

CONCLUSION

It is therefore the opinion of this department that the Commission of the Department of Penal Institutions can make a regulation, the purpose of which is to permit the boys to work for a private concern for a limited time, if the Commission, by such regulation and as a reason therefor, thinks it will be for the best interest of such boys.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

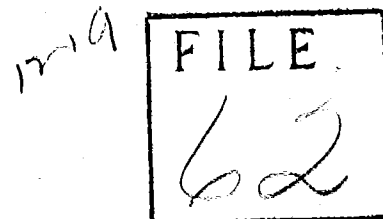
VANE C. THURLO
(Acting) Attorney General

TWB:NS

INFANTS: Jurisdiction sentence delinquent boys under 17-circuit courts, Cape Girardeau Common Pleas; such boys between 17 and 21, same courts, also St. Louis Ct. Crim. Correction.
MO. TRAIN. For certain felonies, circuit courts may sentence boys under 17 to pen., or Train. School; for other felonies
SCHOOL BOYS: may sentence only to Train. School. Remedy to correct sentence to wrong place is habeas corpus.
JURISDICTION:

December 17, 1941

Honorable Loyd I. Miller, Director
Department of Penal Institutions
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for our opinion by your recent letter, which is in the following terms:

"We would like to have an opinion from your office clarifying the question as to who may be sentenced to the Missouri Training School for Boys, and, more particularly, an explanation of the following questions:

"1. What distinction is made between boys under the age of seventeen years and boys between the ages of seventeen and twenty-one years, insofar as sentence to the Missouri Training School is concerned?

"2. What courts may sentence boys to the Missouri Training School?"

This opinion also will answer the request for our opinion by the recent letter of Mr. Paul E. Kaiser, which is in the following terms:

"Re: Coy (Virgil) Sauls, #55469.

"On August 2, 1941, in the Circuit Court of New Madrid County, the subject named above entered a plea of guilty to the crime of Burglary 2nd. degree and was sentenced to serve two years in this institution.

"The prisoner was received at the penitentiary on August 7. He is only 16 years of age, and he had never before been arrested. Because of his youthfulness we deemed it advisable to isolate him in quarantine, thus hoping to reduce to a minimum his association with older inmates, but to continue this arrangement indefinitely would be inhumane.

"This institution cannot properly rehabilitate this type of inmate, and he is below the statutory age limit for admission to the Intermediate Reformatory. We believe the State Training School for Boys at Boonville is the proper place to continue his incarceration.

"Will you please, therefore, advise us if it is not within the jurisdiction of the Circuit Court of Cole County to order his transfer to Boonville, and also help us arrange to bring this case before the Court?

Respectfully,

PAUL E. KAISER
Paul E. Kaiser, Warden."

I. Your second question is answered first, namely, What courts may sentence boys to the Missouri Training School for Boys at Boonville, Missouri?

Juvenile laws and laws providing for the treatment and correction of delinquent and other minors are in Chapter 56, R. S. Mo. 1939; Article IX, Sections 9673 to 9695, inclusive, apply to counties having a population of 50,000 inhabitants or more, and Article X, Sections 9696 to 9718 apply to counties having a population of less than 50,000. Under the law applicable to counties of less than 50,000 population, Section 9698 in part provides:

Hon. Loyd I. Miller

December 15, 1941

"This article shall apply to children under the age of seventeen years, in counties of less than 50,000 population, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. * * * "

Section 9699 in part provides:

"The Cape Girardeau court of common pleas and all circuit courts in counties less than 50,000 population shall have original jurisdiction of all cases coming within the terms of this article. The proceedings of the court in such cases shall be entered in a book or books kept for that purpose, and known as the juvenile records, and the court shall be known as the Cape Girardeau court of common pleas and the circuit court, and may for convenience be called the juvenile court. * * * "

In those counties the circuit courts and the Cape Girardeau court of common pleas have jurisdiction of proceedings conducted under the juvenile law, and there is no juvenile court. Properly speaking, the term "juvenile court" is applied to the circuit court merely as a matter of convenience. It was so ruled under the same statutes in State ex rel. Wells v. Walker, 34 S. W. (2d) 124, 326 Mo. 1233, and the court said, at l. c. 128, 129 of 34 S. W. (2d):

"There are no separate juvenile courts nor juvenile divisions of the circuit courts in counties of less than 50,000."

* * * * *

"That does not mean a separate court. It merely means that 'for convenience'

separate records of the different methods shall be kept, but it is the circuit court in its capacity as such while entertaining juvenile cases and 'for convenience' is called the juvenile court."

* * * * *

"It is the circuit judge who sits and tries the case whether it is tried under the general law or under the juvenile law. As judge of the circuit court, he must determine whether the relator may be prosecuted under the general law. The distinctions which are made are not in the different courts which may have jurisdiction of one prosecuted as a delinquent or as a criminal but in the application of a law in the same court."

As to counties having a population of 50,000 or more, Article IX, Section 9673, in part provides:

"This article shall apply to children under the age of seventeen (17) years, not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children:
* * * "

And Section 9674 in part provides:

"The circuit courts exercising jurisdiction in counties now or hereafter having a population of fifty thousand (50,000) inhabitants or more shall have original jurisdiction of all cases coming within the terms of this article: Provided,

that in counties containing a city of the first class the criminal court shall have such original jurisdiction. For the purpose of this article, the city of St. Louis shall be considered a county within the meaning of this article.

* * * * *

" * * * and the proceedings of the court in such cases shall be entered in a book or books to be kept for that purpose, and known as the juvenile records, and the court may for convenience be called the juvenile court. The clerk of the circuit court in such county shall act as the clerk of the juvenile court."

In those counties the circuit court has jurisdiction, and there is no such thing as a juvenile court; the term "juvenile court" is used merely as a matter of convenience. It was so ruled under the same statutes in State ex rel. MacNish v. Landwehr, 60 S. W. (2d) 4, 1. c. 6, 8, 332 Mo. 622, and the court said:

"Relator is wrong in his contention that the complaint against Opal Brown was filed in the juvenile court because there is no such court. The statute does not create a juvenile court. The Juvenile Law, so called, vests original jurisdiction of all cases arising under that law in the circuit court."

* * * * *

"Evidently the writers of these opinions referred to the court as the 'juvenile court' for convenience only, because the statute provides that the circuit court

shall have original jurisdiction of all cases arising under the Juvenile Law, and the court may for convenience be called the juvenile court. Section 14137, R. S. 1929 (Mo. St. Ann., Sec. 14137). Neither of these cases hold that there is, in fact, a juvenile court."

The circuit courts may proceed under either the juvenile delinquent law, or under the general criminal law. Section 9700 in Article X applies both to counties of less than 50,000 and to counties having a population of more than 50,000 (State ex rel. MacNish v. Landwehr, 60 S. W. (2d) 1. c. 8 (10)), and it provides:

"In the discretion of the judge of any court having jurisdiction of delinquent children under the provisions of articles 9 or 10, chapter 56, R. S. 1939, any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law, and any motion, petition or application, made to any court or judge having general jurisdiction of criminal causes, to transfer the case of or charge against any delinquent child to a court having jurisdiction of delinquent children under the provisions of said articles 9 and 10, may be denied in the discretion of the judge, when in the judgment of the judge such child is not a proper subject to be dealt with under the reformatory provisions of either said article 9 or said article 10."

The power of the circuit judge to make that election was recognized in the last portion of the above quotation from State ex rel. Wells v. Walker, supra.

II. Your first question is, What distinction is made between boys under the age of seventeen years and boys between the ages of seventeen and twenty-one years, insofar as sentence to the Missouri Training School is concerned?

(A) The question is first considered with reference to cases conducted under the juvenile law. In the law applicable to counties of less than 50,000, a delinquent child is defined in Section 9698 as any child under seventeen years of age who violates any state law, or who is incorrigible, or who commits any one of several other actions which are not crimes, and Section 9704 in part provides:

"In case of a delinquent child the court may commit such child, if a boy, to a training school for boys, or to the Missouri reformatory, or, if a girl, to the state industrial home for girls, or, if a colored girl, to the state industrial home for negro girls." The references to the "Missouri reformatory" mean the Missouri Training School for Boys at Boonville (Section 8993, R. S. Mo. 1939).

• With reference to counties having a population of more than 50,000 inhabitants, a delinquent child is defined in Article IX, Section 9673, substantially as above stated, and Section 9688 in part provides:

"In the case of a delinquent child * * * the court may commit the child, if a boy, to the Missouri training school for boys, or, if a girl, to the state industrial school for girls; * * * "

The foregoing applies to boys under seventeen. Both Article IX, Section 9673, and Article X, Section 9698, contain a provision that when jurisdiction has been acquired

under the juvenile law over the person of a child under seventeen, such jurisdiction shall continue until the child shall have attained the age of twenty-one years. Under those provisions, in order to have jurisdiction over a child over seventeen years of age, the court must have by some process brought the child within its jurisdiction while he or she was under seventeen. But another statutory provision is broader, Section 9696, Article X.

Proceeding under the juvenile law either in counties having a population over or under 50,000, circuit courts may sentence to the Missouri Training School for Boys any boy under twenty-one years of age, if he is charged and tried as a delinquent child, instead of being charged and tried under the general criminal law, because Section 9696 provides:

"Whenever in the State of Missouri any minor of the age of seventeen years or over shall commit any of the acts constituting a delinquent child as defined in the statutes of this state, applicable to children under seventeen years, such minor may be caused to be brought by his or her parents or lawful guardian or by the probation officer or by any person interested in said minor, before a court of record having jurisdiction over misdemeanors, and tried in the same manner, as a person charged with the commission of a misdemeanor. Upon the finding of delinquency, the court may proceed to make such order in the case as may seem to be for the best interests of said minor, either by commitment to any public institution, or to any private institution willing to receive such minor, or to the care and custody of any individual willing to care for said minor or said minor may be left in the care of his or her parents or guardian, subject to the supervision of the court under suspended sentence; or the court may proceed to make any other lawful disposition of the case." (Italics ours)

Other sections refer specifically to counties having a population either over or under 50,000. Section 9696 applies to both such counties. It is of general application, and applies "in the State of Missouri." It refers not only to Article X, in which it is found, but refers to all "statutes of this state." Under that section a court other than the circuit court may also have jurisdiction of boys between the ages of seventeen and twenty-one. Said Section 9696 confers jurisdiction on "a court of record having jurisdiction over misdemeanors." For example, in the City of St. Louis exclusive jurisdiction over certain classes of misdemeanors is vested in the St. Louis Court of Criminal Correction. Section 2253, R. S. Mo. 1939; State ex rel. MacNish v. Landwehr, supra, 60 S. W. (2d) 1. c. 6 (2, 3). It is noted that the Landwehr case, supra, recognized the application of another section in Article X to counties otherwise falling within the application of Article IX, because of the use of general terms.

(B) Cases conducted under the general criminal law. This portion of the opinion answers the questions contained in Mr. Kaiser's letter above quoted. It has been seen above that a person under seventeen years of age may be prosecuted in the circuit court under the general criminal law. In State v. Flores, 55 S. W. (2d) 953, 1. c. 955, 332 Mo. 74, the court said:

"These statutes were construed in State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124. It was held that, in a prosecution against a juvenile commenced under the general law, the circuit court had a right to proceed under that law. It was pointed out that since no petition was filed alleging the defendant to be a delinquent child, it was not necessary for the court to exercise the discretion provided under that section. That ruling was approved by this court in Ex parte Bass, 328 Mo. 195, 40 S. W. (2d) 457." Also see State v. Naylor, 40 S. W. (2d) 1079, 1082 (6), 328 Mo. 335.

The offense committed by a boy under seventeen may be a misdemeanor. As to that, Section 8998 in part provides:

" * * * Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. No boy under seventeen years of age convicted of a felony shall hereafter be committed to the county jail as a punishment for such offense. * * "

A boy over seventeen convicted of a misdemeanor by a court of record may be sentenced to the county jail the same as other persons under the general criminal law. A justice of the peace court is not a court of record. Of course, the circuit courts (Section 1990, R. S. Mo. 1939), the Cape Girardeau Court of Common Pleas (Section 2329, R. S. Mo. 1939), and the St. Louis Court of Criminal Correction (Section 2238, R. S. Mo. 1939) are courts of record.

With reference to persons under seventeen convicted of felonies, Section 8998 further provides in part:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri

Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. * * * " (*Italics ours*)

That section prescribes the place of confinement for cases where the defendant was under seventeen years of age on the date that judgment was rendered and sentence pronounced by the court, rather than upon the date when the offense was committed or the plea of guilty received by the court, or the date of the return of a verdict by the jury. It was so ruled in *State v. Townley*, 147 Mo. 205, 48 S. W. 833, under Laws of Missouri, 1897, page 123, Section 5, which in part provided: "Any boy under the age of eighteen years convicted of a crime may be punished in the same manner of persons over the age of eighteen, or he may be imprisoned in the penitentiary or committed to the state reform school; and any boy under the age of eighteen years convicted of any other felony shall be committed to the said reform school * * * ." In that case the defendant was under eighteen when he committed the offense, and when he pleaded guilty, but was over eighteen when he was sentenced to the penitentiary for an offense other than one punishable by not less than ten years in the penitentiary. The court said, at l. c. 208, 209, of 147 Mo:

"In note 2, page 139, volume 4, *American and English Encyclopedia of Law*, it is said: 'It has generally be held that the word "convicted" includes the final judgment, and that one who has been found guilty by the jury, but has not yet been sentenced, is not a "convicted" person.'

"In *Gallagher v. State*, 10 Tex. App. loc. cit. 472, it was said that the word 'convicted' has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused.

* * * * *

"We think there is no question but what the legislature used the word 'convicted' in its broadest and most comprehensive sense, as one judgment, and as the judgment was not rendered until after defendant arrived at the age of eighteen years that it should be affirmed."

Under the provisions of Section 8998 last above quoted, the court may sentence a boy under seventeen to the penitentiary if he has been convicted of an offense punishable by imprisonment in the penitentiary for not less than ten years. For example, murder in the second degree is punishable by imprisonment in the penitentiary for not less than ten years (Section 4378, R. S. Mo. 1939), and for that offense a court may sentence a boy under seventeen to the penitentiary. Also under Section 8998, for the same offense, the court may in its own discretion sentence the boy to imprisonment in the Missouri Training School for Boys. But, as held in *State v. Townley*, supra, any boy under the age of seventeen years convicted of any felony other than one punishable by imprisonment in the penitentiary for not less than ten years cannot legally be sentenced to the penitentiary, but must be sentenced to the Missouri Training School for Boys. Mr. Kaiser's letter states that a sixteen year old boy named Sauls was convicted of the crime of burglary in the second degree, and sentenced by a circuit court to imprisonment in the penitentiary for two years. That offense is punishable by "imprisonment in the state penitentiary for a term not less than two nor more than ten years." Section 4445, R. S. Mo. 1939. Under the above discussed authority, for that offense, assuming Sauls was sixteen years old when convicted, he could not legally be sentenced to the penitentiary, but could only be sentenced to the Missouri Training School for Boys.

Where the court has erroneously sentenced a boy under seventeen to the penitentiary for an offense other than one punishable by imprisonment for not less than ten years,

the remedy is a habeas corpus proceeding in the Circuit Court of Cole County, in which the court has a right to sentence the boy to the proper place of confinement. In the habeas corpus statute, Article VI, Chapter 8, R. S. Mo. 1939, Section 1660, it is provided that:

"No person shall be entitled to the benefit of the provisions of this article for the reason that the judgment by virtue of which such person is confined was erroneous as to time or place of imprisonment; but in such cases it shall be the duty of the court or officer before whom such relief is sought to sentence such person to the proper place of confinement and for the correct length of time from and after the date of the original sentence, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of imprisonment."

That is the same as Section 1996 and Section 2659, R. S. Mo. 1879, which were applied by the Supreme Court in Ex Parte Cohen, 159 Mo. 662. In that case a sixteen year old boy had been sentenced to imprisonment in the penitentiary. The court said:

"The statute governing this case at the time the defendant entered his several pleas of guilty was section 3961, Revised Statutes 1889, which provided: 'Whenever any person shall be convicted of any felony committed while under sixteen years of age, he shall be sentenced to confinement in the reformatory school * * * .' Proceeding then in obedience to the statute, it is considered, ordered and adjudged

that the petitioner Samuel Cohen, * * *
be and he is hereby ordered released
from his imprisonment in the state peni-
tentiary * * * and he is hereby sentenced
to the reformatory school at Boonville,
Missouri, * * * "

We shall institute a habeas corpus case in the Circuit Court of Cole County in order to have Sauls sentenced to the proper place of confinement as soon as we obtain proper evidence of his age. Having been informed that Sauls was born in Arizona on a certain date, we wrote to the Arizona State Department of Health, which advised us that they have no record of his birth. We have written to the prosecuting attorney of the county where Sauls was convicted in order to obtain some evidence of Sauls' age other than his own testimony.

Certain persons convicted of felonies for the first time, between the ages of seventeen and twenty-five may be sentenced to the Intermediate Reformatory for Young Men at Algoa (Section 9117, R. S. Mo. 1939). A boy under seventeen on date of sentence for a felony cannot be sentenced to the institution at Algoa, but must be sentenced either to the institution at Boonville, or to the penitentiary, under the statutes discussed above.

CONCLUSION

In our opinion, jurisdiction to sentence boys under seventeen on date of sentence, adjudged to be delinquent children, to the Missouri Training School for Boys, is vested in the circuit courts and the Cape Girardeau Court of Common Pleas. Jurisdiction to sentence boys between the ages of seventeen and twenty-one on date of sentence, adjudged guilty on the same charge, is vested in the circuit courts, the Cape Girardeau Court of Common Pleas, and other courts of record having jurisdiction of misdemeanors, such as, for example, the St. Louis Court of Criminal Correction. There is no juvenile court in

Missouri. Jurisdiction to sentence boys under seventeen on date of sentence, convicted of a felony under the general law, is vested in the circuit courts.

A boy so convicted of a felony punishable by imprisonment in the penitentiary for a term of not less than ten years, may be sentenced either to the penitentiary or to the Missouri Training School for Boys. One so convicted of any other felony cannot legally be sentenced to the penitentiary, but must be sentenced to the Missouri Training School for Boys. Where a boy has been erroneously sentenced to the penitentiary, the Circuit Court of Cole County has jurisdiction in a habeas corpus case to sentence the boy to the proper place of confinement, the Missouri Training School for Boys, at Boonville.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

EH:VC

ANIMALS: Slaughter of horses and mules not unlawful if
done in humane manner.

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December 31, 1941

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Hon. Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri



Dear Sir:

We are in receipt of your request, dated December 17, 1941, for an opinion from this office, which request reads as follows:

"I am informed that one or two persons are making a business of buying up old and disabled horses, shooting them in this County, and then hauling them to Rich Hill where they are skinned and the carcasses sold for soap, fertilizer, etc.,

"Provided this killing is skillfully and properly performed, I personally do not believe such killing is malicious and prohibited by Sec. 4557, R. S. Mo., 1939.

"Malice, in its legal sense means a wrongful act done intentionally, without just cause or excuse.

"Two members of the local bar made informal complaints about this horse-killing, or I would not ask the opinion of your office regarding it. Would appreciate your views."

In reply we wish to state that we do not find that the State Legislature has ever seen fit to enact statutes regulating the slaughter of horses and mules for the purposes indicated in your opinion request. At the outset we assume that the manner and method used by the persons in the business described in your opinion request could not in anywise be committing a nuisance.

Of course, if they were committing a nuisance, we think that they would be subject to be enjoined for permitting same. Further, we call attention to the case of *McCrory v. Fisher*, 108 S. W. (2d) 413, 1. c. 417, Par. 5, where the court said:

" * * * The exercise of a governmental power which regulates the public health, welfare, and the general property rights of the people, belongs to the police power of the state, in the regulation of which due process of law is not denied, merely because the various steps required to be taken in the carrying out of regulatory provisions do not require formal court proceedings. * * * "

Now, turning to the portion of your opinion request wherein you suggest that Section 4557 R. S. Missouri, 1939, might be applicable, which section reads as follows:

"Every person who shall willfully and maliciously or cruelly kill, maim, wound, beat or torture any dumb animal, whether belonging to himself or another, shall upon conviction be punished by imprisonment in the county jail for not more than three months, or by a fine of \$50.00 or by both such fine and imprisonment: Provided, that nothing herein contained shall be construed to prohibit or interfere with any scientific experiments or investigations: Provided further, that nothing in this sections shall apply to the hunting or trapping of wild animals."

We call attention to 3 C. J. Pars. 203,204, Page 65, which paragraphs we do not copy for the sake of brevity, but call special attention to the case of *People v. Downs*,

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136 N. Y. S. 440, l. c. 444, where the court had this to say in part:

"The infliction of pain alone is insufficient for the purpose of such a prosecution as this; but the question is: Was unjustifiable pain inflicted? The statute itself contemplates and permits the infliction of a certain amount of pain. Certain physical pain may be necessary and justifiable in given cases. I would call it a legal license permitting the infliction of unavoidable pain. Many are the cases where animals suffer, or are permitted to suffer physical pain, but it is insufficient in law to warrant a holding by a committing magistrate. *

* * "

Also, in the case of Horton v. State, 124 Ala. 80, l. c. 81, 25 S. 468, where the court said:

"The word 'cruelly' as employed in the statute must have some significance, and when taken in connection with such other words as 'torture,' 'torments,' 'mutilates,' or 'cruelly beats' found therein, as well as with the manifest purpose of the statute, evidently means something more than to kill. * * *"

Again, in the case of State v. Pugh, 15 Mo. 509, l.c. 511, the court said:

"The torture here alluded to must consist in some violent, wanton and cruel act necessarily producing pain and suffering to the animal. * * *"

And, in the case of State v. Grise, 37 Ark. 456, where the court said:

"The term 'needless' cannot be reasonably construed as characterizing an act which might by care be avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction."

See 3 C. J. S. P. 1190, Par. 7.

From the reading of the aforesaid cases, and from the reading of Section 4557, supra, we are of the opinion that said section would not apply, assuming that the persons in all instances killed the horses and mules in a most skillful and humane manner, and that said section is applicable when a person commits a cruel, wanton and malicious act in the killing or mutilating of animals.

CONCLUSION

We are of the opinion that in the absence of any statute controlling the slaughter of horses and mules, so long as the slaughter is performed in a skillful manner and for a useful purpose, so as to not commit a nuisance or in anywise done in a malicious, wanton or cruel manner it is lawful in Missouri and Section 4557, supra, has no application.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

CRIMINAL COSTS: Sheriff is only entitled to a reasonable amount
JURIES: allowed by the circuit judge and prosecuting
attorney for the board and lodging of a jury.

July 7, 1941

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Honorable Tom Moore, Judge
Ozark, Missouri

Dear Sir:

We are hereby answering your request of July 7, 1941, in reference to the payment of board and lodging for jurors in custody of the sheriff.

The facts upon which we base our opinion read as follows:

"When the jury is ordered kept together, is the sheriff entitled to \$26.00 for board and lodging for the jury where he does not furnish them three meals and lodging, or is the fee to be apportioned by allowing one-fourth for each meal in the day and the additional one-fourth for lodging if they are kept together overnight; in other words, if the sheriff furnishes lunch and supper, is he entitled to one-half of the \$26.00 or all of it, although he does not furnish lodging and breakfast to the jury?"

Section 4221, R. S. Missouri 1939, partially reads as follows:

"* * * And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day

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for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Under the above partial section it will be noticed that the following term is used, "* * for which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge;*" This clause is a limitation on the amount that can be allowed. It does not specifically state that two dollars per day should be allowed.

In construing statutes one must take other sections which apply to the same subject matter. Section 4237, R. S. Missouri 1939, reads as follows:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and

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paid over to those entitled to the fees allowed."

Under the above section it is the duty of the prosecuting attorney to examine all bills of costs and among other things to determine "* * and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, * * * " Also, under the above section the prosecuting attorney and the judge shall certify to the state auditor, or to the clerk of the county court, as to the amount of costs due by the state or county. Under partial section 4221, supra, the words "reasonable compensation" are used and under Section 4237, supra, it is the duty of the prosecuting attorney and the judge to determine whether or not the compensation allowed for the board and lodging of jury-men is reasonable.

The law is well settled that before any fees or costs are allowed to a public official he must be able to place his finger upon the law allowing him such fees. Under the facts in your case there is no specific allotment of fees for the board and lodging of jurors, but there is a limitation of two dollars per day for each jurymen and the officer in charge. In the case of City of Greenfield v. Farmer, 190 S. W. 406, par. 2, the court, in passing upon the allotments of costs and fees, said:

"It is the well-settled law of this state and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and, unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous. It is held in the case of State ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S. W. 499, that no costs can be taxed in any court except such as the statute in terms allows. In Ring v. Chas. Vogel Paint & Glass Co., 46 Mo. App. loc. cit. 377, the following language is used:

"* * * * It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of

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statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

As to the construction of the words "reasonable compensation" as set out in Section 4221, supra, the Supreme Court of this state in defining the word "reasonable" in the case of State v. Coulter, 204 S. W., page 5, l. c. 6, said:

"We notice that the words 'ordinarily careful' are used in the instruction in this case in place of the word 'reasonable' used in the cases cited. Black's Law Dictionary defines 'reasonable' thus: 'Agreeable to reason; just, proper, ordinary, or usual.' For the purposes of this case we consider the words 'reasonable' and 'ordinary' as synonymous. * * * *"

Also, in the case of Gray v. Cheatham, 52 S. W. (2d) 762 (Texas), l. c. 764, the Supreme Court of Texas, in defining the words "reasonable compensation", said:

"* * * Reasonable compensation might include more than the reasonable value of services rendered. By reasonable compensation is meant what would reasonably compensate one for a particular service under particular facts; and what would be the reasonable value of the services rendered would be what was the reasonable price paid for such service or like service in the community where such services or like services were rendered."

Under the above opinion it is always a question of fact as to the amount that would be considered reasonable compensation. It depends upon the circumstances, the time and the reasonable value for like services.

Reasonable compensation, as passed upon by the

July 7, 1941

circuit judge and the prosecuting attorney, in allowing this fee, depends upon the facts of each individual act of a sheriff in the boarding and lodging of the jury. In the case of *E. Wagner & Son v. Commissioner of Internal Revenue*, 93 F. (2d) 816, 1, c. 818, the circuit court of appeals, in a tax income case, held as follows:

"The statute requires that an allowance for salaries or other compensation must be reasonable, before the taxpayer is entitled to a deduction therefor from gross income. Whether or not such salary or other compensation is reasonable is a question of fact. *Sunset Scavenger Co. v. Commissioner*, 9 Cir., 84 F. 2d 453, 454; *General Water Heater Corp. v. Commissioner*, 9 Cir., 42 F. 2d 419, 420. Generally, 'reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises in like circumstances.' * * * "

CONCLUSION

In view of the above authorities it is the opinion of this department that the circuit judge and prosecuting attorney, who certify the fee and cost bills, should determine whether the fee asked by the sheriff for the boarding and lodging of the jury and sheriff in charge of the jury, is reasonable.

It is further the opinion of this department that the reasonableness of the fee or cost bill is a question of fact and depends upon all of the circumstances as to time, place and market value of such necessities furnished by the sheriff to the jury and the deputy sheriff in charge.

It is not for this office to pass upon questions of fact which are directly under the supervision of the circuit judge and prosecuting attorney who are more acquainted with the service, costs and market value of such accommodations furnished by the sheriff.

APPROVED:

Respectfully submitted

VANE C. THURLO
(Acting) Attorney General

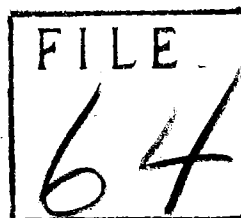
W. J. BURKE
Assistant Attorney General

WJB:DA

COUNTY COURT: Nurses' Home cannot be constructed under
COUNTY HOSPITAL AND levy for construction of a county hospital.
NURSES' HOME:

August 25, 1941

Honorable Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Mr. Morris:

This will acknowledge receipt of your letter under date of August 7, 1941, requesting an official opinion which reads as follows:

"I would appreciate an opinion on the following question: We have a County hospital here in Pike County established under Article 27 of Chapter 111 of the Revised Statutes of Missouri for the year 1919 which provides for the establishment and maintenance of County Hospitals. The trustees now desire to build a nurses' home in addition to the hospital as the nurses at present have rooms on the third floor of the hospital. It is almost imperative that the hospital get this added facility as they are in dire need of additional rooms. When they built the hospital the petition which was granted read as follows:

"Petitioners ask that an annual tax be levied by your Honorable body at such a rate as may accord with the best judgment of the Court, not to exceed however, one mill on the dollar, for the establishment, maintenance and support of a public hospital at said

August 25, 1941

City of Louisiana, Pike County, Missouri.'

"Now would the words 'maintenance and support' give the County Court and the trustees authority to use the annual tax to build a nurses' home?"

We are unable to locate Article 27, Chapter III, R. S. Missouri 1919, referred to in your letter. However, we assume that your reference is to Chapter III, Article 5, R. S. Missouri 1919. Section 12220, R. S. Missouri 1919 provides for the purchase of land and for the building of a hospital and reads as follows:

"Whenever any number, not less than one hundred, of the qualified voters of any such county, who are taxpayers therein, shall present to the county court of such county a petition, in writing, praying the county court that an election be held to authorize the incurring of an indebtedness, and the levying of a direct tax, or the issuing of bonds therefor, for the purpose of purchasing land and building thereon a county hospital for the poor of such county, such county court, upon the presentation of such petition, may, if it so determine, at a regular term thereof, and by order of record of said court, adjudge it necessary for such county to incur an indebtedness and levy a direct tax or issue bonds therefor, for the purpose of purchasing the land and building such a hospital; such county court may, at the same term, order a special election in said county, for the purpose of providing for the incurring of such indebtedness and levying a direct tax or issuing bonds therefor. In said order for such election there shall be recited the amount and purpose of the indebtedness proposed to be incurred, and the number of years during which a direct tax shall be levied, and the amount of

such direct tax on each one hundred dollars' valuation each year to pay said indebtedness; or in case of the issuance of bonds, the length of time for which bonds shall be issued, the rate of interest, the rate of increase of the tax levy to pay the interest, and provide a sinking fund to pay the bonds; and the date on which the election is to be held shall also be recited in said order of the county court."

Counties are merely quasi corporations or political subdivisions of the State and neither the county or the county court has any power unless given by the Constitution of the State or a statutory enactment. In Ray County, to the use of the Common School Fund, v. Bentley et al., 49 Mo., 236, l.c. 242, the court in so holding said:

"But counties have not the powers of corporations in general. They are merely quasi corporations, political divisions of the State, and they act in subordination to and as auxiliary to the State government. (Hann. & St. Jo. R.R. Co. v. Marion County, 36 Mo. 303; State v. St. Louis County Court, 34 Mo. 546; Barton County v. Walser, 47 Mo. 189.) They have no power to purchase land or hold the same unless it is given to them by statute.* * *"

The court, in holding the county court only exercised like powers, said, (l.c. 242):

"The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it

acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. (Reardon v. St. Louis County, 36 Mo. 555.)"

The first statutory enactment for the construction of county hospitals was in 1907, which provisions are very similar to the above quoted section of the R. S. Missouri 1919.

You inquire if the county is authorized to build a nurses' home on the annual tax as provided by the county court for the maintenance and support of this public hospital.

In construing a statutory provision one of the cardinal rules is to determine the intention of the Legislature at the time of such enactment. In Wallace et al. v. Woods, 102 S. W. (2d) 91, 1.c. 95, the court said:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically,' is properly given consideration. * * * 2 Lewis, Sutherland on Stat. Const. (2d Ed.) Sec. 363; Endlich on Interpretation of Statutes, Sec. 329; and Maxwell on Statutes (5th Ed.) 425. Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2d) 920, loc. cit. 925."

Therefore, we must look to the word hospital in the above provisions which authorized the construction of a county hospital, and not as hospital may be interpreted at this writing. It was common knowledge when the above statutory provisions were enacted, that practically no hos-

pitals included nurses' homes. Today, it is not uncommon to have, either attached to the hospital or in a separate building on the same lot or adjoining thereto, a nurses' home.

Funk and Wagnall, New Standard Dictionary, defines "hospital" as follows:

"An institution for the reception, care and medical treatment of the sick or wounded; also, the building used for that purpose."

Section 9832, R. S. Missouri 1939, subdivision 8, defines hospital in the narcotic act which was only enacted in 1937, and reads as follows:

"'Hospital' means an institution for the care and treatment of the sick and injured, approved by the State Board of Health if operated by and for medical physicians or by the State Board of Osteopathic Registration and Examination, if operated by and for osteopathic physicians, as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist or veterinarian."

Now it is true that the modern version of hospital is quite different. The Encyclopaedia Britannica, Volume 11, 14th Edition, page 792, defines the modern version of hospital in this manner:

"The evolution of the modern hospital affords one of the most marvellous evidences of the advance of scientific and humanitarian principles which the world has ever seen. Formerly the hospital was merely a building or buildings, very often unsuitable for the

purposes to which it was put, where sick and injured people were retained and more frequently than not died. The hygienic condition, the methods of treatment and the hospital atmosphere were all so relatively unsatisfactory as to yield a mortality in serious cases of 40 %. At the present time in all large cities, great hospitals have been erected upon extensive sites which are so planned as to constitute in fact a village with many hundreds of inhabitants. This type of modern hospital has common characteristics. A multitude of separate buildings are dotted over the site, wards for male and female patients, residential blocks for medical officers, nurses, servants, administration block, store-rooms, kitchens, etc., and the whole institution may cover 20 acres or upwards. In one such institution, within an area of 20 acres, there are 6m. of drains, 29m. of water and steam pipes, 3m. of roof gutters, 42m. of electric wires."

In *Johnson, City Tax Collector, v. Mississippi Baptist Hospital*, 106 So., 1.c. 3, the court in construing a tax statute exempting hospitals held this did not include a nurses' home on an adjoining lot. In so holding the court said the law provided:

"The following property, and no other, shall be exempt from taxation, to wit:

"(f) Property appropriated to and occupied and used for any hospital or charitable institution."

"(1) In our view the maintaining of a

home for the nurses employed by the hospital and for other employees of the hospital is not a hospital purpose within the meaning of the statute. The statute contemplates such uses as are reasonably necessary to an effective discharge of the powers and duties of the hospital under its charter powers. It is not necessary, for the proper operation of a hospital, that the corporation should furnish homes for the nurses when not on duty. They are no different from other people who work and pay for board and lodging or furnish their own homes when off duty and performing no service necessary for the proper operation of a hospital. It would be an unwarranted distinction, by construction of the language of the statute, to hold that buildings used merely as a rooming house for employees come within the meaning of the statute. See *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 P. 252; *Philadelphia v. Jewish Hospital Ass'n*, 148 Pa. 454, 23 A. 1135; *Re Sisters of Blessed Sacrament*, 38 Pa. Super. Ct. 640; *Phi Beta Epsilon Corporation v. Boston*, 182 Mass. 457, 65 N. E. 824; *Calvary Baptist Church v. Milliken*, 148 Ky. 580, 147 S. W. 12; *People ex rel. v. Y. M. C. A.*, 157 Ill. 403, 41 N. E. 557; *Auditor General v. Woman's Temperance Ass'n*, 119 Mich. 430, 78 N. W. 466; *School District v. Howe*, 62 Ark. 481, 37 S. W. 717; *Baptist B. & M. Society v. Boston*, 204 Mass. 28, 90 N. E. 572; *All Saints Parish v. Brookline*, 178 Mass. 404, 59 N. E. 1003, 52 L. R. A. 778; *First Christian Church v. Beatrice*, 39 Neb. 432, 58 N. W. 166.

"In the case of Phi Beta Epsilon Corporation v. Boston, 182 Mass. 457 at page 459, 65 N. E. 824, 825, the court said:

"But the housing or boarding of students is not of itself an educational process any more than is the housing or boarding of any other class of human beings. The nature of the process, so far as respects its educational features, is not determined solely by the character of those who partake of its benefits. Suppose a number of students of the Institute of Technology should conclude to provide lodging and board for themselves on some co-operative plan, and for that purpose should buy and occupy a house not in any way connected with the grounds or property of the institution, could it be said that such a house was used for an educational purpose? Suppose again, that these students were incorporated for the purpose of providing board and lodging for themselves and others while students, could it be said that the use of the real estate for such purposes was and educational process? The trouble with the plaintiff's case is that the property may have been found, as above stated, to have been used as a dormitory or boarding house, that this was the dominant use and was in no way necessary or convenient for such slight and incidental education or scientific instruction as was furnished by the plaintiff, and therefore was in no proper sense a part of, or merely incidental to, such instruction."

"We are therefore of the opinion that

the nurses' home and the lot in which it is situated in the city of Jackson, assessed for taxation by the city, is subject to taxation, and that it was error to overrule the demurrer."

In *Burke v. Kansas State Osteopathic Association*, 111 Fed. (2) 250, 1.c. 256, a suit was brought by an association of osteopaths against the collector of internal revenue to enjoin the collector from refusing to issue and reissue narcotic licenses to osteopathic physicians in the State of Kansas. The counsel for the association in this case contended that osteopaths were physicians as that word was used in the Federal Narcotic Act. The court held that under the Act of 1913, as the courts of Kansas had construed the Act, osteopaths did not practice surgery and further held that if osteopathic schools of good repute do now teach surgery and have abandoned their former opinion as to the necessity of surgery, the fact has never been recognized by the legislature or the courts of this state. In other words, the legislature has not amended said Act of 1913 and in view of the decisions rendered by the courts of the State of Kansas, as hereinafter mentioned, the word osteopath as used in the Act of 1913 still has the same meaning as it did at the time of the enactment. Therefore, in 1913 at the time of the enactment of this Kansas law, there was a definite meaning to the term "osteopathy" and that meaning was clearly stated in the opinion rendered by the Kansas Supreme Court as early as 1911, *State v. Johnson*, supra. In the above case the court quoted from *State ex rel. v. Gleason*, 148 Kan. 1, 79 Pac. (2) 917, wherein the Supreme Court of Kansas said in part, (1.c. 253-54; 1938):

"The general use of a knife or other instruments in surgical operations was regarded as unnecessary and opposed to the osteopathic system of treatment. Apparently the legislative intent of the act of 1913 (Ch. 290) was to recognize the system of osteopathy as they taught in its schools and colleges of good repute, and to authorize its practice by those who believed in and conformed to its teachings. Our legislature recognized that there is a broad field

for the use of such a system of the healing art. If, as is suggested by counsel for defense, osteopathic schools and colleges of good repute, and those who practice osteopathy, have abandoned their fundamental theory that surgery, in the main, should be confined to manipulation without the use of the knife and other instruments, that fact never has been recognized by the legislature or the courts of this State."

The above case supports our contention that the word hospital in the provisions providing for a county hospital shall have the same meaning as it had at the time said provision was enacted. If these provisions pertaining to the building of a county hospital were of recent enactment then a nurses' home might be considered as a necessary part of the county hospital, but since a hospital at the time of enacting the above provisions did not include a nurses' home then it is the opinion of this department that no nurses' home may be constructed out of this levy.

There is a well established rule that where an agent is clothed with general powers the means and measures necessary to effectuate the powers granted attend the grant of authority as inevitable incident. (State ex rel. Gates, 67 Mo., 1.c. 143; Church v. Hadley, 240 Mo., 1.c. 692-698.) There are also cases which hold that where authority is given for the building of a schoolhouse that the ground for said schoolhouse to be constructed upon may also be purchased and that the board in charge of the work is authorized to purchase said ground for the reason that it is an incidental power because indispensable to attain the end. (State v. Board of Education, 76, S. E. 127; Board of Education v. State, 67 Pac., 559, 1.c. 560.)

However, there is a distinction between such line of authorities and the instant case for the reason that to

August 25, 1941

build the schoolhouse it was necessary to have some land on which to construct said schoolhouse. Naturally it was incidental thereto and indispensable, but in this case the nurses' home was not necessary and indispensable at the time these provisions were enacted. Therefore, we must hold that the nurses' home cannot be constructed out of the levy contemplated, and in the absence of any statutory or constitutional provision authorizing the building of said nurses' home the county cannot construct same.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARH:MAW

OFFICERS: - Acceptance of "tips", even though
after office hours - against public
policy.

September 18, 1941

Hon. Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of September 9, 1941, which reads as follows:

"We would appreciate an opinion as to
whether the Recorder can receive tips
for issuing marriage licenses outside
his office hours."

We understand that by the word "tips", as used
in your letter, you mean "small denominations given
and intended as personal gifts, in addition to the
regular charge for the services rendered." (149 Ky.
377, 149 S. W. 828, Bouvier's Law Dictionary.)

Section 3366 R. S. Missouri, 1939, provides
as follows:

"The recorder shall record all
marriage licenses issued in a well-
bound book kept for that purpose,
with the return thereon, for which
he shall receive a fee of one dollar,
to be paid for by the person obtain-
ing the same."

In the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860, the Court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * * (cases cited) * * .

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. * * * (cases cited) * * ."

In the case of Robinson v. Huffaker, 23 Idaho 173, 129 P. 334, 337, it was held:

" * * * * *
that where one accepts an office with compensation fixed by law, he has no legal claim for extra compensation, and a promise by the county board to pay him an extra fee was not binding, though he had rendered services and exercised a degree of diligence greater than could legally have been required."

In the case of In Re Williams, 128 S. W. (2d) 1098, 1. c. 1102, the Court said:

"However, 'the principle is well settled, on considerations of public policy, that an officer cannot lawfully receive, or recover, a reward for the performance of a service which it is his duty to discharge. This rule has been applied to jailers; policemen; sheriffs; deputy sheriffs.' (23 R. C. L. pp. 1126, 1127.)"

We quote from the above cases in order to show the general propositions of law which we think have a bearing on the question asked in your request.

In the case of Wakefield v. VanTassell, 202 Ill. Rep. 41, 1. c. 44, the Court held:

"It has been well said that public policy is a variable quality, but that it is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex, and that the principles to be applied have always remained unchanged and unchangeable. 'The relations of society become, from time to time, more complex. Statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required.' (Davies v. Davies, L. R. 36 Ch. Div. 364.) * * * * *

The Court, in this case, also quoted, with approval from the case of Brooks v. Cooper, 50 N. J. Eq. 761, the following:

"Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void, and not susceptible of enforcement, ' - as, for instance, an agreement to withdraw an election petition in consideration of money was held void. (Coppock v. Bower, 4 M. & W. 361.) And so an agreement to obtain a pardon was held void. (Kribben v. Haycraft, 26 Mo. 396.) Likewise contracts for services known as 'lobby services,' * * * * * ."

In the case of *People v. Chicago Gas Trust Co.*, 130 Ill. 268, the Court held:

"Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. The question, then, in this case to determine is, does the condition in the deed have a tendency to be injurious to the public or to be against the public good."

We also quote from the case of *Trist v. Child*, 88 U. S. Rep. 441, l. c. 450. While this is a case

September 18, 1941

growing out of a contract for conducting a lobby upon congressmen, the Court, in refusing to uphold the contract, defined and characterized "public policy" in the following language:

"The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that, those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments."

We have made a diligent search to find a case identical to the one which we thought you had in mind at the time you made the opinion request. Our endeavors lead us to cite the case of Yuma County v. Donald B. Wisener, 46 P. 115, 99 A. L. R. 642. Other cases may be found digested in the A. L. R. In the Yuma County case, supra, the following is found at page 645:

"The gist of the first cause of action is that the defendant, by means of the scheme or system above set forth, makes nonresident applicants for marriage licenses believe that they can only obtain a license to marry by paying a fee of \$4.50, when as a matter of law such licenses are required to be issued upon the payment of the fee of \$2, and that when by reason of such deceit on the part of defendant parties make the excess payment, he keeps that for his own use, on the ground that it is not money belonging to Yuma county. "

The Court in this case had this to say at page 646:

"That the conduct set forth in the first cause of action is improper and unethical is obvious to any right-minded person. Any officer who gives a citizen to understand in any manner that the law requires a fee for the performance of a duty in excess of the legal one, and who retains such excess, when paid, for his own use, is certainly guilty of the most reprehensible conduct, which comes perilously near to being a criminal offense, if it is not actually such. Indeed, counsel for defendant in his brief and in his argument before this court did not attempt to defend the conduct of his client, but contended solely that, regardless of what the moral aspects of the situation may be, Yuma county is not entitled to recover the money which the client has collected. This, of course, is the only legal question before us, and we proceed to consider it. In so doing we shall discuss the two causes of action separately."

Hon. Mark Morris

-7-

September 18, 1941

From the reading of this case, and the cases supra, one can readily see the nefarious methods that could be fostered upon the public.

CONCLUSION.

Therefore, in conclusion, we are of the opinion that the acceptance of "tips" by Recorders for issuing marriage licenses, although they may be received outside of office hours, is against public policy and is condemned by the law.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

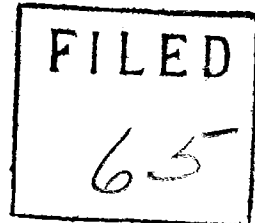
VANE C. THURLO
(Acting) Attorney General

ERC: RW

NEPOTISM: A ~~father~~ is not related to the ~~sister~~ of his son's wife by affinity, and the appointment by the father of such person as an official clerk does not violate Sec. 13, Article 14, of the Constitution.

July 25, 1941 7/25

Hon. Fred E. Mueller
Associate Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

We are in receipt of your letter of July 22nd wherein you ask for an opinion from this office upon the following statement of facts:

"C. Hillmann, a Justice of the Peace of Normandy Township, desires to appoint Dorothy Jordan as his clerk, under the provisions of Section 2774, R. S. 1939. Dorothy Jordan is a sister of Victoria Jordan Hillmann, who is the wife of Kenneth Hillmann, the son of C. Hillmann, the Justice of the Peace. Justice Hillmann asks the opinion of this office whether or not the appointment of the sister of his son's wife would be a violation of Section 13, article 14 of the Constitution of Missouri, which provides as follows:

'Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment.'

July 25, 1941

"We advised him that we did not think that Dorothy Hillmann was related to him by affinity but we found no Missouri Case bearing on the situation. We did however, find that there are a number of cases which hold that the sister of a man's wife is not related by affinity to that man's blood relative. These cases we located in 'Words and Phrases' (Permanent edition) volume 2, pages 662, 664 and page 65 of 'Pocket Parts' and under the word Affinity, Kinsman of wife and of husband.

"Justice Hillmann is without a clerk at this time and desires to make an appointment as soon as possible. We would like to have your opinion in this matter at your earliest convenience."

Under the provisions of Section 13, Article 14, of the Constitution of Missouri, which is correctly set forth in your request for an opinion, persons related within the fourth degree, either by consanguinity or affinity, cannot be appointed to office.

We are of the opinion, however, that if the Justice of the Peace should appoint the sister of his son's wife, such act would not be in violation of the constitutional provision above referred to, because he is not related to such person by consanguinity or affinity in any degree as is prohibited by the said constitutional provision.

In 2 C. J. 378, it is said:

"Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Brittanica, (11th Ed.) Vol. 1, page 301, the author has the following to say about affinity:

"The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

In the case of Pemiscot Land & Cooperage Co. vs. Davis, 147 Mo. App. 194, 1. c. 202, the court had this to say:

"The juror challenged stated that he was a second cousin to the wife of one of the defendants. That brought him within the degree of affinity, though not of consanguinity, prescribed by the statute. One is within the prescribed degree of affinity when the 'relationship is by marriage between a husband and his wife's blood relations, or between a wife and her husband's blood relations' (Webster's New International Dictionary, Ed. 1910)."

"There is no 'affinity' between blood relations of husband and blood relations of wife, within constitutional provision prohibiting judge from presiding on trial of any cause where the parties or either of them shall be connected with him by 'affinity' or 'consanguinity.' (See cases cited.) Words and Phrases, Vol. 2, (Pocket Part) page 65.

It will be noted from reading the above definitions and cases cited that the relationship by affinity comes into force through marriage, and upon the statement of facts before us it certainly could not be said that the father and the sister of the son's wife would be kin by affinity, for the sister would be kin only to the son because of the son's marriage to her sister, and it would be through this marriage that such affinity would arise.

July 25, 1941

CONCLUSION

We are of the opinion that a father is not kin to the sister of his son's wife either by consanguinity or affinity. Therefore, the Justice of the Peace referred to in your opinion request would have the right to appoint the sister of his son's wife, and such appointment would not be in violation of Section 13, Article 14, of the Constitution of Missouri.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:HR

TAXATION: Even the cemetery association later sells off part of land said land tax exempt during time held by association for cemetery purposes.

January 2, 1941



Hon. Martin L. Neaf
Assessor, St. Louis County
Clayton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 13, 1940, requesting our opinion on whether certain property formally owned by the Memorial Park Cemetery Association was subject to real estate tax during said time.

The facts are, as we understand them, that the Association has been in existence about twenty years and its original cemetery tract comprised about 400 acres of land. A number of years ago 200 acres of this tract was abandoned so far as holding it for use for cemetery purposes is concerned. Since the beginning the remaining 200 acres has been dedicated for cemetery purposes. Drives and roadways were laid out therein and the plat we have shows they extend in the portion in question. From time to time throughout the years the tract was landscaped as demands necessitated. During this time some 20,000 lots have been sold and over 5,000 bodies have been buried in various parts of the 200 tract. A portion of this tract, consisting of 23 acres off the east side, was never landscaped, but was included in the original dedication and over 30 burial lots were sold therein. In 1939, the Association repurchased the lots sold in this 23 acre tract, vacated the dedication and sold the whole of said 23 acre tract to private enterprise for development as a residential subdivision.

In our opinion to you under date of June 6, 1940, we had occasion to consider a similar question in connection with the caretakers plot and house in the Salem Cemetery. We cited the case of National Cemetery Association

v. Benson 129 S. W. (2d) 842 (Mo. Sup.) where it was said
l. c. 844:

"We must determine therefore what is included under the word 'cemetery.' A cemetery has been defined to be: 'A place or ground set apart for the burial of the dead, orig. a Roman catacomb, later the consecrated yard of a church so used, now any burial ground, esp. on a large scale; a graveyard; a necropolis.' (Webster's New International Dictionary, 2d Ed.) 'A cemetery is a place set apart, either by municipal authority or private enterprise, for the interment of the dead.' (10 Amer. Juris., Cemeteries, Sec. 2, p. 487.) To invoke the exemption the property must have been 'set apart' for the burial of the dead."

The court held the property taxable in that case saying l. c. 845:

"We can find nothing in the record to show that the land assessed here has either been used as a cemetery or that active measures have been taken toward preparing it for cemetery purposes."

We said in the opinion heretofore mentioned
page 5:

"Note also that the Supreme Court in the Benson case * * * stated with respect to the failure of proof, that no 'active measures have been taken toward preparing it for cemetery purposes.' We take it from this statement, that had the evidence shown that steps had been taken toward preparing the unplatted 65 acres for cemetery purposes the conclusion of the Court would have been the reverse of what it was."

"From this we infer the rule to be that land prepared for cemetery purposes, although no burials have been made therein, is tax exempt."

Hon. Martin L. Neaf.

- 3 -

January 2, 1941.

Thus it appears that the tax exemption requires cemetery lands to be "set apart" for the burial of the dead," and steps be taken to prepare the land for that purpose. No burials are required.

We think the facts in this situation show that these requirements were met, throughout the years the 23 acre tract was owned by the Association. The land was set apart (dedicated) for cemetery purposes and steps (the platting of lots, laying out of drives and roadways, and selling lots therein) were taken to prepare the tract for such purpose.

Therefore, it is our opinion that the land in question was not subject to taxation during the time it was held by the Memorial Cemetery Park Association for cemetery purposes.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General.

COVELL R. HEWITT
(Acting) Attorney General

LLB/mc

TAXATION AND REVENUE: The taxpayer can complain to the State Tax Commission when his proper appeal from the county assessor to the county board of equalization has been denied for the reason he had not introduced evidence in support of the affidavit for appeal.

June 6, 1941

Nangle and Bush
Suite 1600 Dierks Building
Kansas City, Missouri



Attention: Mr. Hilary A. Bush
County Counselor

Gentlemen:

We are in receipt of your request for an opinion from this department which reads as follows:

"The County Court of Jackson County has asked me to request your opinion on the following matter, to-wit:

"Numerous taxpayers of Jackson County have appealed from the action of the County Board of Equalization, to the State Tax Commission. The question has arisen as to their right to appeal without first exhausting their remedies before the County Board of Equalization by prosecuting their appeal to said County Board. The Jackson County Board of Equalization meets to hear appeals pursuant to Section 11381, Revised Statutes of Missouri, 1939, on the fourth Monday in March. During the meeting of the County Board numerous taxpayers filed appeals from the Assessor's figures to said County Board in proper form. Due to the great number of appellants, the County Board was unable to hear them on the exact day and hour when such appeals were filed. The County Clerk, acting as Secretary of the Board, accepted the filing of the appeals and advised them to return at a later

June 6, 1941

date for their hearing. Some of these appellants failed to return for the hearing and at the adjournment date of the County Board of Appeals, its minutes were made to show that, 'No person appearing the appeal is hereby denied.'

"We would like to attack the jurisdiction of the State Tax Commission to hear any appeals pending before it where the appellant to the County Board failed to appear and give evidence concerning his appeal.

"The recent case of State v. Gardner, 148 S. W. 2d, 780, sets out the steps necessary before an appeal may be heard by the State Tax Commission, and one of the steps therein included is a hearing before the County Board. To hold that merely filing a written document with the Secretary of the Board and then failing to pursue that remedy to an actual hearing before the Board, does not in our minds constitute a legal hearing before the County Board. It is our opinion that when the taxpayer failed to prosecute his appeal to the County Board to an actual hearing, he abandoned that appeal, and having failed to perfect an appeal to the County Board he is now disqualified from appealing to the State Tax Commission."

By the above request you conceded the fact that the numerous taxpayers filed their appeals from the assessor's figures to the county board of equalization in proper form. In view of that statement, I am presuming that the appeals were made in proper time and in proper manner. Briefly, your request is to the effect that whether or not the taxpayer must appear before the county board of equalization and prosecute his claim by way of evidence.

Section 10992, R. S. Missouri 1939, reads as follows:

"Every person who thinks himself ag-

grieved by the assessment of his property may appeal, and every appeal shall be in writing, and verified by affidavit, and shall state specially the grounds of the appeal and the matter or thing complained of, and no other matter shall be considered by the board."

We find nothing in this section that makes it mandatory upon the taxpayer to introduce any evidence other than the appeal in writing, verified by affidavit and containing the grounds of the appeal and the matter or thing complained of. In fact this section specifically states, "* * no other matter shall be considered by the board." In other words, the filing of the affidavit of appeal is all that is necessary for the county board of equalization to arrive at a proper assessment of the property set out in the affidavit.

In your request you have cited the case of State v. Gardner, 148 S. W. (2d) 780. This case, in paragraph 5 of the opinion, specifically states:

"This court en banc held in Brinkerhoff-Faris Trust & Savings Co. v. Hill, 323 Mo. 180, 193, 194, 19 S. W. 2d 746, 751 (8,9) which has been followed in at least seven recent decisions, that a taxpayer, who claims his property has been fraudulently assessed, must exhaust his remedy under these statutes before he can resort to equity; and that 'the remedy provided by statute is adequate, certain, and complete.' This decision further holds that to obtain relief from the State Tax Commission the taxpayer must file his complaint before the tax books have been delivered to the tax collector. The petition in the instant case nowhere alleges any attempt on appellant's part to complain to the Tax Commission; nor is it shown that there was time to do so after he filed his appeal with

the county board of equalization."

Under the above quotation all that is necessary for the taxpayer to do is to file his complaint before the tax books have been delivered to the tax collector. There is nothing stated therein about evidence being presented before the county board of equalization. Under the holding in this case and in other cases the taxpayer has exhausted his statutory remedy and therefore may file his complaint upon an adverse decision of the county board of equalization in the office of the State Tax Commission.

In the case of Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 19 S. W. (2d) 746, par. 9, the court stated:

"* * * * Had appellant made timely complaint to the state tax commission, the commission and the state board of equalization, to which it renders an auxiliary service, would, it must be presumed, have at once corrected the alleged discrimination in the assessments, and the state, county, and the road and school districts would have received punctually, and without abatement, the revenue accruing to each of them respectively under the law. It was clearly guilty of laches in not so doing.

"We do not recede from any of the positions taken in the Schlottzhauer Case; we merely supplement its holdings by the further holding that a taxpayer, who is aggrieved by a fraudulent assessment of his property, is not entitled to relief in a court of equity until he has first exhausted the remedies afforded by the statute."

The only holding in the case of State v. Gardner, 148 S. W. (2d) 780, and in the case of Brinkerhoff-Faris Trust & Savings Co. v. Hill, 323 Mo. 180, 19 S. W. (2d) 746, is to the effect that an equitable proceeding could not be had against an assessor where the plaintiff had

not exhausted his remedy at law.

You have conceded in your request that the taxpayers have filed their affidavits for appeal in proper form but you object to the fact that the taxpayers did not introduce evidence in support of their affidavits of appeal from the county assessor. Since the taxpayers did not return to introduce any evidence in behalf of his affidavits of appeal from the county assessor, the county board of equalization marked the pleading to show "No person appearing, the appeal is hereby denied." There is no question but that on a default judgment of any kind an appeal can be made in a proper manner and proper time.

Section 11004, R. S. Missouri 1939, reads as follows:

"The said board shall hear and determine all appeals made from the valuation of property made by the assessor in a summary way, and shall correct and adjust the assessment accordingly. The county clerk shall keep an accurate record of the proceedings and orders of the board, and the assessor shall correct all erroneous assessments, and the clerk shall adjust the tax book according to the orders of said board and the orders of the state board of equalization: Provided, that in adding or deducting such per centum to each tract or parcel of real estate as required by said board, he shall add or deduct in each case any fractional sum of less than fifty cents, so that the value of any separate tract shall contain no fractions of a dollar."

Under the above section the board is authorized to hear and determine all appeals from the assessor in a summary way and we fail to find any statute that requires the taxpayer to do anything other than the filing of the affidavit of appeal in a proper manner as set out in Section 10992, R. S. Missouri 1939.

June 6, 1941

Section 11027, R. S. Missouri 1939, paragraph 8, reads as follows:

"(8) To raise or lower the assessed valuation of any real or personal property, including the power to raise or lower the assessed valuation of the real or personal property of any individual, copartnership, company, association or corporation; Provided, that before any such assessment is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in section 11028."

Under the above partial section the State Tax Commission has the power to raise or lower the assessed valuation of his real estate or personal property which has been assessed and is on the tax rolls.

Section 11028, R. S. Missouri 1939, partially reads as follows:

"* * * and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court

June 6, 1941

at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. * * * * *

Under the above partial section the complainant, or taxpayer, must file a written complaint covering the property as set out in his appeal which was passed upon by the county board of equalization and state that assessment has not been made in compliance with law.

The holdings in the cases of State v. Garnder, 148 S. W. (2d) 780, and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 323 Mo. 180, 19 S. W. (2d) 746, were so decided for the reason that said suits were suits in equity by way of an injunction and the injunction was refused for the reason that the plaintiffs had an adequate remedy at law, that is, an appeal from the return of the assessor to the county board of equalization.

The filing of the written complaint with the State Tax Commission should not be considered as an appeal from the county board of equalization, but if made in the proper time it could be considered as an original petition of complaint. According to your request, the persons mentioned in your letter have complied with all of the law in regard to appeal from the return of the county assessor and the county board of equalization has passed upon that appeal by marking the record as "No person appearing, the appeal is hereby denied. This being the case, the two cases above mentioned, one of which is set out in your request, is not in point."

CONCLUSION

In view of the above authorities it is the opinion of this department that a taxpayer who filed a proper affidavit of appeal in the proper time on an appeal from a valuation of property set by an assessor has exhausted his remedy at law when the same is received by the county board of equalization sitting as the body of appeals at the proper time.

It is further the opinion of this department that it is not necessary for the taxpayer to introduce any evidence

Nangle and Bush

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June 6, 1941

whatsoever except filing of the affidavit which sets out the reason why he asks that his assessment be equalized.

It is further the opinion of this department that when the county board of equalization receives an affidavit of appeal from the county assessor and marks the same, "No person appearing, the appeal is denied," that the next step for the taxpayer is to file a complaint before the State Tax Commission as set out in Section 11028, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

TAXATION: Defense Bonds Series E, F, and G, not taxable as personal property.

June 26, 1941

6-27

Honorable Dan M. Nee
Internal Revenue Collector
Kansas City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of June 20, 1941, as follows:

"We have had several requests for information from taxpayers regarding savings bonds and defense bonds issued by the United States Government. These bonds do not mature until 10 years after they have been purchased but are subject to be turned in at any time within 60 days after date of purchase and interest is paid on such bonds after they have been owned for more than one year.

"The question arises as to whether such savings bonds or defense bonds must be reported on personal tax statements. We are advised by the City Counselor that they must adopt the same ruling as that authorized by the state authorities and that if such bonds are not to be reported for state and county personal tax, they are not to be reported for city personal tax.

"We would thank you to give us a ruling as to whether Government bonds should be reported on the state and county personal tax forms."

Section 10936, R. S. Missouri, 1939, is as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 10937, R. S. Missouri, 1939, the statute granting certain tax exemption, in no way purports to exempt bonds of the United States from being taxed as personal property to the owner thereof.

Section 10950, R. S. Missouri, 1939, enumerates what property shall be returned to the Assessor for purposes of taxation. It does not expressly name bonds of the United States, but is broad enough to include them. This statute first calls for a list of all real estate and then for a list of personal property. The eleventh item, following the specific enumeration of certain personal property, provides that "all other property not above enumerated * * *, and its value," be returned for taxation and requires that "under this head shall be included * * * every other species of property not exempt by law from taxation."

Our view as to the conclusion which we must reach makes it only necessary to say that, without question, bonds of the United States are personal property in the hands of the owners thereof, and that the statutes heretofore quoted are broad enough to include them. There can be no other conclusion, since the Missouri Constitution, Article X, Section 7, makes void all laws exempting property from taxation except that enumerated in Article X, Section 6, which is the same as that granted in Section 10937, supra. However, since the bonds in question are obligations of the National Government, we are governed by the rule under the Constitution of the United States and laws of Congress.

Hon. Dan M. Nee

(3)

June 26, 1941

31 U S C A, 742, which is all inclusive in its scope, provides:

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

The bonds about which you inquire are designated as United States Defense Savings Bonds, series E, F and G, issued pursuant to the Second Liberty Bond Act, 31 U S C A, 752, 754, 757, as amended 31 U S C A, 752, 754, 757b - 1940 Cumulative Annual Pocket Part - as again amended H. R. 2959, 77th Congress (approved February 19, 1941).

Section 4 of the amendment last mentioned provides:

"Interest upon, and gain from the sale or other disposition of, obligations issued on or after the effective date of this Act by the United States or any agency or instrumentality thereof shall not have any exemption, as such, * * * * * under Federal Tax Acts now or hereafter enacted; * * * * *."

The adoption of Section 4 lifts the tax exempt status of bonds of the United States theretofore fixed in 31 U S C A, 742, supra, and in 31 U S C A, 747, 748, 749, as amended 31 U S C A, 748a, 754b, 757c (c) - 1940 Cumulative Pocket Part. These latter amendments exempt these bonds "both as to principal and interest" from all taxation, except estate or inheritance taxes and graduated additional income taxes when held in sums of more than a fixed amount. The exception to tax exemption on income tax was thereafter removed.

So far as we can ascertain, the tax status of said bonds has remained the same from the removal of the income tax exception from exemption. That is, Congress has decreed that they shall be exempt from all taxation except estate and inheritance taxes. However, the adoption of Section 4, supra, again changed the tax status. Upon the authority of this section the Treasury Department has issued circulars pertaining to the sale of bonds of series E, F and G.

Circular 653, April 15, 1941, pertaining to Series E, provides, in Part II, Section 4:

"For the purpose of determining taxes and tax exemptions, the increment in value represented by the difference between the price paid for United States Savings Bonds and the redemption value received therefor (whether at or before maturity) shall be considered as interest, and such interest on Defense savings bonds is not exempt from income or profits taxes now or hereafter imposed by the United States. The bonds shall be subject to estate, inheritance, gift, or other excise taxes, whether Federal or State, but shall be exempt from all taxation now or hereafter imposed on the principal or interest thereof by any State, or any of the possessions of the United States, or by any local taxing authority."

Circular 654, April 15, 1941, pertaining to Series F and G, provides, in Part II, Section 7:

"For the purpose of determining taxes and tax exemptions, the increment in value of savings bonds of Series F represented by the difference between the price paid and the redemption value received therefor (whether at or before

maturity) shall be considered as interest, and such interest on such bonds of Series F, and interest on bonds of Series G, is not exempt from income or profits taxes now or hereafter imposed by the United States. The bonds shall be subject to estate, inheritance, gift, or other excise taxes, whether Federal or State, but shall be exempt from all taxation now or hereafter imposed on the principal or interest thereof by any State, or any of the possessions of the United States, or by any local taxing authority."

Under the case of *Weston v. City Council of Charleston*, 2 Pet. 449, 7 L. Ed. 481, a state is without power to impose a property tax upon bonds of the United States. The court, speaking through Chief Justice Marshall, said at l. c. (L. Ed.) 487:

"Congress has power 'to borrow money on the credit of the United States.' The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

"If the States and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

"But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our Republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, 'to borrow money on the credit of the United States.' Can anything be more dangerous, or more injurious than the admission of a principle which authorizes every State and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the

most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

"In a society formed like ours, with one supreme government for national purposes, and numerous State governments for other purposes; in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the States united may rightfully adopt.

"This subject was brought before the court in the case of *M'Culloch v. The State of Maryland*, 4 Wheaton, 316, when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which

is involved in this. It was discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but the conclusion was that 'all subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation.' 'The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission;' but not 'to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.' 'The attempt to use' the power of taxation 'on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.'

"The court said in that case, that 'the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government.'

"We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles

settled in the case of M'Culloch v. The State of Maryland, to be exempt from State taxation, and consequently from being taxed by corporations deriving their power from States."

We note that the Chief Justice advanced as one reason for the National Government's tax exemption the very reason for the issuance of the bonds with which we are dealing. The necessity that the right to raise funds in time of "war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost," must not be hindered by burdening that power with local taxation.

See also State ex rel. Missouri Insurance Company v. Gehner, 281 U. S. 313, 74 L. Ed. 871, 1. c. 876, wherein it is stated:

"It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. * * * * *

This rule has been maintained in an unbroken line of decisions since first laid down by Chief Justice Marshall, and bonds of the United States have never been taxable as property except as Congress waives the constitutional immunity, which it seems it may do. *Tradesmen's Nat. Bank v. Okla. Tax Commission*, 309 U. S. 560, 60 S. Ct. 688.

Hon. Dan M. Nee

(10)

June 26, 1941

The Acts of Congress above set forth only purport to waive the National Government's immunity as to interest or gain derived from the ownership or disposition of the bonds. There is no waiver of the immunity attached to the principle, or bond itself.

It is, therefore, our opinion that National Defense Bonds, Series E, F and G, are not taxable as personal property to the owner thereof, under the laws of Missouri.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

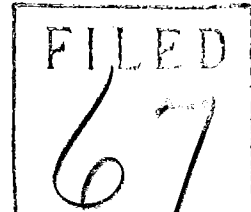
APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv

COUNTIES BUDGET LAW: Liability of county for supplies
not included in officers' budget.

January 8, 1941



Hon. Wayne Norman
Prosecuting Attorney
Unionville, Missouri

Dear Sir:

This will acknowledge receipt of your letter
of January 6, 1941, asking for an opinion as follows:

"During the year of 1939, the sheriff of
this county bought certain supplies for the
county jail, the county court, feeling that
the supplies unnecessary, wrote the manufac-
urers cancelling the order. The supplies
were forwarded and were accepted by said sher-
iff. To date the account has not been paid and
suit has been brought against county for same.
Said sheriff did not list any such expected
purchase in his budget for the year, in fact
it has been the practice in this county that
such supplies be purchased for the court house,
county farm and jail in one account and made
by the county court."

The Supreme Court has answered your question
in the case of Missouri-Kansas Chemical Corporation v.
New Madrid County reported in 139 S. W. (2d), page 457,
cited on May 4, 1940, from which case the following ex-
cerpts are taken.

"County jails are to be kept in good and
sufficient condition, Sec. 8524, R. S. 1929,
Mo. St. Ann. Section 8524, p. 6243, and the
sheriff of the county has the custody, rule,
keeping and charge of the jail, Sec. 8526, Ibid.
Construing said sections, Kansas City Sanitary
Co. v. Laclede County, Banc, 1925, 307 Mo. 10,

17, 269 S. W. 395, 398 (9, 10), relied upon by plaintiff, held a sheriff had authority to purchase the necessary supplies to keep the jail in good and sufficient condition and needed no authorization from the county court to render his county liable for necessary purchases for such purposes.

"But, in 1933 the General Assembly enacted the 'county budget law,' Laws 1933, p. 340 et seq., Mo. St. Ann. Section 12126a et seq., p. 6434, which provides for an annual budget presenting a complete financial plan for the ensuing year. We refer to some, not necessarily all, of its provisions influencing our conclusions. Section 1 makes Secs. 1 to 8 inclusive, thereof applicable to counties having 50,000 inhabitants or less and requires the preparation of an annual budget of estimated receipts and expenditures by the respective county courts. Section 2 provides a classification for proposed expenditures. Section 3 makes it the duty of every officer claiming any payment for supplies to 'submit an itemized statement of the supplies he will require for his office.' Section 4 requires the county court to balance its estimated budget. Section 5 requires the county court to show the estimated expenditures by specified classes. Sections 6 and 7 require officers expecting to receive supplies to be paid for from county funds to submit certain specified information, estimates, et cetera, including the separate listing of each item of supplies. Section 8 requires the county court to go over, revise and amend the estimates to promote efficiency and economy, the public interest and to balance the budget; requires the recording and filing of certified copies of the revised estimate, and also provides: 'Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect * * *.' Section 9 provides that Secs. 9 and 20 inclusive, apply to counties

Hon. Wayne Norman.

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January 8, 1941

having more than 50,000 inhabitants. Section 22 repeals all laws or parts of laws in so far as they conflict with the county budget law.

"(1, 2) New Madrid county has less than 50,000 inhabitants. It is admitted of record that the budget of New Madrid county for 1934, 1935 and 1936 for the purchase of disinfectant, etc. for the county jail, with the exception of the \$200 paid on account, had been exhausted at the time the several respective purchases here involved were made and that the balance sued for consists of items purchased in excess of the budget allowances therefor in the respective years. Plaintiff's representative testified he had been informed the budget 'was low,' and, as we read the record, some statements were dated as of the year following the actual delivery of the supplies. On the record made any order of the county court seeking to effect the payment of the balance due, under the quoted provision of Sec. 8, supra, would be void and of no binding force and effect. Now, absent exceptional circumstances, a sheriff's authority to obligate his county is restricted to his budget allowances. The directed verdict for the county was proper. Consult Traub v. Buchanan County. 341 Mo. 727, 731(3), 108 S. W. (2d) 340, 342(3); Carter-Waters Corp. v. Buchanan County, Mo. Sup., 129 S. W. (2d) 914(2)."

Based upon the above cited decision, it is the opinion of this Department that upon the statement of facts contained in your letter recovery cannot be had against Putnam County.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General.

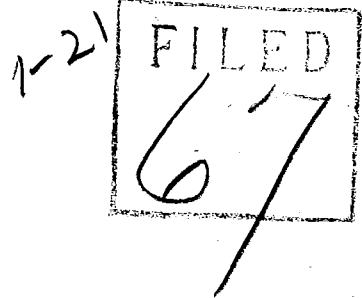
APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WOJ/me

CIRCUIT CLERKS, COUNTY CLERKS: Not entitled to retain fees to apply upon fixed salary.

January 13, 1941



Hon. Arthur Nicholson, Judge
County Court, Southern District
Eminence, Missouri

Dear Sir:

This will acknowledge receipt of your letter of January 9, 1941, asking for an opinion upon the following question:

"Will you kindly render me an opinion regarding the payment of the offices of county clerk and circuit clerk salaries in counties corresponding to this one. The thing I am anxious to know is the method the county court should follow in the payment of their salaries. It is contended by some that they should be allowed to retain the fees collected by them as part or all of their salary and that the court should pay the balance due them by county warrant. That is the policy this court has been following in some offices in this county. I have been recently informed that we should not follow this procedure, but that they should turn over to the county treasurer all monies collected by them and that they should receive a warrant in full from the county for their salary. If possible, I should like to have an answer in my possession not later than January 15."

The salary of the county clerk is provided for in Section 11811, R. S. Mo. 1929, as amended by Laws of 1937, page 440 and following, and is as follows:

"The clerks of the county courts of this State and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly install-

January 13, 1941

ments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: In counties having a population of less than 7,500 persons, the sum of \$1,000.00 for themselves and the sum of \$600.00 for deputies and assistants; in counties having a population of 7,500 and less than 10,000 persons, the sum of \$1,100.00 for themselves and the sum of \$900.00 for deputies and assistants; in counties having a population of 10,000 and less than 11,500 persons, the sum of \$1,250.00 for themselves and the sum of \$900.00 for deputies and assistants; in counties having a population of more than 11,500 persons and less than 12,500 persons, the sum of \$1,300.00 for themselves and the sum of \$1,100.00 for deputies and assistants; in counties having a population of 12,500 and less than 15,000 persons, the sum of \$1,500.00 for themselves and the sum of \$1,300.00 for deputies and assistants; in counties having a population of 15,000 and less than 17,500 persons, the sum of \$1,700.00 for themselves and the sum of \$1,600.00 for deputies and assistants; in counties having a population of 17,500 and less than 20,000 persons, the sum of \$1,900.00 for themselves and the sum of \$1,800.00 for deputies and assistants; in counties having a population of 20,000 and less than 25,000 persons, the sum of \$2,100.00 for themselves and the sum of \$2,000.00 for deputies and assistants; in counties having a population of 25,000 and less than 30,000 persons, the sum of \$2,300.00 for themselves and the sum of \$3,000.00 for deputies and assistants; in counties having a population of 30,000 and less than 70,000 persons, the sum of \$2,500.00 for themselves and the sum of \$3,500.00 for deputies and assistants; in counties having a population of 70,000 and less than 80,000 persons, the sum of \$3,000.00 for themselves and such sum for deputies and assistants as the county court shall find necessary for the prompt and proper discharge of the duties of such office, provided such sum for such deputies and assistants shall

January 13, 1941.

not exceed \$5,00.00; in counties having a population of 80,000 and less than 90,000 persons the sum of \$4,000.00 for themselves and such sum for deputies and assistants as the county court shall find necessary for the prompt and proper discharge of the duties of such office; in counties having a population of 90,000 and less than 200,000 persons the sum of \$3,600.00 for themselves and such sum for deputies and assistants as the county court shall find necessary for the prompt and proper discharge of the duties of such office; in counties having a population of 200,000 and less than 300,000 persons, the sum of \$3,000.00 for themselves and a sum not exceeding \$16,000.00 for deputies and assistants, in such of said counties where court is held at more than one place, and in all other such counties the sum not exceeding \$5,000.00 for deputies and assistants. Provided, that the county court in all counties in this State having a population of 15,000 and less than 40,000 persons may allow the county clerks, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed \$500.00 per annum, to be determined by the county court of such county. Provided, further, that the county court shall determine that the work required to be done by such clerk or clerks demands or requires such extra remuneration. It shall be the duty of the clerks of county courts to charge and collect in all cases every fee accruing to their offices by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month stating on what account such fees were charged and collected, together with the names of the persons paying or who are liable for same, which said report shall be verified by the affidavit of such clerk. It shall be the duty of such clerks upon the filing of said report to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk

January 13, 1941.

shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

And the salary of circuit clerks is provided for in Section 11786, R. S. 1929, as amended by the Laws of Missouri, 1937, page 444 and following, and is as follows:

"The Clerks of the Circuit Courts of this State shall receive for their services annually the following sum: In counties having a population of less than seven thousand five hundred persons, the sum of twelve hundred (\$1200) dollars; in counties having a population of seven thousand five hundred persons and less than ten thousand persons, the sum of fifteen hundred (\$1500) dollars; in counties having a population of ten thousand persons and less than fifteen thousand persons, the sum of seventeen hundred (\$1700) dollars; in counties having a population of fifteen thousand persons and less than seventeen thousand five hundred persons, the sum of nineteen hundred (\$1900) dollars; in counties having a population of seventeen thousand five hundred persons and less than twenty thousand persons, the sum of twenty-one hundred (\$2100) dollars; in counties having a population of twenty thousand persons and less than twenty-five thousand persons, the sum of twenty-three hundred (\$2300) dollars; in counties having a population of twenty-five thousand persons and less than fifty thousand persons, the sum of twenty-five hundred (\$2500) dollars; in counties having a population of fifty thousand persons and less than seventy-five thousand persons, the sum of thirty-six hundred (\$3600) dollars; in counties having a population of seventy-five thousand persons and less than one hundred fifty thousand persons, the sum of four thousand (\$4000) dollars; in counties having a population of one hundred fifty thousand persons and less than four hundred thousand persons, the sum of five thousand (\$5000) dollars; Provided, that in any county wherein the Clerk of the Circuit Court is ex-officio Recorder of Deeds, said offices shall be considered as one for the purpose of this Section; Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of

January 13, 1941.

Deeds, to charge and collect for the county in all cases every fee accruing to his office as such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided; Provided, further, that the Clerks of the Circuit Courts shall be allowed to retain in addition to the sums allowed in this Section, all fees earned by him in cases of change of venue from other counties; Provided, further, that until the expiration of their present term of office, the persons holding the office of Circuit Clerk shall be paid the maximum amount as now provided by law, in the manner provided by this Act." (Underscoring ours in the above two sections).

Section 11813 R. S. Mo. 1929, as amended by Laws of Missouri, 1937, page 447, provides method of paying Circuit Clerks, and is as follows:

"The salary of the Clerk, and that of his deputies, and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are.

January 13, 1941

The Clerk and his deputies and assistants shall present their accounts to the County Court, and said court shall draw its warrant therefor upon the County Treasurer, to be paid out of any money available in the treasury."

And Section 11814 R. S. Mo. 1929, as amended by the Laws of Missouri, 1937, page 447, pertaining to Circuit Clerks is as follows:

"It shall be the duty of the Clerks of all Circuit Courts to charge and collect for the County, in all cases, every fee accruing to their offices under the provision of Sections 11785, 11787 and 11788, or any other statute, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the Clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the Sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by Section 11776. Such Clerk shall, at the end of each month, file with the County Clerk a report of all fees paid and accruing to his office during such month, the date of accrual to be determined as the date of the final disposition of the case, stating the title of the case or on what account such fees were charged, together with the names of the persons who are liable for same, with the names of all sureties, where security of costs have been required, and which report shall also show what fee bills, if any, have been issued and for what fees and when placed in the hands of the Sheriff for collection, and further stating that, after due diligence, he has been unable to collect the fees reported unpaid and which said report shall be verified by the affidavit of such Clerks. And monthly, such Clerks shall pay into the county treasury the amount of all fees collected by virtue of his office and every Clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the

January 13, 1941.

County Court to examine such monthly reports and to require of the Prosecuting Attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such Prosecuting Attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the County are unpaid." (Underscoring ours).

Your attention is called to the underscored passages in each of the above quoted sections of the law. In each instance the clerk is directed to turn into the county treasury the fees collected. Also to the fact that the County Clerk and Circuit Clerk are to be paid by warrant drawn upon the treasurer.

In the recent case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 344 Mo. 795, a case involving the compensation of a judge of the county court the Supreme Court at 1. c. 860 (S. W. (2d)) said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Hedeking v. McCracken, 60 Mo. App. 650, 656." (Underscoring ours).

In the past there have been Statutes which authorized the retention of fees to apply upon the payment of salaries, or for the retention of fees in lieu of salary but at the present time we have no such law affecting these two offices.

Hon. Arthur Nicholson. - 8 -

January 13, 1941.

CONCLUSION.

It is the conclusion that the County Clerk and the Circuit Clerk should properly turn in and account for the fees collected by them which they are directed by law to do; that the salary of each should be paid by warrant upon the county treasury, drawn monthly, each for one-twelfth of the annual salary provided for.

Respectfully submitted,

W. C. JACKSON
Assistant Attorney-General.

APPROVED:

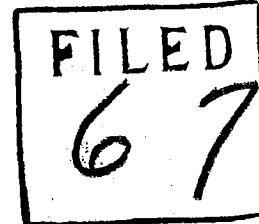
COVELL R. HEWITT
(Acting) Attorney-General.

WOJ/mc

INTOXICATING LIQUOR: Supervisor may grant license to person indicted for violation of Act, if person has qualifications required by Act. May not grant license to person convicted for such violation by judgment and sentence of court.

May 26, 1941

Honorable C. Roy Noel, Supervisor
Department of Liquor Control
Jefferson City, Missouri



Dear Sir:

This is in reply to the request for our opinion by the letter of Mr. Wallace I. Bowers, Chief Clerk of the Department of Liquor Control, dated May 23, 1941, which letter is in the following terms:

"The September Term of the St. Louis Grand Jury returned one hundred four indictments last November against seventy seven St. Louis City licensees, all full liquor with the exception of one, and all misdemeanors except one felony. To date, there have been eight acquittals, four mistrials and two convictions. Effective June 30, the permits of these indicted persons expire.

Therefore, I respectfully request an official opinion upon the following question: Does this department have the legal right to renew permits for persons against whom criminal charges are now pending, said criminal charges being based upon Grand Jury indictments.

In view of the fact that the provisions of our Act require that all renewal applications should be filed with the department sixty days prior to expiration of the present permits on June 30, we would appreciate an opinion at an early date."

May 26, 1941

Said letter refers only to applicants for licenses to sell intoxicating liquor (including intoxicating beer) and not to applicants for licenses to sell non-intoxicating beer. The Liquor Control Act, applicable to intoxicating liquor, is in Chapter 32, Art. 1, R. S. Mo. 1939; the sections of the statute hereinafter referred to are a part of said Act.

Section 4895, among others, provides in part that "It shall be unlawful for any person... to sell ... in this state intoxicating liquor ... without taking out a license." The authority to issue licenses is vested in the Supervisor of Liquor Control (Sec. 4888). By Section 4890 it is in part provided that, "Any person who possesses the qualifications ... and who meets the requirements of ..." the Act may obtain a license.

On the specific point involved, Section 4906 in part provides:

" * * no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, * * ."

And, Section 4909 provides:

"Conviction in any court of any violation of this act shall have the effect of automatically revoking the license of the person convicted, and such revocation shall continue

operative until said case is finally disposed of, and if the defendant is finally acquitted, he may apply for and receive a license hereunder, upon paying the regular license charge therefor, in the same manner as though he had never had a license hereunder."

It is understood that the Supervisor has not revoked the licenses of the persons involved here, under his statutory power to do so (Section 4889, 4905), in certain circumstances. Under Sections 4906 and 4909, above quoted, conviction of any person of a violation of the Liquor Control Act of the State of Missouri automatically revokes the license of such person, and no new license can be granted to a person whose license has been revoked in that manner, or by the Supervisor. Nor can any license be granted to a person who has been convicted, since the ratification of the Twenty-First Amendment to the Constitution of the United States, of a violation of the liquor laws either of the United States or of the State of Missouri. But persons who are charged by indictment with a violation of the Liquor Control Act, and who have not even been tried, cannot be regarded as having been convicted.

The word "convicted" has been defined in some cases as meaning a finding of guilty by a jury after a trial, and in other cases as meaning the final judgment and sentence of a court. In State v. Williams, 6 S. W. (2nd) 915, 1.c. 919(6), 320 Mo. 296, the Supreme Court of Missouri said:

"The word 'convicted' is commonly used merely to signify the finding of the jury that the accused is guilty. This is the well-settled meaning of the term as ordinarily used in constitutional and statutory provisions. 13 C. J. 903-905."

And, in State v. Townley, 147 Mo. 205, 1.c. 208, 209,

48 S. W. 833, the court quoted with approval and made the following statements from the authorities;

"It has generally been held that the word "convicted" includes the final judgment, and that one who has been found guilty by the jury, but has not yet been sentenced, is not a "convicted" person."

"In ordinary phrase the meaning of the word 'conviction' is, the finding by the jury, of a verdict that the accused is guilty. But in legal parlance, it often denotes the final judgment of the court."

When the term "convicted" is used in a statute referring to the various steps in the proceedings of a particular case it means a verdict of guilty. But when it is used as affecting the status or rights of a person in another and subsequent case, convicted includes the judgment and sentence of the court. This distinction is explained in Smith v. Commonwealth of Va., 24 A.L.R. 1286, 1290, 113 S.E. 707, 134 Va. 589, where the court reviewed the authorities and in part quoted the following at l.c. 1290 of 24 A.L.R.:

" * * but where the reference is to the ascertainment of guilt in another proceeding in its bearing upon the status or rights of the individual in a subsequent case, then a broader meaning attaches to the expressions, and a "conviction" is not established or a person deemed to have been "convicted,"

unless it is shown that a judgment has been pronounced upon the verdict.'" (Also see 9 Words & Phrases (Perm. ed.) p. 594 et seq.)

As used in the above quoted portions of the Liquor Control Act the term "convicted" means adjudged guilty by the judgment and sentence of a court. The persons here involved have not been convicted. They have been indicted, and that is a mere accusation. In State v. Anderson, 191 Mo. 134, 142, 90 S. W. 95, 98, the court defined an indictment as follows at p. 142 of 191 Mo.:

"An indictment is an accusation at the suit of the king (or State) by the oaths of twelve men (at the least, not more than twenty-three) of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true.'" (To the same effect, Ballentine's Law Dict. p. 635).

Such an accusation does not raise any presumption of guilt (21 Words & Phrases (perm. ed.) p. 141 et seq.) On the contrary every person accused of committing a crime is presumed to be innocent until he has been proved guilty beyond a reasonable doubt (State v. Shawley 67 S. W. (2d) 74, 1.c. 83, 334 Mo. 352; State v. Shields 58 S. W. (2d) 293, 1.c. 297 (7), 332 Mo. 89). That principle is one of the fundamental safeguards of the liberty of the people, and it is the duty of every public officer to be governed by it. Because of that presumption the universal rule is that proof that a person has been charged with a crime is not admissible in another case to impeach his credibility (State v. Hamilton, 102 S. W. (2d) 642, 1.c. 646 (10), 340 Mo. 768). No person should be subjected to any adverse

May 26, 1941

discrimination on the sole ground that he has been indicted. Because of all the foregoing, the sole fact that a person has been charged by indictment with a violation of the Liquor Control Act is not a legal ground for refusal by the Supervisor to renew the license of such person.

Under the above quoted statutory provisions the Supervisor may legally refuse to renew or grant originally a liquor license to any person who fails to meet the following requirements and qualifications of Section 4906:

"No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village;
* * * * *

Speaking of the power of the Supervisor respecting the granting of licenses in *State ex rel Renner v. Noel*, 149 S. W. (2d) 57, 1.c. 58, 59, the Supreme Court of Missouri said:

"* * * In discharging that function he exercises a judicial discretion which cannot be controlled by mandamus, at least unless he finds in favor of the applicant every fact necessary to entitle the latter to a license, thereby exhausting his discretion and leaving only the ministerial duty of issuing the license. The decision of the Supervisor on the merits is final, and the statute does not allow an appeal or writ of error. This is held in several cases: * * * * *

"We see nothing in the record to justify the action of the trial

May 26, 1941

court in attempting to overturn by mandamus the Supervisor's refusal of a license to the respondent because he was not a person of good moral character. The record shows he made that ruling on facts reported by his subordinates which he believed to be true. While Sec. 26 of the 1934 Act (Mo. St. Ann. section 4525g--30, p. 4689) does provide for notice and a hearing where a license is revoked, the Act does not anywhere provide for formal proceedings or hearings and the reception of evidence where a license is applied for. There is no requirement as to the form or character of the evidence upon which the Supervisor may rely. Certainly there is no showing that he acted arbitrarily in this instance."

Even under that authority the Supervisor may refuse to issue a license only on one of the legal grounds provided by the statute.

CONCLUSION

The Supervisor of Liquor Control has a legal right to renew the licenses of persons who have been charged by indictment with violations of the Liquor Control Act, provided such persons meet the requirements and qualifications of said Act. Licenses cannot be renewed for or granted to persons who have been convicted of violation of said Act. In said Act, the term "convicted" means adjudication of guilty by judgment and sentence of the court.

Respectfully submitted

APPROVED:

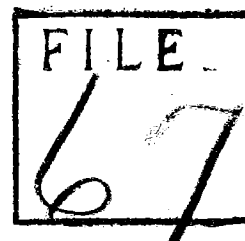
LAWRENCE L. BRADLEY
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

212
TAXATION AND REVENUE: County Court can not abate penalty on the mistake made by the collector as to the amount of taxes owed by the taxpayer.

September 24, 1941

Honorable Russell S. Noblet
Prosecuting Attorney
Nodaway County
Maryville, Missouri



Dear Sir:

This Department is in receipt of your letter of September 18, 1941, wherein you make the following request:

"A few years ago when one taxpayer paid his taxes to the township collector an error was made by the collector and he did not charge the taxpayer for all of his taxes. He supposed that he had, so did the taxpayer. The rest of the taxes were paid; a receipt was given.

"Now, after five years, the ex officio county collector started to advertise the place for sale for back taxes. The man is willing to pay the back taxes. He hates however to pay the additional penalty, because the error was not his, other than not paying attention to his receipts of the years during which the tax was delinquent. They have been paid every year prior to that and since that.

"The ex officio collector wants an order from the county court to the effect that it is alright to disregard the penalty. I told them to give such order but am not sure that I am right. I can find no authority for them to do so, unless it would

come under the section number 11122 or section number 11197 regarding compromises. Technically, I do not think that they can find their authority under these sections."

We have examined the statutes numbered Sections 11122, 11197, R. S. Missouri, 1939, which you mention in your letter as having some bearing on the question. It does not appear that these sections would be direct authority for abating the penalty in question. Section 11122 contemplates a compromise when the land would not sell for the amount of taxes, and is not worth the amount of delinquent taxes, interest and costs. Section 11197, R. S. Missouri, 1939, also applies to certain counties only to compromise judgments under certain conditions. We have other statutes which might be pertinent and point the same out to you.

Section 11214, R. S. Missouri, 1939, refers to erroneous assessments, but is not broad enough in its terms to correct the error which was made in the instant case. Section 10990, R. S. Missouri, 1939, is a broader section and the facts which have caused the mistake would largely determine whether or not it would be applicable. The most pertinent section that we have found in our research is Section 11119, R. S. Missouri, 1939, which is as follows:

"The collector shall make diligent endeavor to collect all taxes upon said 'back tax book,' and whenever he finds that any taxes therein have been paid, he shall report that fact to the county court, or other proper officer, giving the name of the officer or person to whom such taxes were paid; and he shall also report to the court, or other proper officer, all cases of double assessment or other errors, and thereupon the court, or other proper officer, shall cause the necessary action to be taken and entries to be made."

You will note that the above section contains the provision "all cases of double assessment or other errors."

Hon. Russell S. Noblet

(3)

September 24, 1941

The expression "other errors" when considered along with the other terms of the statute, evidently refers to errors or mistakes about an assessment. The mistake or error mentioned in your letter appears to be an error through the mistake or inadvertence of the collector. It does not appear to be of such nature that the county court has jurisdiction to make any correction. It is a matter to be adjusted by and between the taxpayer and the collector. Therefore, we agree with you that there is no special authority for the county court to absolve the taxpayer from the payment of the penalty.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN/rv

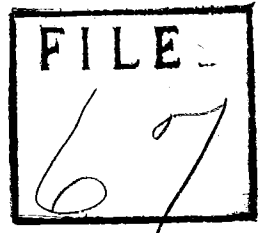
ROADS AND BRIDGES: Commissioners of special road district organized under Art. 18, Chapt. 46, R. S. Mo., 1939, have exclusive control over all roads, bridges and culverts within said district.

67

December 29, 1941

12-31

Hon. Russell S. Noblet
Prosecuting Attorney
Nodaway County
Maryville, Missouri



Dear Sir:

We are in receipt of your letter of December 9, wherein you request an opinion on the following statement of facts:

"May I please have your opinion on the following question?

"In the event that a special road district is organized and the roads are constructed by or for the special district, is it the obligation of the special road district to keep up and maintain and repair the roads and bridges built for such special district, or is it partially an obligation of the township to help maintain and repair such roads?

"Is it necessary that the township make it a township road before they acquire such obligation or does such a road automatically become part of the township roads and thus necessarily a partial obligation for the township?

We assume from your letter that it is contemplated to organize a Special Road District under Article 18, Chapter 46, R. S. Missouri, 1939. This being true, we call atten-

Hon. Russell S. Noblet

(2)

December 29, 1941

tion to Section 8840 R. S. Missouri, 1939, which Section provides in part as follows:

" * * * Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

In the case of State v. Myers, 12 S. W. (2d) 489, l. c. 490, the court had this to say:

"* * * Neither the city council nor the county court has any control over the public highways within the district outside of the corporate limits of the city. Such control is lodged exclusively with the board of commissioners. Section 10809, R. S. 1919."

We wish to point out that Section 10809 R. S. Missouri, 1919, referred to in the quotation above, is now Section 8682 R. S. Missouri, 1939, and, although this latter section deals with the organization of special road districts in counties having a population of 50,000 to 300,000, we wish to call attention to the similarity of the wording between Section 8682, *supra*, and Section 8840, *supra*. For comparison we copy Section 8682, *supra*:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

Therefore, we are of the opinion that Section 8840, *supra*, would be interpreted to mean that the commissioners of a road district organized under Article 18, Chapter 46, R. S. Missouri, 1939, would be vested with exclusive and entire control over all public highways, bridges and culverts in said district, and that the case of *State v. Myers*, *supra*, would be followed by the courts.

Hon. Russell S. Noblet

(4)

December 29, 1941

CONCLUSION

We are of the opinion that the commissioners of a new special road district organized under Article 18, Chapter 46, R. S. Missouri, 1939, have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within such special road district, existing at the time of the organization, and the construction, erection and maintenance after organization.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

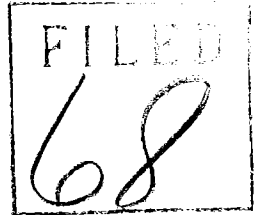
VANE C. THURLO
(Acting) Attorney General

BRC:RW

CLERK OF CIRCUIT COURT: Salary change effected by 1940
census begins January 1, 1941.

January 20, 1941

Honorable Forrest Ott, Clerk
Circuit Court
Harrisonville, Missouri



Dear Sir:

This will acknowledge receipt of your letter of January 15, 1941, in which you asked for an opinion as follows:

"In the recent opinion concerning salaries of Circuit Clerks, the 'Conclusion' reads as follows:

"It is the opinion of this department that the circuit clerk, prosecuting attorney and other county officers affected by the decrease or increase of the population could only be paid in accordance with said increase or decrease at the beginning of the next fiscal year of his term after the population has been determined by the federal government, and that no increase be allowed or decrease be ordered before the first day of the fiscal year following the year of 1940."

"Local newspapers today received a bulletin announcing the official population of Cass County to be 19,534, and at the top of the bulletin was the following, 'Released for publication by newspapers on January 9, 1941.' This will cause my salary to fall in a lower bracket, under 20,000.

"I would like to have your opinion about whether or not the decrease in my salary will begin now, in 1941, or not until January 1, 1942. As your conclusion states 'at the beginning of the next fiscal year of his term

January 20, 1941.

after the population has been determined by the federal government,' it appears to me as though our decrease may not take effect until January 1, 1942.

"We suppose that January 9, 1941, was the day the official population for Cass County was announced, but, of course, we would like for you to determine that. If possible, please let me know before I certify my salary for the month of January, 1941, down to the County Court for payment, as I do not wish to certify my old salary and then find I will have to refund a portion of it."

The law authorizing the taking of the census is found in Title 13, U.S.C.A., Accumulative Annual Pocket Part for 1940, and it is necessary to refer to certain sections of this act in order to determine your question. The sections necessary are the following, 206, 213, and 218.

"The census of the population and of agriculture required by section 201 of this title shall be taken as of the 1st day of April, and it shall be the duty of each enumerator to commence the enumeration of his district on the day following unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event it shall be the duty of each enumerator to prepare the returns hereinbefore required to be made and to forward the same to the supervisor of his district within thirty days from the commencement of the enumeration of his district: Provided, that in any city having two thousand five hundred inhabitants or more under the preceding census the enumeration of the population shall be completed within two weeks from the commencement thereof."

"The Director of the Census is hereby authorized to make requisition upon the Public Printer for such printing as may be necessary to carry out the provisions of this chapter, to wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this chapter or by chapters 1 and 3 of this title and to publish and distribute said bulletins and reports."

"The Director of the Census is authorized at his discretion, upon the written request of the governor of any State or Territory or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and \$1 additional for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes, upon payment of the actual cost of searching the records and \$1 for supplying a certificate; and that the Director of the Census is authorized to furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work: Provided, however, That in no case shall information furnished under the authority of this chapter be used to the detriment of the person or persons to whom such information relates. All moneys hereafter received by the Bureau of the Census in payment for labor and materials used in furnishing transcripts of census records or special statistical compilations from such records shall be deposited to the credit of the appropriation for collecting statistics."

January 20, 1941.

The census is directed to be taken effective as of April 1, 1940; the taking of the census to be commenced the day following April 1, 1940, and to be concluded within thirty days. The director of the census is authorized to publish bulletins and to furnish upon the request of a Governor, or a court of record a certified copy of the population returns which may be requested. There is no formal date set for the publication of census reports, and the Courts of this State have never set a definite date when a general change of salary would be effective if a change in population caused a fluctuation of salary. The substance of the rulings on this question seems to be that as soon as the new population is available the compensation of officers should be based upon the new population, but that no salary adjustments should be made during a term year.

In the recent case of *Kay v. Moniteau County*, 134 S. W. (2d) page 81, a case in which the court paid the salary of the prosecuting attorney on the basis of the 1930 census although it was admitted at the trial that there was no official report of the census until 1936, which was several years after the payment of the salary. The Supreme Court at 1. c. 83 said:

"Since the county court paid plaintiff the salary authorized under the census method, it is immaterial to plaintiff as to how the court acquired knowledge of the census. The census method was available and the court was bound under the law to be guided thereby."

And in the earlier case of *Carter County v. Huett*, 259 S. W. 1057, also a salary case in which the salary paid was based on the 1920 census, the Supreme Court said 1. c. 1059:

"As to the fact that Carter county, as of the 1st day of January, 1920, had such a population as put it in the class whose prosecuting attorneys were entitled to receive a salary of \$1,000 per annum, there is and can be no dispute. The substance of plaintiff's contention is that this fact was not and legally could not have been ascertained, within the meaning of the statute, so as to make it applicable to the

January 20, 1941

salary of the prosecuting attorney for the year of 1920. There is nothing here showing an express or specific finding by the county court of the population of the county, but the making of orders for the issuance of warrants for the payment of the increased salary, involved an ascertainment of the existence of a population within a given minimum and maximum limit. The defendants, judges of the county court, in auditing and paying the salary of the prosecuting attorney, were in the exercise of their statutory authority, and it cannot be said as a matter of law, under the terms of the Census Act, or under the statute, that the population of the county was not ascertained, or that as a matter of law it could not have been ascertained by the decennial census of 1920 for the purpose of determining the salary paid. This is said as applicable to the case against all of the defendants herein."

This office has no information as to what knowledge the county court of Cass County has concerning the population of the county as shown by the 1940 census, or when it acquired such knowledge. The enumeration was completed more than seven months ago, and it is not only possible but highly probable that the county court had knowledge of the population long prior to January 9, 1941. And the population as ascertained by this census should be the basis for paying salaries as soon as available regardless of how the knowledge was obtained.

CONCLUSION.

It is the conclusion of this Department that the salary of the clerk of the circuit court of Cass County should be paid for the entire year of 1941, upon the population as determined by the 1940 census, which was taken as of April 1, 1940.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney-General

COVELL R. HEWITT
(Acting) Attorney-General

W. J. BULKE
Assistant Attorney-General

WOJ/WJB/mc

SHERIFFS: Entitled to mileage in each case for serving several summons on same trip.

February 28, 1941

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Honorable Forrest Ott
Clerk of the Circuit Court
Harrisonville, Missouri

Dear Mr. Ott:

Under date of February 24, 1941, you ask for an opinion as follows:

"IN RE: Martha Lee Brown vs W. R. Rogers.
Case No. 23607
Lee Brown vs W. R. Rogers.
Case No. 23608
Daily Brown vs W. R. Rogers.
Case No. 23609

"Three three above entitled cases were filed in the Circuit Court of Cass County, Mo., February 15, 1941.

"Summons was issued in each of the three cases that day and given to the Sheriff for service, the defendant residing in Pleasant Hill, Cass County, Mo.

"On February 17, 1941, the Sheriff served the three Summonses in the three separate suits on said defendant, W. R. Rogers.

"Please give us an official opinion on whether or not the Sheriff is entitled to charge mileage in each of the three cases, when the Sheriff served all three Summonses at once and just made one trip in so doing.

"The lawyers here disagree on this point, and I would appreciate very much if you would clear up this matter, once and for all, as I want to be sure and tax the costs on my books properly."

An officer is not entitled to fees unless provided for by Statute. State ex rel. v. Brown 146 Mo. 401, l. c. 406:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. Then the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

The fees of sheriffs are prescribed by Section 13411, Article 2, Chapter 99, Revised Statutes of Missouri, 1939. This section is in part as follows:

"Fees of sheriffs shall be allowed for their services as follows:

For serving every summons or original writ and returning the same for each defendant \$1.00 *****

For each mile actually travelled venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip\$0.10

***** No mileage fees for serving any writ, summons or other legal process shall be collected unless the sheriff shall actually travel the distance for which he makes such charge: *****

Hon. Forrest Ott.

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February 28, 1941.

There are three separate cases pending; it was necessary to serve the summons in each case. Had the cases been filed at different times serving the three summons would have required three trips. They were however filed at the same time, and the sheriff made only one trip, but the miles had to be travelled in order to serve the summons in each case. And for serving the summons and travelling the necessary miles to serve the summons the Sheriff is entitled to the fees provided for in Section 13411, R. S. 1939. There is no provision made for apportioning the mileage when the miles are travelled in one trip but serving writs in more than one case. Had the sheriff served three separate defendants the mileage would not be questioned.

CONCLUSION.

It is the conclusion that the sheriff's mileage should be charged in each case just as the fee for serving the summons is charged.

Also enclosed herewith are copies of two other opinions of similar character.

Respectfully submitted,

W. C. JACKSON
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WOJ/mc
Encs. 2.

TAXATION:

An election for a county library cannot be held if at that time the county court has levied to its full limitations under Section 11, Article X of the Constitution of Missouri.

REVENUE:

March 6, 1941



Miss Ruth O'Malley
Executive Secretary
Missouri Library Commission
Jefferson City, Missouri

Dear Miss O'Malley:

We are in receipt of your request for an opinion under date of March 2, 1941, which reads as follows:

"We have a letter from Mr. W. J. Burke of February 27 in which his opinion of March 26 on a point in the county library law, Chapter 110, Article 6, Sections 14767-14776, R. S., 1939, is further amplified. We understand from this later opinion that the conclusion intended is that where the constitutional limitation has been reached the county cannot vote on an additional levy under the library law.

"May we ask your further opinion on this point? We understand that the levies are made by the county court in their May term. Does this preclude the right of the citizens of a county to vote at the annual election held the first Tuesday in April on a levy to be made at a succeeding term of the court out of a General Revenue fund which has not yet been levied?

"May we ask an additional opinion regarding the petition which has been presented to the court as follows:

March 6, 1941

"We, the undersigned taxpayers of Lafayette County, Missouri, in accordance with the provisions set forth in Section 13463, Revised Statutes of Missouri, 1929, being residents outside of the territory of all cities and towns in Lafayette County, Missouri, now maintaining a public library at least in part by taxation, do hereby petition the County Court of Lafayette County, Missouri, that a county district of the county outside of the territory of all such aforesaid cities and towns be established and be known as 'Lafayette County Library District;' and do further petition that an annual tax be levied for the purpose herein specified, such tax to be at the rate of $\frac{1}{2}$ mills on the dollar."

In our opinion given to you on March 26, 1940, we held that a levy could not be voted for county libraries in Lafayette County for the reason that that county had levied to its full limitation under Section 11 of Article X of the Constitution of Missouri.

In your present request you ask if an election could be held in April for a levy of one-half mill on the dollar for a county library and the county court could, in the May Term, make a levy less the one-half mill and the levy, under the election for a county library, would be valid. Under Section 14767, R. S. Missouri 1939, it specifically states:

"* * * * * and the tax specified in such notice shall, subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county.
* * * * *

Miss Ruth O'Malley

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March 6, 1941

Under the above partial section it specifically describes the election as a levy and since the county has levied to its full limitation, such an election for such purpose would be invalid under the holding in the case of Brooks v. Schultz, 178 Mo. 222, which case was set out in our opinion to you on March 26, 1940, in reference to this same matter.

In your request you also referred to a levy out of the general revenue fund. Money cannot be taken out of the general revenue fund for county library purposes for the reason that cities maintaining and taxing for city public libraries are exempt from the payment of any tax for county library purposes. I understand that Lexington and Higginsville have city libraries upon which the citizens of the cities are paying taxes. The election held under Section 14767, supra, applies to the district corresponding to rural school districts of the county. The money received under said election must be kept in a separate fund known as the "County Library Fund."

As stated before, your county library election cannot be held in April and be based upon a decrease of the levy made by the county court in May. One procedure can be followed, if consented to by the county court, which would permit the election to be held the first Tuesday in April. Section 11044, R. S. Missouri 1939, reads as follows:

"As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Under Section 10964, R. S. Missouri 1939, the assessor starts his assessment on the first day of June and should return the assessment to the county clerk as

soon as completed and not later than the end of that year. It is not necessary that the county court receive the completed assessment from the assessor before levying the taxes. The levy can be made before May and as a gauge for the levying of the taxes may use the last assessment and it is not necessary that they await the assessment for this year. It was so held in *State v. St. Louis-San Francisco Ry. Co.*, 300 S. W. 274, par. 2, 3, where the court said:

"Although the statute does not specifically provide that the county court shall make the levy of taxes for county purposes at any particular time, such time is quite limited perforce of other provisions. Section 12863, R. S. 1919, requires the county court to determine the sum necessary to be raised for county purposes and to fix the rate necessary to raise that amount as soon as may be after the assessor's books shall be corrected and adjusted according to law. This must be at or before the May term of each year, because, at that term, the county court is authorized and empowered to appropriate, apportion, and subdivide all of the revenues collected and to be collected, etc. Section 12866, R. S. 1919. The legislative intent that the levy should be made at or before the May term is thus quite manifest. *State ex rel. Wabash Railroad Co.*, supra, loc. cit. 141 (158 S. W. 27).

"Thus the county court is at least authorized and empowered to make the levy for county purposes at its May term and, in fixing the rate of such levy, the court is governed by the last assessment, which means the last assessment completed at the time such levy is made. It can mean nothing else. If the assessment for the current year is completed

at the time the levy is made, well and good. That assessment can be used as the measuring rod to ascertain the rate which can legally be levied. If the assessment for the current year is not complete at that time, then the completed assessment for the previous year must be used."

This case was also followed in *State v. St. Louis-S. F. Ry. Co.*, 92 S. W. (2d) 644. In that case the court, at page 646, said:

"* * * * * We find nothing in any of the cases cited by appellant indicating that the assessments completed during a calendar year should be the proper basis for the making of the levy of the following year. The decisions point the other way. The Constitution reads: 'the last assessment.' Under the authority of *State ex rel. v. St. Louis-San Francisco Ry. Co.*, supra, that means the last completed assessment. The county court, in the case before us, used the last completed assessment that was available as a basis for the levy of the year 1931. Under that assessment it was authorized to make a levy of 50 cents on the \$100 valuation, because it was less than \$30,000,000."

Under the holding in the above two cases, if the county court sees fit it may levy taxes before the second Monday in April and deduct enough to take care of an assessment for a levy made by way of an election for a county library fund. It is not necessary that the county court wait until May to make the assessment as it may be made according to the above cases before the May Term and they may base their levy on the assessment of last year and not wait for the assessment of this year. The petition set out in your request follows Section 13463, R. S. Missouri

Miss Ruth O'Malley

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March 6, 1941

1929, which is now Section 14767, R. S. Missouri 1939.
This petition is sufficient.

CONCLUSION

In view of the above authorities it is the opinion of this department that an election for a county library, under Section 14767, R. S. Missouri 1939, cannot be held where the present levy for taxes has been made to its full constitutional limits.

We further hold that the county court may levy before the May Term, and if the levy is made before the first Tuesday in April and is not to its full constitutional limits a valid election can be held on the first Tuesday in April for the purpose of voting a county library tax and the creation of a county library district.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

WJB:DA

APPROVED:

VANE C. THURLO
(Acting) Attorney General

PENAL INSTITUTIONS: Upon conviction in a capital case on
CRIMINAL PROCEDURE: appeal and stay of execution the sheriff
must deliver the convict to the Warden
of the Penitentiary not more than ten
days from the date of the judgment.

March 31, 1941

Honorable Michael W. O'Hern
Prosecuting Attorney of Jackson County
Kansas City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you
request an opinion from this department, as follows:

"On February 1st, 1941, in Jackson County, Missouri, one JAMES BUTTS was found guilty of Murder in the First Degree by a jury and the death penalty was assessed; thereafter, on the 22nd day of March, 1941, sentence was pronounced and judgment rendered against the defendant and the Court ordered the defendant to be delivered to the custody of the Sheriff of Jackson County, and by said Sheriff to be delivered to the Warden of the State Penitentiary on the 26th day of March, 1941, it was further ordered by the Court that the said JAMES BUTTS be executed by the Warden on the 1st day of May, 1941. The defendant filed an affidavit of appeal and the Court allowed such appeal.

"In compliance with the order of the Court the Sheriff on this date is to deliver the prisoner to the Warden of the State Penitentiary. Counsel for the defendant contends that under the law all proceedings, including the delivery of the prisoner to the Warden,

are stayed once an order is made allowing an appeal and that the prisoner should remain in the custody of the Sheriff of Jackson County pending said appeal.

"This office is desirous of having an opinion from your office construing SECTIONS 4108, 4132 and 4135 R. S. Mo. 1939. Such an opinion from your office will be greatly appreciated."

Section 4106 R. S. Mo. 1939, which relates to penitentiary sentences only, reads as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Under this section it is mandatory that the sheriff without delay transfer the convict to the penitentiary unless an appeal is taken and a stay of execution granted under Section 4132, R. S. Mo. 1939. Under Section 4106 the execution of the sentence is the taking of the defendant to the penitentiary.

Section 4108, R. S. Mo. 1939, reads as follows:

"When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the

seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the state penitentiary at Jefferson City, Missouri, for execution."

Under Section 4108, supra, that part which is underlined specifically states: "judgment must be executed." In other words, the execution of the judgment under the death penalty now is performed by the Warden at the Penitentiary. The underlined portion of Section 4108, supra, also directed the sheriff to deliver the defendant to the Warden of the State Penitentiary by order of the court and the delivery of the convict to the penitentiary must be made not more than ten days from the date of the judgment. Under Section 4108, supra, the sheriff is not directed to execute the judgment, but the Warden is directed to execute it as set out in Section 4112, R. S. Mo. 1939.

The act of the sheriff in taking the prisoner to the penitentiary under Section 4108, supra, is only a ministerial act, the same as taking him from the courtroom to the county jail after a defendant has been sentenced to the penitentiary.

The stay of execution granted under Section 4132, R. S. Mo. 1939, is a stay of the administering of the case by the Warden as set out in Section 4112, R. S. Mo. 1939.

Section 4132, R. S. Mo. 1939, reads as follows:

"No such appeal or writ shall stay or delay the execution of such judgment or sentence, except in capital cases, unless the supreme court, or a judge thereof, or the court in which the judgment was rendered, or the judge of such court, on inspection of the record,

shall be of opinion that there is probable cause for such an appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the supreme court thereon, and shall make an order expressly directing that such appeal or writ of error shall operate as a stay of proceedings on the judgment; but in capital cases the order granting the appeal shall operate as such stay absolutely."

This section grants a stay of judgment of sentence to the penitentiary as carried out under Section 4106, supra, upon a proper order being made by the court or, under the case law, by the making of a bond. It also stays execution under the death penalty in capital cases without an order from the supreme court, the court in which the judgment was ordered or, judge of said court.

All sections of the statutes applicable to the same subject matter must be read together. It was so held in *Sayles vs. Kansas City Structural Steel Co.*, 128 S. W. (2d) 1046, 344 Mo. 756. Courts cannot interpolate in a statute where omission is not plainly indicated. It was so held in *Betz vs. Columbia Telephone Co.*, 24 S. W. (2d) 224.

Section 4132, supra, does not state that the sheriff cannot proceed with his duties under the law, but states: "shall operate as a stay of proceedings on the judgment." Under a penitentiary sentence taking the prisoner to the penitentiary was a proceeding in the execution of the judgment, where, under the death sentence, the proceeding on the judgment is the act of the Warden.

Section 4108, supra, was re-enacted in the Laws of 1937, page 221, and is a much later law than Section 4132, supra. That the later law governs was held in *Stiers vs. Vrooman*, 115 S. W. (2d) 84. Section 4135, R. S. Mo. 1939, reads as follows:

"If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty

of the sheriff, if the order were made by the court rendering the judgment, or upon being served with the clerk's certificate and a copy of the order, to keep the defendant in custody without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal or the writ of error."

The above section applies only to the execution of sentences which are performed by the sheriff and is not applicable to the execution of the sentence calling for the gas chamber which is performed by the Warden of the Penitentiary. Section 4135 and Section 4132, R. S. Mo. 1939, were construed in Ex Parte Carey, 267 S. W. 806, loc. cit. 808, 306 Mo. 287, where the court said:

"The fundamental idea underlying both decisions, as disclosed by the opinions, is this: If a defendant in a criminal cause who has appealed from the final judgment therein may, notwithstanding, be subjected to the punishment assessed against him, while his appeal is pending and before it can be heard, then the remedy afforded by appeal can thereby be measurably defeated; this the Legislature after expressly conferring the remedy could not have intended."

Under the above holding the Supreme Court declared it was not the intention of the Legislature that a man who had been convicted on a criminal charge and had appealed shall be subjected to the punishment assessed against him while his appeal is pending. These sections set out are only applicable to cases where the defendant receives a penitentiary sentence and are not applicable to cases where the defendant is adjudged to die in the gas chamber. Under the law, a defendant con-

March 31, 1941

victed and assessed the death penalty cannot make bond and must be held under Section 4108, supra, in the penitentiary until the final judgment of the case in the Supreme Court.

CONCLUSION

In view of the above authorities, it is the opinion of this department that when Section 4132, R. S. Missouri 1939, is invoked in a death case, a stay of execution automatically exists without an order of any court. Under that part of Section 4108, R. S. Missouri 1939, which provides that the sheriff deliver the defendant, where a death sentence has been rendered, at a time specified in an order of the court, it is mandatory that the sheriff deliver the prisoner within a time not more than ten days from the date of the judgment. He should deliver the prisoner to the Warden of the State Penitentiary at Jefferson City, Missouri, for execution of the judgment. The stay of execution only applies to the warden and not to the sheriff who takes the prisoner to the penitentiary for the reason that the execution of the judgment is performed by the warden under Section 4112, R. S. Missouri 1939, and the act of the sheriff in taking the prisoner to the penitentiary is not a part of the execution of the judgment.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

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MOTOR VEHICLES:

PROSECUTING ATTORNEYS:

A jury, judge, or prosecuting attorney cannot assess or recommend a fine of less than Five Dollars for careless driving under Section 8383, R. S. Missouri 1939.

August 28, 1941

Honorable Michael W. O'Hern
Prosecuting Attorney
Jackson County
Kansas City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of August 27, 1941, which reads as follows:

"There has been a large number of cases filed in the justice courts in our county for traffic violations on the highway. One of the most troublesome one has to do with careless driving; that is, speeding, failure to stop at stop signs and driving at a rate of speed that endangers the property of another and the life and limb of a person.

"The only section of the statutes that I can find that covers cases of this kind is Section 8383, Revised Statutes of Missouri 1939, and as I understand it the penalty for violating this section of the statutes is provided for in Section 8404 Sub-division (d). I would like to know if Section 8383 is the section that covers the class of cases above mentioned and if so, does Section 8404 Sub-division (d) provide for the penalty.

"I have been asked another question and that is, assuming that Section 8404 Sub-division (d) provides for the penalty of not less than \$5.00, could I tell a justice of the peace or a court that while the minimum

fine is \$5.00 that he could make it less. I have advised that I have no such authority to change this law, that is a matter for the Legislature.

"Would you be kind enough to give me an opinion on the three questions above set forth, namely, does the class of cases that I have specified fall under Section 8383 and if so, is the penalty section found under Section 8404 Sub-division (d) and lastly, would I be justified in asking the justice to reduce the fine from \$5.00 to a lesser amount. You will note that Sub-division (d) of the penalty Section 8404 has a rather peculiar ending, in that, it states 'or by imprisonment in the county jail for a term not exceeding two year'."

Section 8383, R. S. Missouri 1939, reads as follows:

"Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive but not conclusive, of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools: Provided, however, that no person shall operate a

solid tire commercial motor vehicle having a rated live load capacity of two (2) tons and less at a rate of speed exceeding twenty miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than two (2) tons and not more than five (5) tons at a rate of speed exceeding fifteen miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than five (5) tons at a rate of speed exceeding ten miles per hour; and provided further, that no person shall operate a motor vehicle equipped with iron or other metal tires at a greater rate of speed than six miles per hour."

The above section is applicable to the charge of careless driving and is part of Article 1, Chapter 45, R. S. Missouri 1939, which article and chapter pertain exclusively to motor vehicles.

Section 8404, paragraph (d) of Article 1, Chapter 45, R. S. Missouri 1939, reads as follows:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two year, or by both such fine and imprisonment."

Under the above paragraph (d) the minimum fine on a charge of careless driving is set out as Five Dollars (\$5.00). It is a very extraordinary and special statute which applies to the punishment under Article 1, Chapter 45, pertaining to motor vehicles. It is very noticeable it sets out specifically "* * not less than five dollars (\$5.00) * * or by imprisonment in the county jail for a term not exceeding two year, * *" Section 8404, supra, is a section that sets out the penalties for the punish-

ment for violating the laws in regard to motor vehicles as set out in Article 1, Chapter 45. Paragraph (a) of said section provides for the punishment for the theft of a motor vehicle or parts from a motor vehicle of the value of Thirty Dollars (\$30.00) or more. Paragraph (b) provides a punishment for the theft of any motor vehicle, tire or any part or equipment of a motor vehicle under the value of Thirty Dollars (\$30.00). Paragraph (c) provides a punishment for the violation of paragraph (a), Section 8396, paragraph (a), Section 8398 or paragraph (f) or (g) of Section 8401. All of the penalties above set out in paragraphs (a), (b) and (c) do not set out the punishment of a person charged with careless driving. The Legislature saw fit to enact paragraph (d), supra, which provided for the punishment of any of the other provisions of Article 1, Chapter 45, R. S. Missouri 1939. Paragraph (d) is a special law for the punishment of any of the other provisions except paragraphs (a), (b) and (c) of Section 8404, Article 1, Chapter 45, R. S. Missouri 1939, which applies specifically to motor vehicles.

Under the general criminal law, in reference to the punishment of a misdemeanor, where the penalty is not fixed by law, the Legislature saw fit to enact Section 4853, R. S. Missouri 1939, which reads as follows:

"Whenever any offense is declared by statute to be a misdemeanor, and no punishment is prescribed by that or any other statute, the offender shall be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

Under the above section no minimum fine, such as Five Dollars, has been set out, and this section applies only generally to the punishment upon a conviction of a misdemeanor where no punishment is prescribed for the commission of that misdemeanor although an act declares a certain act as a misdemeanor. The courts of this state have held continually that where there is a special statute and a general statute regarding any subject, the special statute controls. It was so held in *State v. Harris*, 87 S. W. (2d) 1026, 337 Mo. 1052. We find no section where any court can assess a punishment of any crime, including misdemeanors,

that would be less than that prescribed by statute.

Section 4094, R. S. Missouri 1939, states that it is mandatory that where a jury assesses a punishment whether of imprisonment or fine below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence and render judgment according to the lowest limit prescribed by law in such case. This section was upheld in a very early opinion of the Supreme Court in the case of State v. McGuaig, 22 Mo. 318, 1. c. 320, where the court said:

"* * The defendant pleaded 'not guilty,' was tried and found guilty in manner and form as charged in the third count of the indictment, and the jury assessed his punishment to a fine of \$300.

"The defendant moved for a new trial, 'because the verdict was against law, against evidence, and against the weight of evidence; because the verdict is against the instructions of the court, and is against the provisions of the statute regulating the punishment for the offence charged in the third count of the indictment.'

"The court overruled this motion, and sentenced the defendant to pay the lowest fine allowed by law for the offence charged in the third count, which is the sum of \$500. The fine assessed by the jury being lower than the lowest amount allowed by the statute for such an offense, viz., \$300, the court disregarded so much of the verdict and put the fine to the lowest sum which the statute allows. The defendant prayed an appeal to this court.

"The statute regulating practice and proceedings in criminal cases, art. 7, section 5, says: 'If the jury assess a punishment, whether

of imprisonment or fine, below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence and render judgment according to lowest limit prescribed by law in such case.' This section of the statute sanctions the act of the court, and makes it the duty of the court to treat the illegal fine as a blank, and fill it with the punishment at the lowest limit prescribed by the act for the offence.

This case has been followed in State v. Julin, 235 S. W. 818, paragraph 5, where the court said:

"Sixth. The next question earnestly urged here by appellant is the action of the court in raising the punishment from one year to two years in the penitentiary. The jury returned a verdict finding appellant guilty and assessing his punishment at one year in the penitentiary. Section 4049, R. S. 1919, provides as follows:

"If the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence, and render judgment according to the lowest limit prescribed by law in such case.'

"The constitutional rights of appellant were not invaded or imposed upon by the action of the court in following the plain letter of the statute. Appellant had been regularly charged with crime by a grand jury, had been arraigned, was confronted by the witnesses against him, was afforded every opportunity to make his defense, and enjoyed in the trial of the case such protection and safeguards as were vouchsafed by the

Constitution, both state and federal, and this statute is but a sequence of and supplementary to section 4048, R. S. 1919. Section 3698, R. S. 1919, is as follows:

"Whenever any offender is declared by law punishable, upon conviction, by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the offender may be sentenced to imprisonment during his natural life, or for any number of years not less than such as are prescribed; but no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years."

"From the foregoing it is apparent that it became the duty of the trial court to change the punishment fixed by the jury to that of the minimum punishment fixed by statute, and in doing so there was no violation of the constitutional rights of appellant. The punishment, upon conviction, of a number of offenses under our law, is fixed by the court, and not by the jury; e. g., section 3248, R. S. 1919. At the common law the verdict of the jury was guilty or not guilty, and the court fixed the punishment according to the laws in force, and the sections above quoted are not therefore in contravention of the constitutional rights of appellant and are constitutional. State v. Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846; State v. Mathews, 202 Mo. 143, 100 S. W. 420."

The court of appeals in the case of Ex Parte Snyder, 29 Mo. App. 256, 1. c. 261, in commenting upon this matter, said:

"The trial court had no authority in a criminal trial to substitute its opinion

for that of the jury, either as to the guilt or innocence of the accused, or as to the measure of punishment assessed by the jury, provided, such assessment was within the limits prescribed by the statute creating the offence. Had the jury in their verdict exceeded the limit of the law in the punishment awarded, or assessed punishment less than the law prescribes, the court could have proceeded to judgment as provided in sections 1931, 1932, Revised Statutes. The court, however, received the verdict of the jury, as it was compelled to do; and then, sua sponte, set it aside, continued the cause, and peremptorily discharged the jury, with a pronouncement of perpetual disqualification as jurors in that court. Such a proceeding is, or ought to be, without precedent, and is certainly without warrant of law. * * * * *

Also, in an early case the Supreme Court of this state in *State v. Daniels*, 32 Mo. 558, l. c. 560, said:

"This case will have to be remanded for error in the judgment of the court below. The penalty fixed by law for an offence of this kind is imprisonment in the penitentiary not less than ten years. The jury assessed the punishment at ten years, the minimum. The court, however, in giving judgment upon the finding of the jury, reduced the time to two years. The statute which gives power to the court, in cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in its opinion, the conviction is proper, but the punishment assessed is greater than under the circumstances of the case ought to be inflicted, never contemplated that the court should have power to reduce it below the minimum. The judgment of the court is therefore illegal and unauthorized."

All of the above cases, without dissension, hold that even where a jury brings in a verdict assessing a punishment by imprisonment or by fine less than the minimum set out in the statutes, it is mandatory upon the court to assess a larger sentence of imprisonment or larger fine to the amount of the minimum set out in the penal statute. Paragraph (d) of Section 8404, supra, sets out "any person who violates any of the other provisions of this article shall * * *". The punishment set out in paragraph (d) is mandatory. The word "shall", when used in its ordinary meaning, is mandatory. In the case of State ex inf. McKittrick, Attorney General, v. Wymore, Prosecuting Attorney, 119 S. W. (2d) 941, pars. 7-10, said:

"It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."

Since a jury cannot bring in a verdict assessing a punishment less than the minimum set out for the punishment in any case and it has been held by many cases and under the statute that it is mandatory upon the court to assess the proper minimum sentence, it goes without saying that the minimum punishment cannot be changed upon a recommendation made by a prosecuting attorney.

In your request you mention the fact that Paragraph (d) of Section 8404, supra, provides for a sentence in the county jail for a term not exceeding two years. This is a very extraordinary sentence in the county jail and was probably caused by a mistake in drawing the original bill, but since it is the law, it must be so read. It is the only section that we know of that provides for a punishment which limits a sentence to two years in the county jail. You merely mention the above, but as it is not necessary for an opinion as to the penalty of not less than Five Dollars (\$5.00), yet we call your attention to Section 4852, R. S. Missouri 1939, which reads as follows:

"Whenever any offender is declared by law punishable upon conviction by imprisonment in the penitentiary, or by imprisonment in a county jail, or by fine, or by both such fine and imprisonment, and no limit is fixed by law to the duration of imprisonment in the jail or to

the fine in such cases, the convict shall, in no instance, be sentenced to a longer term of imprisonment in the county jail than twelve months, nor shall the fine in any such case exceed one thousand dollars."

It is very noticeable under the above section that it states "and no limit is fixed by law to the duration of imprisonment in the jail or to the fine in such cases, * " The convict shall not be sentenced to a longer term of imprisonment in the county jail than twelve months. This section is not applicable to the special punishment section of paragraph (d), Section 8404, supra, for the reason that paragraph (d) specifically sets out that the imprisonment in the county jail shall not exceed two years.

CONCLUSION

It is our opinion that Section 8383, R. S. Missouri 1939, is the proper section to be invoked on cases of traffic violations on the highway, such as careless driving.

It is further the opinion of this department that paragraph (d) of Section 8404, supra, is the only section that provides a punishment for the violation of Section 8383 as to careless driving.

It is further the opinion of this department that a jury, judge or prosecuting attorney cannot assess or recommend a fine of less than Five Dollars (\$5.00) for careless driving, the punishment for which is set out in Section 8404, paragraph (d), Article 1, Chapter 45, R. S. Missouri 1939.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

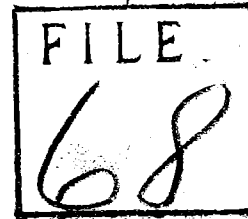
VANE C. THURLO
(Acting) Attorney General

WJB:DA

BOARD OF CHIROPRACTIC EXAMINERS: May not remit renewal fees; issuance of renewal license is mandatory on payment of required fee.

August 28, 1941

State Board of Chiropractic Examiners
Frances Building
Brookfield, Missouri



Attention: Dr. T. C. Oyler, Secretary

Gentlemen:

We are in receipt of your request for an opinion, dated June 1, 1941, as follows:

"There have been quite a number of the Chiropractors who are being taken in the draft. I have had a letter from several of them, asking if the board could or would dispense with the renewal of their license in 1942, feeling that when they are in the service of their country that they should not have to pay a license renewal fee. So far as the board is concerned, we are willing to do so, but can see no way under the law where we can legally waive the payment of the renewal.

"Secondly: the Missouri State Chiropractors held their annual convention in St. Louis recently and they adopted a resolution requesting that the board pass a regulation requiring that all Chiropractors practicing in the state must attend a two-day educational review course each year in order that their license may be renewed each biennium. Their idea was that we require them to attend the state convention, which is educational. I seriously doubt if the board has power to pass such a regulation, while I feel that it would be a

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good thing for our profession and should be done. Yet, I doubt whether it would be advisable to specify where they get this review course, should they get one, as some Chiropractors wish to take a review course in a Chiropractic College, and would not feel that they would want to take two review courses. Specifying where it should be taken, I feel, might be arbitrary.

"I feel that the board is willing to pass such a regulation if it is in accordance with law, and could be enforced."

In answer to your first question, we find no statutes specifically exempting members of the armed forces of the United States from the payment of license fees. Section 10937, Revised Statutes of Missouri, 1939, is in part as follows:

"The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; * * * "

Our Supreme Court has on several occasions ruled that this section, and the exemption set out therein, must be strictly construed (State v. Casey, 210 Mo. 235; State ex rel. v. Johnston, 214 Mo. 656), and the exemption has been held to apply only to property taxes. (State ex rel. v. Smith, 338 Mo. 409, 90 S. W. 2d 405)

Furthermore, the fees required to be paid under the provisions of Chapter 63, Revised Statutes of Missouri, 1939, which applies to chiropractors, are clearly license fees and not a tax in any sense. Section 10057 of the Revised Statutes of 1939, which refers to the renewal of licenses, reads as follows:

"Every person holding a license from the state board of chiropractic examiners, shall have it recorded with the circuit clerk of the county or city in which he or she maintains an office, and the date of recording shall in all cases be indorsed thereon. Until such license is filed for record, the holder shall exercise none of the rights or privileges conferred therein. The circuit clerk shall keep in a book provided for that purpose a complete list of all licenses recorded by him, with the date of recording thereof. A fee of \$1.00 shall be paid the official recording such license, which license shall at all times be displayed in the office of the holder thereof. All persons practicing chiropractic in this state shall pay on or before September 1st of each even-numbered year after a license is issued to them as herein provided, to said state board of chiropractic examiners, a renewal license fee of \$10.00, and no person shall practice chiropractic after September 1st of the even-numbered years following the issuance of such license, without such renewal. The secretary of the board shall on or before August 1st, of each even-numbered year, mail to all chiropractors in the state a notice that the renewal fee shall be due on or before the 1st day of September following such notice. Nothing in this chapter shall be construed so as to require that the renewal receipt shall be recorded as the original licenses are required to be recorded. Each practitioner of chiropractic shall display in his office in a conspicuous place his renewal license together with his license showing that he is lawfully entitled to practice chiropractic."

We think that portion of the above statute which is as follows - "All persons practicing chiropractic in this

state shall pay on or before September 1st of each even-numbered year after a license is issued to them as herein provided, to said state board of chiropractic examiners, a renewal license fee of \$10.00, and no person shall practice chiropractic after September 1st of the even-numbered years following the issuance of such license, without such renewal" - is decisive of the question at hand and clearly requires that a renewal fee of \$10.00 be paid every two years after the issuance of the original license by every person who desires to practice that science. We think the rule of construction found in *Keller v. State Social Security Commission*, 137 S. W. (2d) 898, is applicable, wherein the opinion states:

"In construing this statute the following well established rule should be kept in mind: Where the language of a statute is plain and unambiguous nothing contrary to the evident intent can be implied. State ex rel. *Jacobsmeier v. Thatcher*, 338 Mo. 622, 92 S. W. 2d 640. A statute should be so construed as to give effect to the legislative intent. State ex rel. *Wabash R. Co. v. Shain*, 341 Mo. 19, 106 S. W. 2d 898. A statute that is clear in its terms and leaves no room for construction must be enforced as written. *Dahlin v. Missouri Commission for Blind*, Mo. App., 262 S. W. 420. * * * * *

Since the statute by its terms clearly contemplates that it apply to all persons alike, we conclude that the Board has no power to waive the requirements of the statute so as to discriminate in favor of those in the armed forces of the United States, however desirable this may be. We think that any person applying for a renewal license, who had not paid a renewal fee for a period of years, even though he had not practiced chiropractic within those years, could be forced to pay the renewals for those years before securing his renewal license. We do not believe that this rule will work any particular hardship in the case of those who have been drafted to the Army since their period of service will undoubtedly expire before any two-year renewal period shall have elapsed.

In answer to your second question as to the validity of a proposed regulation that a two-day educational review course be required for renewal of a license, we fail to find any provision in the Chiropractic Act which authorizes the Board to make such regulation. The statute, by its terms, requires the issuance of a renewal license on payment of a fee of \$10.00. In fact, it terms the license a receipt at one point. We find the following in the section:

"Nothing in this section shall be construed so as to require that the renewal receipt shall be recorded as the original licenses are required to be recorded."

While we fail to find any case in this state discussing this exact problem, we find that our Supreme Court has discussed a similar section in the Dental Board Act in State ex rel. Wolfe v. Missouri Dental Board, 233 S. W. 390. In speaking of the effect of a statute similar to Section 10057, supra, the opinion states, l. c. 393, 394:

"One of the chief objects of the law is to get the cash with which to run the Missouri Dental Board."

"Then, for fear the Missouri Dental Board would run out of funds, the law requires the applicant, after he has been examined and given a certificate of registration, which certificate vouches for his educational and moral qualifications to practice dentistry, and before he can practice under his certificate of qualification (or 'registry,' as the law calls it), to get a license from the Missouri Dental Board and pay \$1 therefor. Section 5489, Laws of 1917, p. 256. This license must be renewed on or before November 30th of each year, and

casually the applicant must drop into the till of the Missouri Dental Board, \$1 each time. Section 5491, Laws of 1917, p. 257. No examination is required for this license. It is a fee proposition, pure and simple. It serves no substantial purpose other than the contribution annually of the dollar to the secretary of the Missouri Dental Board. True, it must be posted in the office, but the posting of the certificate of registration would serve the same end, because it bespeaks the qualification of the party.

* * * * *

"We now come to the law as to renewals of this original license. It is found in Acts of 1917, Laws of 1917, p. 257, Sec. 5491, which reads:

"All persons who have been regularly registered and licensed as dentists under the provisions of this act shall be entitled to have their license renewed upon application to said dental board on or before the 30th day of November in each calendar year next succeeding the expiration of the license then held by such applicant. All applications for renewal of license, as herein provided, shall be accompanied with a fee of \$1.00, and each new license so issued shall be kept and displayed, as herein provided for original licenses."

"Is there discretion lodged in the board in the performance of this act? We say not. The law says applicants for a renewal license 'shall be entitled to have their license renewed' upon payment of a fee of one dollar. Of course, the applicant must be regularly registered and previously licensed before he is entitled to a renewal license. If the applicant is duly registered and has been previously licensed, then

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the law says such 'applicant shall be entitled to a license.' There is no discretion found in this language. If the prerequisites exist, the renewal license must follow the application as the night follows the day."

It should be noted in the case just quoted that there must be an application for renewal of a dentist's license, which would present a greater opportunity for the exercise of discretion than in the case at hand where no application must be made, the only requirement being the receipt of the sum of \$10.00

CONCLUSION

It is the conclusion of this department that the State Board of Chiropractic Examiners has no power to exempt by rule or regulation any person from the payment of the renewal license fee required biennially of all persons practicing chiropractic.

It is the further opinion of this department that the State Board of Chiropractic Examiners has no authority to make a rule or regulation requiring any licensee to attend an educational review course as a prerequisite to the renewal of his license in September of the even-numbered years.

Respectfully submitted,

Approved:

ROBERT L. HYDER
Assistant Attorney General

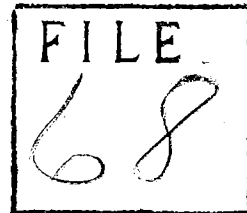
VANE C. THURLO
(Acting) Attorney General

RLH:VC

CRIMINAL LAW: Convict under death penalty reprieved by Governor
INSANITY: and discharged by State Hospital as sane is sub-
ject to execution.

October 18, 1941

Honorable Michael W. O'Hern
Prosecuting Attorney
Courthouse
Jackson County
Kansas City, Missouri



Dear Sir:

We are in receipt of your request for an official opinion from this department under date of October 15, 1941, which is as follows:

"This office is desirous of obtaining an opinion from the Attorney General's Office upon several questions of criminal procedure, based upon the facts hereafter set out:

"On June 26th, 1929, one FERDINAND BROCKINGTON, a negro, was found guilty of 'Murder in the First Degree,' before the Honorable Ralph S. Latshaw (now deceased), then Judge of the Criminal Court of Jackson County, Missouri, and the said BROCKINGTON'S punishment was assessed at death by hanging. The Supreme Court of Missouri, on the 25th day of March, 1931, affirmed the sentence of death and fixed the date of execution at the 8th day of May, 1931, and, in describing the facts attending the murder, used the following language (see 36 S. W. (2) 911):

"Defendant was a negro fifty-four years of age, and May 12, 1929 lived at 1409 Brooklyn, Kansas City. His family consisted of a wife and several children, four of whom and one son-in-law were in the house with him at the time of the alleged murder. On the night of May 11, 1929, he came from his work for his supper at the usual time, went back to

the city and returned after midnight, drunk. He had originally come from Arkansas and had been in Kansas City only a few months. He was in a bad temper, raised a disturbance with his family and ordered his wife to pack his suit case, he was going back to Arkansas; made sinister threats and created such a disturbance that one daughter went out and called the police. Also his son-in-law, George Ross, called the police. The defendant learned of these calls, became enraged and said if the police came he would mow them down. Officers Ralph Hinds and Delbert Bates came to the place. Hinds knocked on the door calling out, 'Police Officers.' The defendant had a revolver, opened the door and fired several shots, three of which struck Hinds, mortally wounding him. Bates was wounded, the defendant ran out of the back door. He was arrested two or three hours later. A half-pint bottle of corn whiskey about half full was found on him, also a 32-calibre revolver which was empty but indicated by the odor of burnt powder that it had been recently discharged

"I. The defense was insanity and one point made in the motion for new trial is that the evidence was insufficient to sustain a verdict of murder in the first degree because it showed the defendant was in such mental condition that his act could not have been deliberate. The defendant introduced a number of witnesses who testified that at times he showed evidence of insanity, and they believed him insane. The state introduced counter evidence upon that point. The defendant and members of his family, all of whom contradicted their written statements made the next day after the homicide, testified that he had spells during which he didn't know what he was doing. He himself said that

he came home that night, became unconscious, and didn't know anything that happened from the time he got home until he found himself in the police station, lying on the floor and somebody kicking him. There was sufficient evidence from which the jury could readily find that he was only beside himself with whiskey, that the shooting was deliberate, and that he was fully cognizant of the character of the act.'

"On the 14th day of July, 1930, Henry S. Caulfield, Governor of the State of Missouri, wrote a letter to J. H. Smedley, Sheriff of Jackson County, Missouri, advising said Sheriff that a petition had been presented to the said Governor tending to support a claim of insanity on the part of BROCKINGTON. Governor Caulfield in the letter cited Section 4148, R. S. Missouri 1919 (now Section 4192 R. S. Missouri 1939); Section 4149 R. S. Missouri 1919 (now Section 4193 R. S. Missouri 1939); Section 4150 R. S. Missouri 1919 (now Section 4194 R. S. Missouri 1939); and Section 4151 R. S. Missouri 1919 (now Section 4195 R. S. Missouri 1939).

"The above statutes provide in substance that if a sheriff shall have cause to believe that any convict who has been sentenced to the punishment of death has become insane, he may summon a jury of twelve jurors to inquire into such insanity; provide that the Prosecuting Attorney shall attend such inquiry, that if such convict is found insane the sheriff shall suspend the execution of the sentence until he has received a warrant from the Governor or from the Supreme or other Court directing the execution of such convict; and that the sheriff shall transmit such inquisition to the Governor.

"Governor Caulfield after citing said statutes requested an opinion from the

sheriff as to whether BROCKINGTON was probably insane and whether the sheriff would summon a jury to hold an inquisition as provided by the above sections of the statutes. As a result of said letter the sheriff of Jackson County, summoned a jury which found the defendant to be insane as of that time. Acting upon this finding Governor Caulfield, on the 29th day of April, 1931, less than a month after the Supreme Court had affirmed the death sentence, suspended the execution of said sentence and ordered the sheriff of Jackson County to immediately convey said FERDINAND BROCKINGTON to the State Hospital for the Insane No. 2, located at St. Joseph, Missouri, 'there to be detained until restored to reason.' The Governor further ordered the Superintendent of said State Hospital to receive said BROCKINGTON, safely keep him confined in said Hospital and treat him for insanity 'until restored to reason,' at which time the said Superintendent should give due notice to the Governor of the State 'who shall then order sentence to be executed.' The said BROCKINGTON was confined in the State Hospital No. 2, at St. Joseph, Missouri, from the 30th day of April, 1931, until the 1st day of August, 1933, at which time he escaped therefrom.

"The records of said State Hospital show that FERDINAND BROCKINGTON was never classified as to any psychosis, i.e., as to whether he was sane or insane. Said records further show that on the 21st day of August, 1934, over a year after BROCKINGTON escaped from the Hospital, he was 'discharged' from the Institution by authority of the President of the Board of Managers of the State Eleemosynary Institutions. According to an affidavit of James R. Bunch, now Superintendent of said State Hospital No. 2, the records of said Institution show 'that the said Ferdinand Brockington is no longer

wanted by said Institution.'

"FERDINAND BROCKINGTON was arrested in Pontiac, Michigan, on the 22nd day of September, 1941, under the name of 'John D. Oliver.' He has been positively identified as the FERDINAND BROCKINGTON above described; and the finger prints of the man arrested in Pontiac, Michigan, have been declared by the Federal Bureau of Investigation, Washington, D. C., to be identical with those of the FERDINAND BROCKINGTON above described.

"FERDINAND BROCKINGTON has been returned to the State of Missouri, under extradition proceedings instituted by the Prosecuting Attorney's Office of this County, and he is now confined in the County Jail in Kansas City, Missouri.

"Affidavits have been obtained in Pontiac, Michigan, by the office of the Prosecuting Attorney of Jackson County, tending to show that FERDINAND BROCKINGTON for the past four and one-half years has been sane.

"Bearing in mind the above facts the following questions have arisen as to the procedure to be followed henceforward in the execution or commitment of the defendant:

"1. Under Sections 4194 and 4195 R. S. Missouri Statutes 1939, should a hearing be held by the Governor of the State of Missouri, to determine whether or not the defendant has recovered his sanity; the nature of the hearing; if a jury should inquire into the facts of sanity or insanity and if such a hearing is required, who should request the Governor for said hearing?

"2. By whom should the costs of said

hearing before the Governor be defrayed?

"3. If the defendant is found by the Governor to have recovered his sanity, may the Governor issue a warrant setting time and place for the execution of the defendant? If so, to whom is the warrant directed and the form of same? And is it necessary, if the defendant is found to have recovered his sanity, that application be made to the Supreme Court of the State of Missouri, for an order directing the Circuit Court of Jackson County to re-sentence the defendant in accordance with the present method of execution? If so, who should make such application to the Supreme Court?

"4. In view of the fact that the Judge of the Circuit Court before whom the defendant was tried is deceased, should such re-sentencing, if necessary, be done by the present Judge of the Criminal Division 'A' in Jackson County, or should it be done by the Circuit Judge presiding over the Division in which the defendant was convicted?

"5. What, if any, suggestions has the Attorney General to make as to the type of evidence that should be adduced before the Governor to establish that the defendant is sane at the present time?

"6. In case the Governor finds the defendant to be insane, what order or commitment should be issued by the Governor, to whom issued and its contents?"

The three following sections are applicable to your request. Section 4192, R. S. Mo. 1939, reads as follows:

"If, after any convict be sentenced to the punishment of death, the sheriff or warden having in charge his person shall have cause to believe that such convict has be-

come insane he may summon a jury of twelve competent jurors to inquire into such insanity, giving notice thereof to the prosecuting attorney of the county where such criminal proceedings originated, or to the circuit attorney of the city of St. Louis, if such proceeding originated in the city of St. Louis."

It is very noticeable under the above section that either the sheriff or warden having charge of the person may summon a jury to inquire into his insanity. Under the present law, which provides for the execution of the death sentence by the warden by the use of lethal gas within the walls of the State penitentiary, yet the sheriff may have the person in charge before his transfer to the penitentiary and, under the above section, may summon a jury of twelve persons to inquire into the sanity of the person.

Section 4194, R. S. Mo. 1939, reads as follows:

"The inquisition of the jury shall be signed by them and by the officer in charge of said convict. If it be found that such convict is insane, the execution of the sentence shall be suspended until the officer in charge of such convict receives a warrant from the governor, or from the supreme or other court as hereinafter authorized, directing the execution of such convict."

Under the above section it is only applicable to a case where the convict is declared insane by the sheriff's or warden's jury, and does not apply where the convict is declared sane. It should be specifically noticed that in this section if the convict is declared insane the execution of the sentence should be suspended until the officer in charge of such conviction receives a warrant from the Governor, or from the Supreme or other court as hereinafter authorized, directing the execution of such convict.

Section 4195, R. S. Mo. 1939, reads as follows:

"The officer in charge of such convict shall immediately transmit such inquisition to the governor, who may, as soon as he shall be convinced of the sanity of the convict, issue a warrant appointing the time of execution, pursuant to his sentence; or, he may, in his discretion, commute the punishment to imprisonment in the penitentiary for life."

Under the above section, if the jury, as summoned under Section 4192, supra, should find the convict sane, the Governor, upon receipt of the inquisition or verdict of said jury, may, as soon as he shall be convinced of the sanity of the convict, issue a warrant and set a time for the execution, or, he may commute the sentence to imprisonment in the penitentiary for life. The purpose of this section is to set a certain time for the execution, where it has been suspended at a time near the time of the execution and the trial of the case may overlap the certain date set. In that case this section authorizes the Governor to set a different date.

Section 9352, R. S. Mo. 1939, reads as follows:

"If any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part, of the sentence of the court, become insane, it shall be the duty of the governor of the state to inquire into the facts; and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the state penitentiary, order such lunatic to be conveyed to a state hospital and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor."

This section is a general section applying only to where the penalty is for a term of years in the penitentiary and does not apply where the penalty is a death sentence. It will be noticed that it uses the term "and before the execution, in whole or in part, of the sentence of the court, become insane, * * *." This section further states "If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor." In such a case, upon the convict being declared sane by anyone who has charge of the convict by reason of the inquisition of the governor, the execution of the sentence will begin without an order of the governor. This section (9352, supra) is a general section and is not applicable. In case of a general law and a special law, such as Section 4192, supra, the special law should be followed. It was so held in *State v. Harris*, 87 S. W. (2d) 1026, 1. c. 1029, para. 6, 337 Mo. 1052, where the court said:

"Assuming for the purpose of this case that section 4428 is a valid enactment, we have, then, two legislative acts passed at the same session of the Legislature, taking effect at the same time and relating to the same general subject. They should be construed together and if possible harmonized so as to give effect to each. *Gasconade County v. Gordon et al.*, 241 Mo. 569, 581, 145 S. W. 1160. If, however, the statutes are necessarily inconsistent, that which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature. *Gasconade County v. Gordon et al.*, supra. The rule is thus stated in *State ex rel. County of Buchanan v. Fulks et al.*, 296 Mo. 614, 626, 247 S. W. 129, 132, quoting from 36 Cyc. 1151:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should

be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

In your request you state that the record of State Hospital Number Two shows that on the 21st day of August, 1934, Ferdinand Brockington was discharged from the institution by authority of the President of the Board of Managers of the State Eleemosynary Institutions and you further stated that James R. Bunch, now Superintendent of State Hospital Number Two, by an affidavit stated "that the said Ferdinand Brockington is no longer wanted by said Institution."

Section 9321, R. S. Mo. 1939, reads as follows:

"Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."

Under the above section it will be noticed that the decision of the Superintendent and his staff on the matter of an inmate of the State hospital who have charge of insane persons, shall be final. Also in the case of *In re Moynihan*, 62 S. W. (2d) 410, para. 11-15, the court said:

"However, such an order for temporary restraint, as made by the probate court here, is not binding upon the superintendent of a state hospital to keep the person confined until an order is made in that court for release. It is in no sense like a commitment in a criminal case for a definite term in jail or in the penitentiary. The person may lawfully be either discharged or paroled and set at liberty by the superintendent of his own motion at any time. Section 8629, R. S. 1929 (Mo. St. Ann. Sec. 8629). The hospital is a state institution. Chapter 46, articles 1 and 2, R. S. Mo. 1929 (section 8560 et seq. (Mo. St. Ann., Sec. 8560 et seq.)). The superintendent is one skilled in the treatment of mental diseases. Section 8578, R. S. 1929 (Mo. St. Ann. Sec. 8578). He is better qualified to determine a person's mental condition and the necessity for his confinement than the probate judge. He is a public officer, and improper action on his part will not be presumed. * * * * *

In your request you also state:

"* * * As a result of said letter the sheriff of Jackson County, summoned a jury which found the defendant to be insane as of that time. Acting upon this finding Governor Caulfield, on the 29th day of April, 1931, less than a month after the Supreme Court had affirmed the death sentence, suspended the execution of said sentence and ordered the sheriff of Jackson County to immediately convey said FERDINAND BROCKINGTON to the State Hospital for the Insane No. 2, located at St. Joseph, Missouri, 'there to be detained until restored to reason.' The Governor further ordered the Superintendent of said State Hospital to receive said BROCKINGTON, safely keep him

confined in said Hospital and treat him for insanity 'until restored to reason,' at which time the said Superintendent should give due notice to the Governor of the State 'who shall then order sentence to be executed.' * * * *"

Since Governor Caulfield set the suspension until the convict was restored to reason and also required the Superintendent to give notice to the Governor of the State, who then should order the sentence to be executed, and since there is no record that such a notice has been given, we must rely upon the order and authority of the President of the Board of Managers of the State Eleemosynary Institutions that Ferdinand Brockington is now sane. Governor Caulfield could have set out any restrictions to be entered into under the suspension of the sentence or on any parole or commutation so long as the restriction is not illegal, immoral or impossible of fulfillment. It was so held in *Jacobs v. Crawford*, 272 S. W. 931; *Ex parte Strauss*, 7 S. W. (2d) 1000; *Ex parte Webbe*, 30 S. W. (2d) 612, and *Lime v. Blagg*, Acting Warden, 131 S. W. (2d) 583.

Under Section 4194, R. S. Mo. 1939, it specifically states that the execution should be suspended until either the Governor or the Supreme Court or other court directs the execution of such convict. Since the form of punishment in a capital offense has been changed since the time of the affirming of the sentence in the Ferdinand Brockington case from hanging to death in the lethal gas chambers within the walls of the State penitentiary, it will be necessary for this office to file a motion to modify the original judgment and affirmance in the case of *State v. Ferdinand Brockington*, 36 S. W. (2d) 911. This was done in the case of *State v. Brown*, 112 S. W. (2d) 568, l. c. 571, where the court said:

"It is therefore ordered and decreed that the opinion heretofore adopted by this court be modified; that the sentence to suffer death by hanging be set aside; that the conviction of appellant of murder in the first degree and the infliction of capital punishment be affirmed; that the case be remanded to the trial court; and that that court as soon as may be expedient, have the appellant brought

before it for the purpose of passing a sentence in accordance with the provisions of Laws Mo., 1937, pp. 222, 223. It is so ordered."

The procedure set out in this case was also followed in State v. Kenyon, 126 S. W. (2d) 245, 343 Mo. 1168; State v. Wright, 112 S. W. (2d) 571, 342 Mo. 58, and State v. Boyer, 112 S. W. (2d) 575, 342 Mo. 64.

When an order is made by the Supreme Court directing the person in charge of the convict to have him resentenced on the death penalty he is then sent to the penitentiary in compliance with Section 4108, R. S. Mo. 1939. Section 4108 reads as follows:

"When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the state penitentiary at Jefferson City, Missouri, for execution."

In compliance with Section 4108, supra, if the sheriff does not desire to call a jury to inquire into the sanity of Ferdinand Brockington, then he is placed in custody of the warden and if the warden has good reason to believe Ferdinand Brockington is insane he may call a jury, as set out in Section 4192, supra.

In your request as to the proper evidence on such a hearing, we find that the law does not set out the procedure except that a jury may be summoned to inquire into the sanity of the convict and the only other procedure is set out in

Section 4193, R. S. Mo. 1939. This section does not specifically state that the rules of civil or criminal procedure be followed. It follows that any information - such as affidavits, depositions or witnesses in person, may be inquired into by the jury.

You also inquire in your request that upon an order of resentencing by the Supreme Court which judge shall resentence Ferdinand Brockington. We find that in the original case of State v. Ferdinand Brockington, 36 S. W. (2d) 911 he was sentenced by the Honorable Judge Ralph S. Latshaw, who was judge of Division 8 of the Sixteenth Circuit in Jackson County, Missouri, and, in checking as to his present successor, we find that Division 8 of the Sixteenth Circuit in Jackson County, Missouri, is now presided over by the Honorable Judge Paul A. Buzzard. Your main inquiry in this respect is whether the judge of the same division of the circuit should resentence or whether it should be the judge of Criminal Division A of the Circuit Court of Jackson County. We find that in the case of State v. Messino, 30 S. W. (2d) 750, 1. c. 757, 325 Mo. 743, the court said:

"While, as stated, there are some decisions to the contrary, we think the weight of authority is that, where the judge who presided at the trial dies or goes out of office leaving a motion for new trial undisposed of, his successor in office, if the facts are fully presented to him, has authority to determine the motion on its merits, even where the sufficiency of the evidence is challenged, and without express statutory provision. In this state, as we have seen, the statute impliedly confers authority. We are satisfied with the construction heretofore given the statute, and we are convinced that defendant was not deprived of any constitutional right by such construction and the holding that in the circumstances shown the successor of the trial judge had authority to determine the motion for new trial.

"Defendant has by leave of court added to his brief a citation to Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, decided April 14, 1930, in which the United States Supreme

Court holds that on certain conditions one accused of felony may waive his right to a constitutional jury of twelve and consent to a lesser number or to trial without a jury. The decision does not involve the question above discussed.

"But it is urged that the remarks made by Judge Woodbury at the time of overruling the motion show that he did not acquaint himself with and consider all of the evidence. We think otherwise. He said that he had carefully studied the authorities presented in support of the motion and had spent many hours 'referring to parts of the reporter's notes and parts of the transcript of the testimony.' Appellant's counsel say they had had parts of the testimony transcribed and submitted to the court and that a full transcript had not been made. The hearing of the motion occurred some four months after the trial and extended over a period of several days, after which the judge took a month to consider before ruling on the motion. We may safely presume that all the facts thought to bear upon points made in the motion were fully presented and that the judge gave full consideration to all questions urged. The suggestion that he could not read the reporter's notes, therefore could glean nothing by reference to them, is hypercritical. His action in overruling the motion shows that he considered the verdict to be sufficiently supported by the evidence. And in view of the fact that at least five unimpeached and uncontradicted witnesses identified defendant as the driver of the car from which deceased was killed, we do not see how the sufficiency of the evidence can be seriously questioned. We rule this point against defendant."

In the above case the court specifically held that in a murder case where the judge who tried the case died before the motion for a new trial was passed on, then the judge of that particular division should pass upon the motion for a new trial and sentence the defendant. And, in view of this decision, there is no question but that the judge of Division 8 of the Sixteenth Circuit in Jackson County, Missouri, should resentence the defendant when ordered under a mandate of the Supreme Court, and not the judge of Division A or B, designated by the rules of the Jackson County Court as such division.

Of course, the present Governor, under Section 8, Article V, of the Constitution of Missouri, even after the Supreme Court of this State has modified the opinion of the original case to the extent that he be administered lethal gas by the warden within the walls of the State penitentiary, may grant a reprieve, pardon, another suspension of sentence, or commutation of the convict. Section 8, Article V, Constitution of Missouri, reads as follows:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the commutation, pardon or reprieve, and the reason for granting the same."

Under the present statement of facts it does not seem necessary that the Governor at this time hold any inquisition until the record in the original case is properly modified to comply with the present law of execution under the death penalty. Of course, the sheriff at the present time may call for a jury to inquire as to the sanity of Ferdinand Brockington under Section 4192, supra.

You also inquire as to the costs of a hearing before the governor, sheriff or warden, under Sections 4192 and 4194, supra. These sections do not provide for costs or fees to be paid either by the county or State and since, under such sections, no costs or fees can be taxed they cannot be allowed. It was so held in State ex rel. v. Wilder, 196 Mo. 418, l. c. 433, where the court said:

"This court has uniformly held that no costs can be taxed except such as the law in terms allows, and it being essential that the witnesses actually and necessarily travel the mileage in consequence of a subpoena legally served upon them, and there being no legal service of process upon the witnesses claiming fees in this case, it must be ruled that the auditor was warranted in refusing to allow the fees for such witnesses as certified by the judge and prosecuting attorney."

And, it was also so held in State ex rel. v. Wilder, 197 Mo. 27, l. c. 32, where the court said:

"The sole question arising from the facts alleged by the relator and admitted by the State Auditor, is whether the State is liable for the costs claimed by the relator. For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. (Shed v. Railroad, 67 Mo. 687; Crouch v. Plummer, 17 Mo. 420; State ex rel. v. Hill, 72 Mo. 512; Williams v. Chariton County, 85 Mo. 646.)"

CONCLUSION.

In answer to your first question, it is the opinion of this department that under Sections 4194 and 4195, R. S.

Mo. 1939, in view of the modification to be made in the original case of State v. Ferdinand Brockington, it is not necessary at this time that a hearing be held by the Governor of the State of Missouri to determine whether or not the defendant has recovered his sanity. Of course, the sheriff who has now custody of Ferdinand Brockington may inquire as to his insanity under Section 4192, R. S. Mo. 1939.

In answer to your second question, it is the opinion of this department that the costs of a hearing before a jury summoned by the sheriff or by the warden, or, in a hearing by the Governor later, if necessary, should not be paid either by the county or by the State and cannot be taxed in any manner.

In answer to your third question, it is further the opinion of this department that in view of the motion for a modification in the original case, it would not be necessary for the Governor to issue a warrant setting the time and place for the execution of the defendant. The only time that this authority is granted to the Governor is when the jury summoned by the sheriff or warden find that the convict is sane as set out under Section 4194, R. S. Mo. 1939, and the time originally set by the court has passed on account of the time being taken up by the inquiry of the jury. It is mandatory that a motion to modify the original judgment in the Supreme Court of this State be filed by this office.

In answer to your fourth question, it is the opinion of this department that the present judge of Division 8 of the Sixteenth Circuit in Jackson County, Missouri, who is now the Honorable Judge Paul A. Buzzard, must resentence Ferdinand Brockington upon the receipt of the mandate from the Supreme Court, after the filing of the motion for the modification of the original judgment in the cause.

In answer to your fifth question, it is the opinion of this department that since we have held that it is not necessary for the Governor at this time to hold a hearing and that in view of the motion for modification and a mandate of the Supreme Court, if an inquiry is held by a jury upon the order of a sheriff or warden, any evidence such as affidavits, depositions or personal witnesses, may be used at the hearing. We base this opinion on the fact that under the facts applicable upon a procedure set out in your request no mention is made

Hon. Michael W. O'Hern

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October 18, 1941

that the hearing should be in accordance with any civil or criminal procedure.

In answer to your sixth question, it is our opinion that the Governor, in view of our answers to your first five questions, need not make any order of commitment, but await the mandate of the Supreme Court on the motion to modify the judgment or decision in the original case.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

WJB:CP

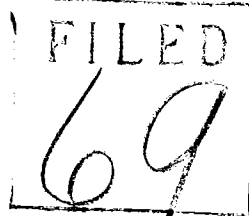
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

INTOXICATING
LIQUOR:

The penalty for a violation of Section 8
of the Liquor Control Act is a misdemeanor
as provided by Section 43 of said act.

January 21, 1941



Mr. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Mr. Paul:

This is in reply to your request for our opinion
by your letter dated January 17, 1941, which is in the
following terms:

"Would you kindly inform me whether or
not under Section 8, page 7 of the in-
toxicating liquor laws, State of Missouri
1929, as published by the Department of
Liquor Control, the same being Section
8 of page 528 of the Laws of Missouri,
1927, whether or not the penalty is a
misdemeanor or a felony. I would appreciate
an early reply in regard to this matter."

Section 8 of the Liquor Control Act, Laws 1933, Ex.
Sess. page 77, Section 8, as amended, Laws 1937, page
527, Section 2, Mo. Stat. Ann. page 4686, Section 4525g-9
provides:

"No person shall possess intoxicating
liquor within the State of Missouri unless
the package in which such intoxicating
liquor is contained and from which it is
taken for consumption has, while contain-
ing such intoxicating liquor, been labeled
and sealed with the official seal prescribed

January 21, 1941

under this act and the regulations made hereunder; provided further, that nothing in this act shall be so construed as to prevent the natural fermentation of fruit juices in the home for the exclusive use of the occupants of the home and their guests."

It is provided by Section 43 of the Liquor Control Act, Laws 1933, page 77, Section 43, as amended, Laws 1935, page 267, Section 1, Mo. Stat. Ann. page 4689, Section 4525g-48 that:

"Any person violating any of the provisions of this Act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty (\$50.00) Dollars, nor more than One Thousand (\$1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence."

Inasmuch as a penalty for a violation of Section 8, supra, is not provided otherwise than by said Section 43, the penalty is for a misdemeanor as provided by Section 43, supra.

CONCLUSION

It is our opinion that the penalty for a violation of Section 8 of the Liquor Control Act is a misdemeanor as provided by Section 43 of said Act.

Respectfully submitted

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

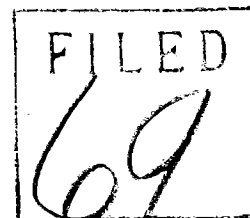
COVELL R. HEWITT
(Acting) Attorney General

EH:RT

PROSECUTING ATTORNEY) One charged with careless and reckless
CRIMINAL LAW) driving who paid a fine is not put in
FORMER JEOPARDY) jeopardy by being subsequently charged
with carrying a deadly weapon while
intoxicated.

February 12, 1941

Mr. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of January 18, 1941, which reads as follows:

"I have been confronted with the following state of facts and desire your opinion before further proceeding in this case: Mr. X was arrested by the State Highway Department and was charged with operating a motor car while intoxicated.

"Mr. Tracy, then Prosecuting Attorney later reduced the charge to careless and reckless driving, and Mr. X. paid a fine. At the time of his original arrest, Mr. X. had in his possession in the car a certain revolver pistol. Upon assuming office I filed a charge of carrying deadly weapons while intoxicated. Since filing that charge I have read certain cases among which are: State vs. Selby, 90 Mo. 302, 2 SW 468, and also the case State v. Toombs, 34 S.W. 2, P. 61.

"In view of these cases I am wondering whether or not I have sufficient grounds to base the suit upon, as I have interpreted these cases to mean that where it has been a conviction upon one cause of action and certain elements were necessary in that cause, and the same elements are also necessary in the second cause, that the plea of former jeopardy would be a bar to further prosecution."

In answering your request we shall not consider the fact that this Defendant was originally charged with operating a motor car while intoxicated, for reason that this charge was later reduced to a charge for careless and reckless driving for which the said defendant paid a fine. So for the premises in this case we shall assume that the defendant was formerly charged with careless and reckless driving.

Now, the question: Would a charge of carrying a deadly weapon while intoxicated be subject to a plea of former jeopardy? The evidence of the carrying of the concealed weapon relates back to the time of the former arrest. At that time he had in his possession in the car a revolver. Section 23 of Article II of the Constitution of Missouri prohibits any person being put in jeopardy and reads as follows:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which

the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

Amendment V to the Constitution of the United States prohibits any person for the same offense to be put in jeopardy, and reads as follows:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The statutory provisions regarding jeopardy are found in Sections 4846, 4847 and 4848, R. S. Missouri, 1939, and read as follows:

"When the defendant shall be acquitted or convicted upon any indictment, he shall not thereafter be tried or convicted of a different degree of the same offense, nor for an attempt to commit the offense charged in the indictment, or any degree thereof, or any offense necessarily included therein, provided he could have been legally convicted of such degree of offense, or attempt to commit the same, under the first indictment."

"When a defendant shall have been acquitted of a criminal charge upon trial, on the ground of variance between the indictment and the proof, or upon any exceptions to the form or substance of the indictment, or where he shall be convicted, but the judgment shall for any cause be arrested, he may be tried and convicted on a subsequent indictment for the same offense, or any degree thereof, or of an attempt to commit such offense."

"When a defendant shall have been acquitted upon a trial, on the merits and facts, and not on any ground stated in the last section, he may plead such acquittal in bar to any subsequent accusation for the same offense, notwithstanding any defect in form or substance in the indictment upon which such acquittal was had."

Corpus Juris, in stating the general principle that even when two offenses are nominally the same, a conviction of one will not be a bar to the other if they are substantially different, said:

"* * * Even where two offenses are nominally the same, if they are substantially different, a conviction of one will not be a bar to a prosecution in the other. Nor is a putting in jeopardy for one act a bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had."

We find in Bishop on Criminal Law, Volume 1, 9th Ed., page 775, Section 1051, the rule as to when offenses are the same, as follows:

"Just principle seems to sustain the following: They are not the same when (1) the two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction, -- a proposition of which the exact limits are difficult to define; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second. On the other side, (5) the offences are the same whenever evidence adequate to the one indictment will equally sustain the other. Moreover, (6) if the two indictments set out like offences and relate to one transaction, yet if one contains more of criminal charge than the other, but upon it there

could be a conviction for what is embraced in the other, the offences, though of different names are, within our constitutional guaranty, the same."

Also, in Section 1060 of Volume 1 of Bishop on Criminal Law, page 785, same offenses are interpreted in the following language:

"* * * 'a fundamental rule of law that out of the same facts a series of charges shall not be preferred.' To give our constitutional provision the force evidently intended, and to render it effectual, 'the same offence' must be interpreted as equivalent to the same criminal act. Judicial utterances have even gone apparently to the extent that there can be only one punishment for one criminal transaction. But this is carrying the rule, at least according to the greater number of the authorities, too far the other way."
(Underscoring ours).

In Volume 8 of Blashfield's Cyclopedia of Automobile Law and Practice, Section 5494, pages 244-5, the rule is given as to when the same facts constitute two or more offenses and one will not bar a conviction of the other, and reads in part as follows:

"* * * When the same facts constitute two or more offenses, wherein the lesser is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act. * * *"

It has been held in this state that the stealing of goods of more than one at the same time and place only constitutes one charge. State v. Citius, 56 S. W. (2d) 72, 1. c. 74. Also, State v. Bockman, 124 S. W. (2d) 1025, 1. c. 1206.

It has been held in a number of foreign cases that a conviction of assault with intent to murder does not bar a prosecution for carrying a pistol. In Brown v. State, 37 So. 408 (Supreme Court of Ala.) a special plea of former conviction was filed by the defendant showing that the defendant was indicted of assault with intent to murder and convicted of an assault and battery with a weapon. The plea of former conviction stated that the offense now charged was the same and based upon the same act and the same testimony would support both charges. The State demurred on the ground that said plea on its face showed distinct and separate offenses and said demurrer was sustained by the court. The court, in upholding the action of the lower court on appeal, said:

"The demurrer to the defendant's plea of former conviction was properly sustained."

In Richardson v. State, 30 So. 650 (Supreme Court of Miss.) the defendant was acquitted of assault and battery with intent to kill and murder one Henrietta Pierce. The grand jury subsequently returned an indictment against the defendant charging him with force and arms unlawfully, feloniously and intentionally pointing a pistol toward Henrietta Pierce, and did then and there and while so intentionally pointing said pistol willfully and feloniously discharged same and injure. The defendant filed a plea of autrefois acquit. The District Attorney demurred and the lower court sustained the demurrer. In upholding the action of the lower court on appeal, the Supreme Court said:

"The previous acquittal on an indictment for assault and battery with intent to kill and murder is no bar to this indictment for pointing a gun, etc. Granted that it would have been a bar if the previous acquittal had been on a charge of murder or manslaughter, this would have been because of the express provision of Code 969 and it does not apply to assault and battery."

Woodroe v. State, 96 S. W. 30 (Court of Criminal Appeals, Texas), the appellant was convicted of unlawfully carrying a pistol and fined \$25.00. The appellant claimed that the court committed error in striking out her plea of former acquittal. Such plea of former acquittal set up the fact that she had previously been acquitted of an assault with intent to murder and that was the very occasion when she had the pistol for which she is now being tried. The court held that that was no bar to this prosecution.

In Nichols v. State, 40 S. W. 502 (Court of Criminal Appeals, Texas), the defendant was charged with carrying on and about his person a pistol and fined \$25.00. The defendant had formerly been charged and convicted of disturbing the peace and displaying a deadly weapon. The defendant plead not guilty as he was formerly convicted against the latter charge. The court said:

"Appellant was charged with carrying on and about his person a pistol, and fined and in the sum of \$25, and appeals.

"In addition to his plea of not guilty, appellant filed a plea of former conviction, in which he states that he had been previously convicted of a disturbance of the peace, by going near a private residence, and displaying a deadly weapon, and further alleging that it was the same trans-

action as that charged in the information in this case. So far as this bill is concerned, it may be conceded that the proof in the former case was in substance that appellant was traveling along the road, and passing near the residence of one Ray; that Ray's dog barked at him, and, after going a short distance, appellant returned, and fired the pistol at the dog, and, in doing so, fired towards the residence of Ray, it being but a few steps away. For this display of the pistol and disturbing people at Ray's house, appellant was convicted in the justice court, under a complaint charging him with going near the private residence of another, and rudely displaying his pistol, under article 334 of the Penal Code of 1895. On the trial the court instructed the jury 'that the plea of former conviction offered by the defendant was stricken out by the court, and, in making up your verdict in this cause, you will not consider the same.' etc. This was not error. The offenses were different. Appellant was riding along the road, carrying the pistol with him before he reached the place where the shooting occurred, and carried it on beyond that point. Our statute has made these offenses different prescribing different punishments; and the offense of carrying the pistol was complete before it was displayed and fired. Without entering into a discussion of the question we refer to *Wheelock v. State* (Tex. Cr. App.) 38 S. W. 182, and *Burns v. State*, Id. 204."

In the case of *State v. Garcia*, 200 N. W. 201 (Supreme Court of Iowa), the court approvingly quoted from their decision in the case of *State v. Broderick*, 191 Iowa, 717, 719, 183 N. W. 310, 311. At l. c. 202, as follows:

"We said in State v. Broderick,
191 Iowa, 717, 719, 183 N. W. 310
311:

"The "same evidence test" is not infallible, but may be accepted as true only in a general sense. While the difference of evidence conclusively establishes the distinctness of the accusations, it does not follow ~~e con-~~verso that two indictments are identical in their accusations, although the same evidence may be legally competent and sufficient to sustain each; because two crimes may be committed in the course of one and the same transaction."

In Collier v. State, 69 S. E. 29 (Court of Appeals of Georgia) the court held that a former conviction for being drunk and disorderly on a public highway would not be good in bar of a prosecution for firing such a pistol on a public highway on the Sabbath Day. This is true, although the defendant will have been convicted of being drunk and disorderly on the highway when he fired the pistol. The offenses are separate and distinct. The evidence necessary to convict of the first offense would not be sufficient to convict of the second.

In State v. Burgess, 268 Mo. 407, 1. c. 420, the court held that the evidence disclosing that the defendant was found guilty of making away with, securing with intent to embezzle Three Hundred (\$300.00) Dollars entrusted to him for investment in March, will not authorize a discharge upon a plea of former jeopardy when put upon trial for making away with, securing with the intent to embezzle Four Hundred Fifty (\$450.00) Dollars entrusted to him by the same person for the same purpose in the previous decision, and the court further held that where there were two distinct offenses, conviction of one is no bar to prosecution for the other, although it involves the same testimony. In so holding, the court said:

"It is also urged that defendant should be discharged because the facts which were testified to on behalf of the State in this case were likewise offered in evidence in the trial of another charge against defendant.

"We have carefully examined both the record and the plea, without lengthening the opinion with a statement of the disclosures, it is our opinion that the defendant has not been in former jeopardy on this charge, and that upon the showing made he was not entitled to his discharge on that ground. * * * * *

In State v. Page, 58 S. W. (2d) 293, 1. c. 295, 296, the defendant had been indicted and acquitted on a charge of forging a deed. In the case at bar the defendant was charged with having forged a certification of purported acknowledgment to the deed. By written plea in bar filed before the trial and also by evidence offered at the trial in the instant case, the defendant interposed the acquittal under the first indictment as a bar to his further prosecution under the second, which plea the court overruled. In holding the two offenses separate and distinct and involving different actions, the court said:

"* * * If there was evidence in the trial under indictment No. 278 tending to show that defendant had falsely certified an acknowledgment to the deed therein charged to have been forged, it could only have been competent, if at all, as it might bear upon the question of the alleged forgery of the deed. The two offenses are separate and distinct, involving different actions. One is the forgery of the deed which might be committed by any person. The other is the

false certification of a purported acknowledgment to the deed, which could be committed only by a person authorized to take and certify acknowledgments, acting in his official capacity. The deed might be forged though not acknowledged at all, and there might be a false certificate of acknowledgment to a genuine deed in violation of section 4180.

* * * * *

"It follows that the charge in indictment No. 278 of forging the deed did not, as appellant contends it did, include the offense or act denounced by section 4180 upon which the indictment in the instant case was based, and appellant could not have been convicted under the first indictment of the offense charged in the second. Neither would the same evidence nor the same character of evidence have sustained both charges."

In the case of State v. Shelby, 90 Mo. 302, 1. c. 306-7, the defendant was indicted in one count for carrying about his person a deadly weapon when under the influence of intoxicating drink and in the other for carrying concealed a deadly weapon. The evidence in this case disclosed that the defendant was a guest of a hotel; that he took a pistol from his coat pocket where it was concealed and laid it upon his lap while sitting at a table in the dining room; and that at the time the defendant was under the influence of intoxicating drink. The court, in holding that the defendant was not guilty of two distinct offenses, said:

"* * * Carrying a deadly weapon is an element common to both offences charged in the indictment; and there is proof of but one carrying, and that at the same time and place. By the verdict the carrying of the weapon is first attached to the

fact that the defendant was under the influence of intoxicating drink and made one offence. The same carrying is then attached to the fact of concealment and made another offence. Now all these elements existed at one and the same time. They constituted but one misdemeanor. The fact that defendant took the pistol out and laid it upon his lap, but furnishes the proof of his guilt, and in no just sense can it be said the defendant was guilty of two distinct offences. The state, under the evidence, could take a verdict of guilty for one offence, but not for both."

We contend there is a distinction between the facts in the above case and the instant case. In the above case, as stated by the court, the carrying of a deadly weapon was an element common to both offenses charged and the proof was of but one carrying at the same time and place. In the instant case the defendant was charged and paid a fine for careless and reckless driving and the charge now pending is one of carrying a deadly weapon while intoxicated. There is no element common to both of these cases. In the former charge there was no element of carrying a deadly weapon or of being intoxicated and in the latter charge there is no element of careless and reckless driving. Therefore, no element of either constitutes a part of the other offense. We contend that the mere fact that both crimes were committed at the same time and place is not, of itself, sufficient to sustain the charge of former jeopardy.

In State v. Toombs, 34 S. W. (2d) 61, the Supreme Court of Missouri, Division No. 2, went to some length in laying down the general principle of former jeopardy in this state. In this case, at l. c. 66, the court quotes with approval 16 Corpus Juris, Section 445, page 265, and reads as follows:

"A test almost universally applied to determine the identity of the offenses is to ascertain the identity, in character and effect, of the evidence in both cases. If the evidence which is necessary to support the second indictment was admissible under the former, was related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar. But if the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction.' 16 C. J. Sec. 445, p. 265."

In the above case the defendant was tried and convicted for violating Section 3350, R. S. Mo. 1919. The indictment charged that on or about January 17, 1928, he being president of the International Life Insurance Company, a corporation, wilfully, designedly and feloniously procured the signing of a certain false and fraudulent certificate of ownership of 3,000 shares of the capital stock of said corporation with felonious intent to issue the same, said certificate being numbered D11011. The jury assessed defendant's punishment at a fine of \$1.00 and three years' imprisonment in the penitentiary. Prior to the trial of the instant case the defendant had been tried and convicted for procuring the signing with intent to issue to certificate D11009 above mentioned and sentenced to pay a fine of Three Thousand Dollars (\$3,000.00), and three years' imprisonment in the penitentiary. The facts disclosed that the three certificates numbered D11009, D11010 and D11011, were issued at the same time and place and in the same manner. The defendant contended, among other things, that this case should be reversed for the reason that he had been once tried and convicted for the same offence. In passing on this matter, the court said, at l. c. 66:

"The situation here presented seems to us to meet both of the tests above quoted from R.C.L. and C.J. We are aware that in applying to concrete cases the general rules that may be said to be fairly well established, in endeavoring to determine whether in a given case there was one offense committed or several, appellate courts have reached different conclusions upon facts that, if not the same, at least appear to be of similar nature and to call for the application of the same principle. We shall make no attempt to reconcile these apparently conflicting decisions. We have found no case that seems directly in point in its facts.

"It is not in keeping with the spirit of our law that should one be twice punished for the same crime. The guaranty that no person shall for the same offense be twice put in jeopardy has always in this country been regarded as one of the most sacred rights of the individual. While courts should not so apply the principle as to defeat the design of the penal laws to protect society and prevent crime, we think no legitimate purpose of the criminal laws would be subserved by a technical construction whereby several prosecutions might be maintained and several punishments inflicted for what constitutes essentially one criminal act. It is our opinion that defendant committed but one offense for which he has been convicted and is being punished, and that his plea of former conviction should have been sustained. We think the following cases, as well as those cited above, support this conclusion: Hurst v. State, 86 Ala. 604, 6 So. 120, 11 Am.St.Rep. 79; Clem v. State, 42 Ind. 420, 13 Am.Rep. 369; Spannall v. State, 83 Tex Cr.R. 418, 203 S.W. 357, 2 A.L.R. 593."

February 12, 1941

We are of the opinion that what the court said in the case of State v. Toombs, supra, hereinabove quoted, is the well established law in this State regarding former jeopardy. However, there is a clear distinction in that case and the case at bar. In that case the defendant had been charged and convicted for procuring the signing with intent to issue of certificate D11009. He was sentenced to pay a fine of Three Thousand (\$3,000.00) Dollars and three years' imprisonment in the penitentiary. The defendant was later charged and convicted with a similar crime regarding certificate #D11011 and he has appealed. The facts are that the three certificates D11009, D11010 and D11011 were all issued at the same time and place and in the same manner. The court, on appeal in the Toombs Case, supra, held the latter charge put the defendant in former jeopardy for the reason he committed but one offense. The above decision, in holding both charges constitute but one offense, follows those decisions in this state hereinabove referred to, that the stealing of goods of more than one at the same time and place constitutes only one offense. Therefore, this case is clearly distinguishable from the case at Bar.

Therefore, it is the opinion of this department that the defendant may be prosecuted for carrying concealed weapons while intoxicated even though the defendant had plead guilty to the charge of driving an automobile in a careless and reckless manner which was committed at the same time and place without being placed in jeopardy twice for the same offense.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

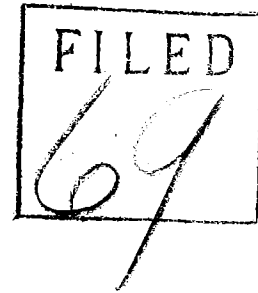
GOVELL R. HEWITT
(Acting) Attorney General

ARH/rv

COUNTY SUPPLIES: Section 2511, R. S. 1939, did not prescribe method for purchase of supplies in counties having a population of 15,700 inhabitants.

April 17, 1941

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



Dear Sir:

This will acknowledge receipt of your letter of April 12, 1941, in which you ask for an opinion as follows:

"Would you kindly advise me whether or not section 2511 of the revised Statutes of Missouri, 1939, applies to counties with a population of 15,700, or whether supplies for a county of that size are to be purchased under a different section."

What is now Section 2511, R. S. Missouri, 1939, was enacted by the Fifty-third General Assembly in 1925. It was Senate Bill 312 and pertained only to counties having not less than 70,000 inhabitants nor more than 90,000 inhabitants. The title to the Act, and Section 1 of the Act, are herein below set out:

"AN ACT to amend article 5, of chapter 21, Revised Statutes of Missouri 1919, relating to county courts, by adding thereto sixteen new sections relating to county courts, and the judges thereof, in all counties of this state which may now or hereafter have not less than seventy thousand inhabitants, nor more than ninety thousand inhabitants, as shown by the last preceding decennial federal

April 17, 1941

census, which said new sections shall be designated and numbered sections 2590a, 2590b, 2590c, 2590d, 2590e, 2590f, 2590g, 2590h, 2590i, 2590j, 2590k, 2590l, 2590m, 2590n, 2590o and 2590p.

"That article 5, of chapter 21, Revised Statutes of Missouri, 1919, relating to county courts be and the same is hereby amended by adding thereto sixteen new sections relating to county courts, and the judges thereof, in all counties of this state which may now or hereafter have not less than seventy thousand inhabitants, nor more than ninety thousand inhabitants, as shown by the last preceding decennial federal census, which said new sections shall be designated and numbered sections 2590a, 2590b, 2590c, 2590d, 2590e, 2590f, 2590g, 2590h, 2590i, 2590j, 2590k, 2590l, 2590m, 2590n, 2590o and 2590p, and to read as follows:

Section 2511, R. S. Missouri, 1939, was Section 2590o of this Act.

We fail to find where this law has been amended in any way that would make it apply to counties having a population of 15,700.

As to how supplies for a county having a population of 15,700 are purchased, we do not find any section of the law prescribing a particular method for the purchase of all supplies for a county of this size. Section 2480, Article 13, Chapter 10, R. S. Missouri, 1939, furnishes authority for the county court to purchase supplies and is as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or

April 17, 1941

receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed and real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In the cases of Ewing v. Vernon County, 216 Mo. 681, Harkarder v. Vernon County, 216 Mo. 696 and Motley v. Pike County, 233 Mo. 42, the purchase of necessary supplies, when the county court had refused to furnish the necessary supplies, by the county officer needing the supplies was upheld. These cases were decided before the passage of the 'County Budget Act.' This Act, which is now found in Article 2, Chapter 73, R. S. Missouri, 1939, contains Section 10912, which is as follows:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies

Honorable James L. Paul

(4)

April 17, 1941

until all the information required by
this section shall have been furnished.

The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."
(underscoring ours)

From the above section you will note that whatever supplies are purchased an estimate of their cost must be included within the county budget for the year in which they are to be purchased.

CONCLUSION.

It is the conclusion of this Department that Section 2511 of Article 14, Chapter 10, R. S. Missouri, 1939, does not apply to counties having a population of 15,700 inhabitants; that there is no section of the statutes generally prescribing how purchases of supplies for counties of this size may be made; that the purchase of supplies may be made by the county court and, in some instances, by the officers who need the supplies, but that before the supplies can be lawfully purchased they shall have been included in the county budget.

Respectfully submitted,

APPROVED:

VANE C. THURLO
(Acting) Attorney General

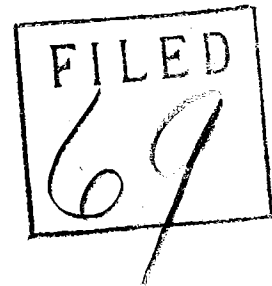
W. O. JACKSON
Assistant Attorney General

WOJ/rv

FOOD STAMP PLAN: Counties under 50,000 inhabitants may participate in Food Stamp Plan if expenditure properly budgeted, but have no authority to borrow funds against unknown future revenue for this purpose.

April 21, 1941

Honorable Eldon W. Palmer
Clerk, County Court
Butler County
Poplar Bluff, Missouri



Dear Sir:

Under date of April 18th, 1941, you wrote this office asking for an opinion as follows:

"The Chamber of Commerce of Poplar Bluff, all of the business men of this city, together with the County Court of Butler County, want to put in operation the food stamp plan in the County.

"In order to do this there must be a revolving fund created in the amount of \$7500.00. The Bankers of this city have agreed that if the County Court will issue them a warrant in the amount of \$7500.00 that they will hold this warrant as a revolving fund, asking the County to pay only the interest each year.

"Kindly advise us if the County Court can legally issue this warrant, or in other words, borrow that amount of money under the budget set up.

April 21, 1941

"The City of Poplar Bluff will, or is willing to bear one-half of the above necessary expense.

"Kindly advise us at once if this can be done, as there is to be a mass meeting on Tuesday, April 22nd, and we wish to have your reply on this matter at that time."

Your letter is very brief and omits some facts which would be very helpful in preparing the opinion. You fail to state whether or not the amount of the proposed warrant is within the anticipated and estimated revenue of Butler County and whether or not an item for the food stamp plan was included in the county budget. Inasmuch as your letter asks if the county can "borrow" we are assuming that the amount of the proposed warrant is not within the estimated revenue.

The food stamp plan is a plan whereby the Surplus Commodities Corporation, acting with the Federal Department of Agriculture under the Agriculture Adjustment Act, distributes surplus food commodities to persons on relief. The plan is authorized by Section 612c, Title 7, U.S.C.A., which is in part as follows:

"* * * (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce or by increasing their utilization through benefits, indemnities, donations or by other means, among persons in low income groups as determined by the Secretary of Agriculture; * * * * *"

and by Section 713c, Title 15, U.S.C.A., which section is as follows:

"In carrying out the provisions of clause (2) of section 612c of Title 7, as amended, the Secretary of Agriculture may transfer to the Federal Surplus Commodities Corporation, which Corporation is hereby continued, until June 30, 1942, as an agency of the United States under the direction of the Secretary of Agriculture, such funds, appropriated by said section 612c, as may be necessary for the purpose of effectuating said clause (2) of section 612c: Provided, That such transferred funds, together with other funds of the Corporation, may be used for purchasing, exchanging, processing, distributing, disposing, transporting, storing, and handling of agricultural commodities and products thereof and inspection costs, commissions, and other incidental costs and expenses, without regard to the provisions of existing law governing the expenditure of public funds and for administrative expenses, including rent, printing and binding, and the employment of persons and means, in the District of Columbia and elsewhere, such employment of persons to be in accordance with the provisions of law applicable to the employment of persons by the Agricultural Adjustment Administration.

"In carrying out clause (2) of Section 612c, the funds appropriated by said section may be used for the purchase, without regard to the provisions of

existing law governing the expenditure of public funds, of agricultural commodities and products thereof, and such commodities, as well as agricultural commodities and products thereof purchased under the preceding paragraph hereof, may be donated for relief purposes."

The first thing to be determined is whether or not county funds could be lawfully used for the purpose of setting up a revolving fund in connection with this plan to distribute food to persons on relief. The funds of the county are derived by taxation from the people and must be used for public purposes.

In the case of Jasper County Farm Bureau v. Jasper County, 286 S. W. 381, also reported in 315 Mo. 560, the question was whether or not public funds could be appropriated by the Jasper County Farm Bureau, and such use of the county funds was upheld and, in discussing the matter, the Supreme Court said:

"It is also true that many objects for which money may be appropriated are so clearly public in their nature that there could not well be any difference of opinion on the subject, such, for example, as public charities, and appropriations provided for the care of the indigent, destitute, and insane, either in institutions exclusively under state control or those maintained by corporations for purely charitable purposes. In 1894 this court, in banc, in the case of State ex rel. City of St. Louis v. Seibert, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624, held that an appropriation for the support of the indigent insane in the asylum of the city of St. Louis who belonged to

the state outside of the city was not unconstitutional even though such insane asylum was a private institution of such city and was not one of the state eleemosynary institutions. So also public funds appropriated for the state and county system of schools. Likewise the expending of public funds in the construction of necessary public buildings and the construction and maintenance of public roads. On the other hand, there are many other enterprises helpful to the public in the community in which they are located, and that contribute very largely to the development and progress of the state, that are so purely private in their nature as not to admit of any doubt about the matter. Such, for example, are manufacturing or commercial enterprises established and maintained by private individuals or corporations for purely private gain.

"There are also many purposes for which public money may be appropriated from the use of which some persons derive more benefit than others, but this circumstance does not detract from the fact that their chief function is to administer to the public good, although the enjoyment and advantages derived from their maintenance are not distributed equally, even between members of the public who are situated alike or in the same class. If it were essential to the establishment or existence of an enterprise to be set up and sustained by public aid that all members of the public or all members of any class should derive from it

April 21, 1941

the same or like benefits or advantages, then it would be entirely impossible to describe a public enterprise in aid of which public funds might be set apart.

"The truth of this statement is so obvious that no elaboration is needed. It is seen in the operation and conduct of all those uses that are so distinctly public in their nature as to leave no room for doubt as to their public character. There is no public institution, public road, public bridge, public hospital, or public park from which some persons do not derive more benefit than others. It is not, however, necessary that the whole body of the contributing public shall be directly benefited or receive the advantages accruing from the establishment of the object in aid of which public funds may be set apart. It will be sufficient if it should be of such a character as that it promotes the general welfare and prosperity of the people who are taxed to sustain it."

And in the more recent case of *Jennings v. City of St. Louis, et al.*, 58 S. W. (2d) 979, a case in which the legality of a bond issue to provide funds for relief was upheld, the Supreme Court used the following language, at page 981:

"The appellant concedes that the city of St. Louis has the right, and in fact the obligation, to expend its money for the support, maintenance, and care of destitute children and others who may be destitute by reason

of sickness, age, insanity, or physical deficiencies. But he contends that the city has no right to spend the taxpayer's money upon persons who may be destitute solely by reason of the present economic situation. He contends that the real purpose of the bonds is to provide for the man who is able-bodied and capable of working, but unable to find work because of the widespread unemployment that is prevalent throughout this entire nation of which we take judicial knowledge. City and County of San Francisco v. Collins (Cal. Sup.) 13 P. (2d) 912; State ex rel. v. Industrial Commission, 207 Wis. 652, 242 N. W. 321.

"The good of society demands that when a person 'is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood,' he is entitled to be supported at the expense of the public. 'It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important.' 'So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper.' 'An able-bodied man, who can, if he chooses obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may

be properly extended to the wives and children of such men.' 21 R. C. L. 705, 706. It necessarily follows that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support, is entitled to public relief."

And the Court further said, in the same case, at page 982:

"We, therefore, hold that the ordinances authorizing the issuance of these bonds are for a 'public purpose.' They undertake to provide relief for people of the city of St. Louis who are unable to care for themselves, and to relieve them of their condition, and it is immaterial what caused their condition."

Under the above cited cases it is apparent that the food stamp plan would be a public purpose for which the funds of a county might be used if the county had conferred upon it authority under which the county court could properly appropriate the funds for that purpose. In Article 2 of Chapter 73, R. S. Mo. 1939, is the county budget law, first enacted in 1933. This law was enacted for the purpose of providing a system for the management of the financial affairs of the various counties of the state. It directs the classification of county expenditures into six different classes and the making of a budget estimate, listing expenditures and classifying them according to the statutory classification into which they fall. In Section 10911 of this Article and Chapter in directing that the county court shall classify the proposed expenditures is the following:

"* * * From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. * * *"

(Underscoring ours.)

And, under Class 6 in this same section is the following:

"* * * the county court may expend
any balance for any lawful purpose:
* * * *."

From the above it is apparent that it is within the power of the county court of Butler County to appropriate the funds of the county to participate in the food stamp plan and such appropriation is properly included in the budget estimate under Class 5, or when there is an unexpended balance in Class 6.

The first eight sections of the County Budget Act, 10910 to 10917, inclusive, apply to counties having a population of 50,000 inhabitants or less and the remaining sections of the Act apply only to counties having a population of more than 50,000 inhabitants. Inasmuch as the population of Butler County, by the 1940 Census, was 34,276 inhabitants only the first eight sections of the Budget Act apply to Butler County. In these first eight sections there is no provision made for a county having a population of 50,000 or less inhabitants to borrow money. The only authority a county of this size has to borrow money is found in Section 12 of Article X of the Constitution of Missouri. The first clause of this section is as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; * * * * *."

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CONCLUSION.

It is our conclusion that participation in the food stamp plan is a legitimate use for county funds; but before county funds may be used for such purpose an item should be included in the county budget showing such contemplated use, or, that there should be an unexpended balance in Class 6 of the budget of the county and that the expenditure is within the anticipated and estimated revenue of the county. Further, that it would be illegal for a county to issue a warrant against some unanticipated and unestimated funds and place this warrant in the hands of a bank to be used as security upon which to borrow money to participate in the food stamp plan.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WOJ:CP

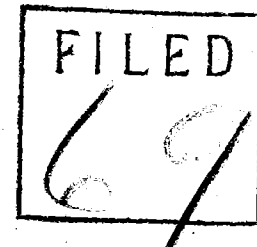
SOLDIERS AND OTHER PERSONS
IN MILITARY SERVICE:

Civil courts have jurisdiction
concurrent with military courts
to try for violations of civil
laws.

August 18, 1941

8-19 #69

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Fineville, Missouri



Dear Sir:

Under date of August 11, 1941, you wrote this office
requesting an opinion as follows:

"We have had the question arise in
this county several times as to the
right of county and state officials
to arrest and prosecute members of
the United States Army who are on
furlough and who violate the laws
of this state. I would appreciate
your opinion as to whether or not
the officers of this state have con-
current, exclusively, or no juris-
diction with the Government Officers
where the violation is committed while
the members are on furlough?

"For your information, I might say that
these violations consist mostly of
careless and reckless driving and
drunken driving."

Your question is quite broad, and it is possible
that cases might arise which would be exceptions to the
general statement of the law which is contained herein.

Military courts are courts of special jurisdiction, and they are created and their jurisdiction defined by the Articles of War, which are found in Chapter 36, Title 10, U.S.C.A. In the same chapter and title are the punitive sections of the Articles of War. Military Courts were created primarily for the punishment of military offenses. A number of acts, which are civil offenses, are not included specifically, but are covered by two very broad sections, the Ninety-fifth and the Ninety-sixth Articles of War, which are, respectively, Sections 1567 and 1568, Chapter 36, Title 10, U.S.C.A. These two Articles of War are as follows:

Section 1567

"Any officer or cadet who is convicted of conduct unbecoming an officer and a gentlemen shall be dismissed from the service."

Section 1568

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It will readily be seen that while such acts as are mentioned in your letter might not be specifically made punishable by military courts, the two above sections would be sufficiently broad to cover them.

The general rule is that when the State laws and the Federal laws are in conflict that the Federal laws shall be paramount. There are reported cases of soldiers who had been arrested by civil authorities and were being punished, being released by Habeas Corpus from the civil authorities.

As mentioned above, Military Courts are primarily for the punishment of military offenses and this is recognized, and the right of civil authorities to punish for civil offenses is also recognized, by the Seventy-fourth Article of War, Section 1546, Chapter 36, Title 10, U.S.C.A., which is as follows:

"When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence

of a court-martial, such delivery if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of said court-martial offense."

In addition to the Seventy-fourth Article of War above, there are other articles recognizing the right of the civil authorities to punish persons in the military service for violations of the civil laws. Numerous cases have been tried involving the custody of persons in the military service by civil authorities, but we have found no case directly involving a person on furlough.

Your attention is called to the fact that there is a distinction between times of peace and times of war. And, as there has been no declaration of war by Congress, this opinion treats only of the right of civil authorities to try persons in the military service for civil offenses in times of peace.

Persons in the military service who are on furlough or leave of absence are merely temporarily released from duty and given permission to travel to some other point or points. The same rules which are applicable to persons not on furlough or leave of absence would be applicable to those who are absent from their posts of duty with permission.

No Missouri Case has been found involving the custody of a person in the military service of the United States by the civil authorities. But the Supreme Court of Missouri had occasion to apply the provisions of the Articles of War in the case of McKittrick, Attorney-General, for and in behalf of Donaldson, Sheriff v. Brown, 85 S. W. (2d) 385. This was a case involving the custody and right to try a member of the Missouri Militia for an act committed while on duty and in the service of the State of Missouri.

The Articles of war are applicable for the punishment of persons committing military offenses while in the military

service of the state. Section 15024, Article IV, Chapter 121, R. S. Missouri, 1929.

In the above mentioned case, a soldier had committed an act, while in the military service of the state, for which the civil officers desired to try him; the military authorities had preferred charges against him and were holding him in custody. The Attorney-General of Missouri, on behalf of the sheriff, having a warrant for the arrest of the person, instituted habeas corpus proceedings, seeking the release of the person from the custody of the military authorities. The Supreme Court refused to grant the prayer of the Attorney-General on the ground that the jurisdiction of the civil and military authorities was concurrent, and the person was already under the custody of the military authorities awaiting trial for the same act. From this case we quote at length, at l. c. 390 and 391:

"The court-martial has, or will have, jurisdiction to try the prisoner on this charge of manslaughter. But this further question arises. Where the offense charged is one cognizable by the civil courts, the jurisdiction of the court-martial is not exclusive, but concurrent with that of the state courts. *Caldwell v. Parker*, 252 U. S. 376, 40 S. Ct. 388, 64 L. Ed. 621. And the first paragraph of article 74 of the articles of war, section 1546, USCA, title 10, p. 310, provides:

"When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable

by the laws of the land, the commanding officer is required, except in time of war, upon application duly made to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.' (Italics ours).

"It would seem that the instant case comes squarely within the first exception in the above article. The prisoner is a person subject to military law; he is held by the military authorities to answer for a crime punishable under the articles of war; he is awaiting trial. We cannot find that this particular part of the article has ever been judicially construed. But in *Caldwell v. Parker*, supra, the Supreme Court of the United States reviewed the history of the articles of war and declared the meaning and effect of the other exception 'except in time of war' appearing in article 74. The opinion (252 U. S. 376, loc. cit. 387, 40 S. Ct. 388, loc. cit. 391, 64 L. Ed. 621, loc. cit. 625) expresses grave doubt 'whether it was the purpose of Congress, by the words "except in time of war" * * * * * to do more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified -- a doubt which,

if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the state courts (in the case under adjudication), but the entire absence of jurisdiction in the military tribunals.' In other words, the opinion indicates a view that the spirit and purpose of the articles of war was to confer upon the state courts a prior or paramount jurisdiction to try persons in the military service for criminal offenses cognizable by them, except in areas affected by military operations, or where martial law had been declared, or where civil authority is totally suspended or obstructed. And if this be true in time of war, all the more should it be true where the only reason supporting the military authorities in retaining jurisdiction against the state courts is that they had first asserted it.

"In the instant case, the civil authority, so far as this record shows, was neither totally suspended nor obstructed in Dunklin County; nor was the circuit court of that county unable to function and dispense justice. And the Governor did not declare martial law, as he might have done under section 13825, R. S. Mo. 1929 (Mo. St. Ann. Sec. 13825, p. 5039). But what was said in *Caldwell v. Parker* was purely arguendo. In its concluding paragraphs the opinion declines to enter upon an investigation of whether Congress 'intended by the provision "except in time of war" * * * * * to do more than meet the conditions exacted by the actual exigencies of war.' And the case was decided on the point that since both the state court and the court-martial had concurrent jurisdiction of the homicide there involved, and the state court had enforced its jurisdic-

tion and rendered judgment, the United States Supreme Court would not interfere by habeas corpus to nullify that judgment on the ground contended for by the petitioner that jurisdiction was exclusively vested in a court-martial to try the petitioner in time of war.

"The Caldwell-Parker Case was written by Mr. Chief Justice White. Later, in Kahn v. Anderson, 255 U. S. 1, 9, 41 S. Ct. 224, 226, 65 L. Ed. 469, he said, speaking of that case, that the sole question involved in it was 'whether the jurisdiction which it was conceded such a court (court-martial) possessed was intended to be exclusive of a concurrent power in the state court to punish the same act, as the mere result of a declaration of war and without reference to any interruption, by a condition of war, of the power of the civil courts to perform their duty.'

"And in Grafton v. U. S., supra (206 U. S. 333, loc. cit. 348, 27 S. Ct. 749, loc. cit. 752, 51 L. Ed. 1084, loc. cit. 1089, 11 Ann. Cas. 640, loc. cit. 643), it was held 'that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier, if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts.' In this Grafton Case the accused was acquitted on a homicide charge by a court-martial in the Phillipine Islands and the civil courts thereafter tried and convicted him upon the same homicide, the latter judgment being reversed on a writ of error by the United States Supreme Court. It is

not precisely in point on the question presented here, perhaps, but it goes to show that a court-martial, having jurisdiction, may bar a further prosecution in the civil courts even though on a more aggravated charge growing out of the same act.

"In U. S. v. Hirsch (D. C.) 254 F. 109, 110, it is said, speaking of the articles of war prior to those now in force, that 'under this law both courts-martial and civil courts necessarily respected the jurisdiction which was being exercised by the other, and the court first apprehending the defendant was thus able to proceed with a trial, without reference to the concurrent jurisdiction of the other. In the same way double jeopardy was avoided.'

"While the expressions in Caldwell v. Parker, supra, strongly appeal to us, and we would be inclined to give them effect in the instant case if we felt at liberty to do so, yet the language of the statute is so plain that we feel bound thereby, in view of the fact that the United States Supreme Court in the Caldwell-Parker Case did not base its judgment on those reasons. It may be that Congress was unwilling to permit the civil courts to interfere with a criminal proceeding first started by the military authorities, save with the consent of the latter. It appears that the article stood substantially as it is now, but without the exceptions which we have italicized above, from 1776 until 1916, when they were first inserted."

The case of Caldwell v. Parker, referred to in the foregoing quotation, is one of the leading cases involving the custody of a person in the military service by the civil

authorities. In the case the Supreme Court of the United States upheld the right of the civil authorities to try a person in the military service, even in time of war.

An earlier case on the subject is the case of United States ex rel. Drury, et al. v. Lewis, Warden of the Common Jail of Allegheny County, Pennsylvania, 50 L. Ed. 343. In this case the right of the civil authorities, in peace time, to try persons in the military service for an act committed while soldiers were in the performance of their duty, but not on United States property, was upheld. From this decision we quote at length, at l. c. 345-6:

"Mr. Chief Justice Fuller delivered the opinion of the court:

"In Baker v. Grice, 169 U. S. 284, 290, 42 L. Ed. 748, 750, 18 Sup. Ct. Rep. 323, an appeal from the final order of the circuit court of the United States for the northern district of Texas, in habeas corpus, it was said:

"The court below had jurisdiction to issue the writ, and to decide the questions which were argued before it. Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868, 6 Sup. Ct. Rep. 734; Whitten v. Thomlinson, 160 U. S. 231, 40 L. Ed. 406, 16 Sup. Ct. Rep. 297. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while circuit courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of habeas corpus, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency; and that instead of discharging, they will leave the prisoner to be dealt with by the courts

of the state; that after a final determination of the case by the state court, the Federal courts will ~~even~~ then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *Re Loney* (Thomas v. Loney) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584, and *Re Neagle* (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.'

"The rule thus declared is well settled, and, in our judgment, it was properly applied in this case. Crowley was a citizen of Pennsylvania, not in the service of the United States, and was killed in or near a street of the city of Pittsburgh, and not on property belonging to the United States or over which the United States had jurisdiction.

"The homicide occurred within the territorial jurisdiction of the court of oyer and terminer, which, as Judge Acheson observed, was the only civil court which could have jurisdiction to try petitioners for the alleged unlawful killing, and the indictment presented a case cognizable by that court.

"The general jurisdiction, in time of peace, of the civil courts of a state over persons in the military service of the United States, who are accused of a capital crime or of any offense against the person of a citizen, committed within the state, is, of course, not denied."

CONCLUSION.

It is the conclusion of this department that the courts of the State of Missouri have concurrent jurisdiction with military courts to try persons in the military service for offense against the laws of the State, of the nature indicated in your letter, which offenses were committed outside the limits of a military reservation. In connection with this conclusion, it is suggested, if the authorities of your county find it necessary to arrest and hold for trial a person in the military service, that the commanding officer of the person held be notified immediately.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

WOJ/rv

PEDDLERS: - Farmer who feeds and kills his own cattle
may sell the meat therefrom without paying
a peddler's license.

October 2, 1941

Hon. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
dated September 24, 1941, which reads as follows:

"We have a person in this county who
buys livestock, and after fattening
them, wants to kill and sell the meat
as a peddler. Under the Missouri
Statutes, I do not find any section
applicable for a license. Please
give me your opinion on whether the
same is prohibited, and if not, what
section is applicable for a license."

We call your attention to Section 14608 R. S.
Missouri, 1939, which reads as follows, to-wit:

"Whoever shall deal in the selling
of patents, patent rights, patent or
other medicines, lightning rods,
goods, wares or merchandise, except
pianos, organs, sewing machines,
books, charts, maps and stationary,
agricultural and horticultural pro-
ducts, including milk, butter, eggs
and cheese, by going about from place
to place to sell the same, is de-
clared to be a peddler."

We also call attention to Section 7330 R. S. Missouri, 1939, which reads as follows:

"No incorporated city, town or village in this state shall have power to levy or collect any tax, license or fees from any farmer, or producer or producers, for the sale of produce raised by him, her or them, when sold from his, her or their wagon, cart or vehicle, or from any person or persons in the employ of such farmer or producer in any such city, town or village."

In the case of St. Louis v. Meyer, 185 Mo. 583, 1.c. 592, it is stated that the defendant was a resident of St. Louis county, Missouri, and was for many years engaged in cultivating a farm in said county as its proprietor. Upon this farm he for many years raised apples, potatoes, tomatoes, grapes and like fruits and vegetables; he has also raised chickens and kept milk cows thereon, hauling them either in person or by employee into said city, and passing along the streets of said city, and selling or offering to sell such products in small quantities from his wagon, either from place to place or by outcry, to whomsoever would buy. The Court, in passing upon this statement of facts, in the light of what is now Section 14608, supra, had this to say: 1. c. 593, 597, 599, 601.

"The first proposition to be settled in this dispute is this: 'Has the State, by a general enactment of the Legislature, manifested a policy upon the character of business in which defendant was engaged?' If so, the city of St. Louis is restricted to the exercise of only such jurisdiction as is consistent with and in harmony with the policy of the State so manifested.

" * * * * *

"It follows that if defendant, in selling his products in the manner as shown by the agreed statement, was not a peddler under the general law of the State, and no license could be exacted of him for doing that character of business, then we take it that a municipality can not, for conducting the same character of business, exact a license from him, simply by calling him a hawker. The general law of the State has indicated, in no doubtful or uncertain terms, that no license shall be exacted from persons engaged in the character of business indicated by the agreed statement. Whether defendant be defined as peddler or hawker, an ordinance which undertakes to exact a license from him is not in harmony with the policy of the State as manifested by its general laws upon the subject, and as was said by the court in Trenton v. Clayton, supra: 'As the municipal corporation can not legislate regarding any subject-matter unless so authorized by the State, so is the corporation powerless to extend or widen the scope of its powers by the arbitrary and unauthorized definition of words or terms, so as to include more than was intended by the Legislature.

* * *

" * * * The agreed statement of facts upon which this cause was submitted to the trial court leaves no doubt as to the character of business in which the defendant was engaged. It was that of a farmer, and the mere fact that he went from place to place, similar to

that of peddler or hawker, to dispose of the fruits of his business, by no means is sufficient to warrant the adding to his name as farmer that of peddler or hawker. The disposition of the products of his farm in the manner indicated by the facts in evidence must be treated as a mere incident to his business of farming. * * * *

* * * *

"* * * People who bring produce here from the country are not peddlers or itinerant traders, but farmers; * * every farmer who wags here what he makes at home from the soil need fear nothing from any discrimination against him in favor of those who live nearer to the city.' * * * " (Underscoring ours.)

In the case of Higbee v. Burgin, 197 Mo. App. 682, the defendant was a farmer and sold from his wagon in the appellant city, near which he lived, spareribs and sausage made from hogs raised and butchered by him. The Court, in passing upon this statement of facts in the light of what is now Section 7330, supra, had this to say: l. c. 683, 684, 685 -

"Defendant was a farmer and sold from his wagon in appellant city, near which he lived, spareribs and sausage made from hogs raised and butchered by him.

* * *

"The word 'produce' may have a variety of meanings dependent upon the connection in which it is used. In reference to the produce of a farmer the court of appeals

of the District of Columbia said:

"But the common parlance of the county and the common practice of the country, has been to consider all those things as farming products or agricultural products which had the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contra-distinguished from manufacturing or other industrial pursuits."

* * * * *

"Under the definition given it seems to us beyond question that the pursuit undertaken by defendant was that vending 'produce' within the meaning of our statute supra. The meat being sold by defendant was raised and brought into use for human consumption on the farm by the defendant who was engaged in agricultural pursuits and was, therefore, farm produce. * * * * *

* * * * *

"* * * If instead of selling the sausage and spareribs of the hogs defendant had sold the lard rendered from their fat, could it be said that the lard was not 'farm produce?' Or would it do to say that when a farmer is making his butter and cheese he is engaged in the creamery business? We think not. Similar comparisons could be made ad infinitum. Whatever might have been said in the beginning as to the farmer being engaged in the pursuit of slaughtering, slaughter house operation or meat packing, when he butchered

October 2, 1941

stock raised on his farm, such as the hogs involved in this case, the usages and practices of generations on American farms has in this day made such a practice one of agriculture or farming.

* * * * *

"We are unable to see how it can be said that fresh meats do not come within the definition of agricultural products as that term is used in section 10282 of the statute. * * * "
(Section 10282 is now Section 7330 R. S. Missouri, 1939.)

See 7 C. J. 1023, Note 36; 25 C. J. 673, Note 55.

In the case of Re Snyder, (Idaho Case), 68 L. R. A., the Court held that beef is the product of the farm and may be sold within the corporate limits of cities of the State of Idaho, without license, when said beef is raised and butchered by the farmer offering said meat for sale.

CONCLUSION

We are of the opinion that a farmer who feeds his own cattle and butchers the same has the right to sell the meat in the cities of the State of Missouri, without paying a peddler's license so to do.

Respectfully submitted

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

BRC:RW

ANIMALS: The stealing of a dog is subject to a charge of larceny.

October 24, 1941

11-7
Hon. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of October 22, 1941, which is as follows:

"A, a man with a wife and small child, which child has been sickly all its life, owned a shepherd dog. The dog became quite attached to the child and developed vicious propensities in and about the premises, which the owner A well knew. The dog in the past month has been viciously barking at passer bys, and has bitten two or three persons who attempted to enter the yard.

"On Friday afternoon, the Mayor of this town went to A's property to inform him that it would be necessary for him to do something with the dog, inasmuch as the school board was complaining to the city council of this dog and another scaring school children. A. was not at home, and the dog attacked the Mayor and bit him, not seriously, but painfully. The Mayor then called the sheriff's office Saturday morning, and the sheriff went to the home of A. and A. not being at home, the sheriff informed the boy that he would have to keep the dog tied up at all times. Later, Saturday, the Mayor

Oct. 24, 1941

called upon the deputy sheriff of Pineville Township to come to Lanagan; and upon his arrival, gave him an order signed by the Mayor appointing him, the deputy constable, city marshal, the town not having a marshal, and ordering him to go to A's home and take the dog and dispose of it. The deputy constable, in company with the Mayor, drove to A's home and upon arrival there, told the boy to untie the dog, which he had tied up pursuant to the sheriff's order, and put him in the back of the constable's car, which the boy did.

"The constable, acting as special appointed marshal, together with the Mayor, then drove off and the dog has not been seen or heard of since; although I am informed by grapevine, that the dog was killed by the constable pursuant to the order of the Mayor. A. has sworn out a warrant against the Mayor and constable for stealing this dog, alleged to have a value of \$100.

"I would appreciate your opinion, if, after considering the above and foregoing facts, you think a criminal charge lies and if so, what is the proper charge? A preliminary hearing has been scheduled for the first of November, and I would like to know by that time, if possible, your opinion."

In a careful research of the statutes of Missouri in reference to the condemnation of dogs of vicious character, we only find Article 12, Chapter 103, which would be considered applicable. If the procedure described in that Article has been followed by the Mayor and the Constable, acting as special appointed Marshal, they have not committed the crime of larceny. From a reading of the facts in your request, it appears to this department that the taking of the dog by the Constable and the Mayor was an unlawful act.

The sections authorizing the killing of dogs under Article 12, Chapter 103 are Section 14541 and 14543. Under neither of these sections, nor under the facts as set out in your request, can we say that the dog was lawfully taken away.

Section 4456, R. S. Mo. 1939, reads as follows:

"Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

This section specifically states that dogs are personal property. In the case of Gerhart v. City of St. Louis, 270 S. W. 680, para. 2,3, the court in holding that a dog was subject to larceny said:

"The plaintiff in this case had an adequate and complete remedy at law. When we began the practice of law, our first case was a dog case, and we were as proud as the small boy with his first pair of red-topped boots when we recovered for our client the sum of \$50 for a dog (pure-bred Collie) which had been shot by a neighbor. We have kept in touch with dog law ever since. Dogs are property in Missouri. 'It has long been the settled law that dogs are property in Missouri, and that no one has the right to kill them except for just cause.' Reed v. Goldneck, 112 Mo.

App. loc. cit. 312, 6 S. W. 1105. To like effect are *Penton v. Bisel*, 80 Mo. App. loc. cit. 138; *Woolsey v. Haas*, 65 Mo. App. loc. cit. 199, bottom of page; *State v. Mease*, 69 Mo. App. loc. cit. 582; *Gillum v. Sisson*, 53 Mo. App. loc. cit. 516. This court in the early case of *Burden v. Hornsby*, 50 Mo. 238, sustained a judgment of damages for the killing of 'Old Drum,' mentioned, supra. Not only so, but we have made the dog a subject of grand larceny, just the same as other property worth more than \$30. R. S. 1919, Sec. 3312; R. S. 1909, Sec. 4535; R. S. 1899, Sec. 1898; R. S. 1889, Sec. 3535. So at least as early as R. S. 1889, dogs have been classed as property, with a value."

CONCLUSION.

In view of the above authorities, it is the opinion of this department that under the facts set out in your request the Mayor and the Constable had no authority to take the dog from the premises of the owner.

It is further the opinion of this department that the proper procedure is the filing of a complaint or information for larceny.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney-General

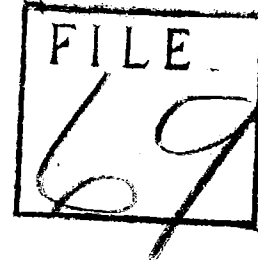
VANE C. THURLO
(Acting) Attorney-General

WJB:CP

ROADS AND HIGHWAYS: OVERSEERS: CONTRACTING FOR ROAD MACHINERY:
Road overseers of common road districts are not authorized to contract for road machinery nor to incur obligations in excess of income for current year.

November 22, 1941

Hon. James L. Paul
Prosecuting Attorney
Pineville, Missouri



Dear Mr. Paul:

This is in reply to your request of November 17, for an opinion from this department based on the following statement of facts:

"I would like to have your opinion on the following question: May a road overseer in a common road district issue warrants which exceed the revenue for that particular district in any one year? This question has arisen where a road overseer of a common road district has contracted and agreed to buy and purchase road machinery; the payment of which together with the actual expense in road repairs has exceeded the income for that year."

Your question seems to involve two questions; (1) the authority of a road overseer to contract for road machinery, and (2) to obligate the district for an amount in excess of the income of the district for the year in which such obligation is entered into.

On the first question, the office of road overseer is an office which is created under the statutes and we must look to the statute to ascertain his powers and duties. Under Article 3 of Chapter 46, we find that the office of road overseer is created. Section 8514 of this article gives the county courts jurisdiction over the roads in their particular county. Under Section 8518, the road overseer is required to give a bond to the county court. One of the conditions of the bond is that he will account to the highway engineer for tools and machinery and property belonging to the county or road district. Reviewing the remaining sections of this article, it will be seen the lawmakers have at no time authorized the road overseer to enter into contracts for road machinery for the district

and bind the county for the payment thereof. Section 2480 R. S. Mo. 1939, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Under this section, it would seem that the lawmakers intended the county court to control and have management of the machinery of the road district and have authority to purchase same. This rule is further stated in Volume 29 C. J., page 574, Section 299 in the following language.

"Under the rule that they are not agents for the local authorities, contract obligations can be imposed by highway officers on local authorities only so far as they are authorized to incur such obligations. * * * *"

And also in Section 300 on page 575, the court said:

"Ordinarily highway officers have no power to incur or create indebtedness, except, perhaps, in certain cases of emergency. They have no authority to issue certificates of indebtedness, or to purchase on credit. * * * *"

On the question of incurring indebtedness in excess of the revenue for the current year, we find that the Supreme Court of this state, by an opinion dated December 22, 1933, in the case of Hawkins et al. v. Cox et al, 66 S. W. (2d) 539, had before it the question of the authority of the commissioners of a special road district to incur an indebtedness in excess of the revenue for the year in which the contract was made. In that case the commissioners had purchased road machinery, the payment for which was to be made over a period of years subsequent thereto. At l. c. 543, the court said:

"The question presented here is whether the road district in question exceeded its powers in this respect, under its then financial condition, in making the contract of purchase just referred to, and, if so, to what extent. We think the first question must be answered in the affirmative. Municipal corporations, such as are special road districts, are by our Constitution placed on what has been termed a cash basis. This has been accomplished by the provisions of section 12, article 10, of the Constitution, which provides that 'no county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose.' The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year,' but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in *Book v. Earl*, 87 Mo. 246, where this court said: 'The contracting of a debt in the future, by the county in any manner or for any purpose, in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters,' is prohibited. '* * * * * The evident purpose of the framers of the constitution and the people who adopted it was to abolish in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in

any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

"* * * * In Trask v. Livingston County, 210 Mo. 582, 109 S. W. 656, 658, 37 L. R. A. (N. S.) 1045, the county in September, 1889 contracted to have a bridge built to be paid for in a fixed amount when completed. It was not accepted by the county till in May 1890, when warrants were issued for its payment out of the revenues for 1890. The court said: 'When the county became indebted on these bridge contracts must be determined by the "income and revenue provided," which under the constitution, must be looked to for the payment of such indebtedness, and it was the "income and revenue provided" for the year 1889, which the county court was authorized to appropriate for that purpose, and not the revenue for the year 1890, which at the date of the contract for the building of said bridges, had never been assessed, levied, or collected. * * * "

"The contract for the purchase of and payment for this road machinery made in February 1928, is void at least to the extent it attempted to obligate the district for payments beyond the cash payment made at the time and the amount to be paid out of the revenues provided for 1928. Anderson v. Ripley County, 181 Mo. 46, 65, 80 S. W. 263."

From the foregoing statement of the court it very clearly appears that the road district officers would not be authorized to enter into a contract for the payment of money which would be in excess of the taxes for that purpose for that year.

Hon. James L. Paul

-5-

November 22, 1941

CONCLUSION

From the foregoing it is the opinion of this department that a road overseer is not authorized to enter into a contract for machinery for the district, the payment of which, together with the actual expense of road repairs, exceeds the income of that year.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

ROADS AND BRIDGES: County may ask damages for injury to county roads in the original condemnation suit by the United States condemning roads in an army area.

December 1, 1941

Hon. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

12-15



Dear Sir:

We are in receipt of your request for an opinion under date of November 24, 1941, which reads as follows:

"The County Court has asked me to write you for your opinion relative to roads in the camp area in this county.

"The Court has been informed that in many instances, people who have land adjoining the camp area will be closed in unless new roads and bridges are built to allow them egress and exgress from their property. Inasmuch as most of the farms located south of the camp's present survey line have their roads running north to what is known as the Goodman-Erie-Bethpage road, and part of this road will be within the camp enclosure, would not the federal government be liable and responsible to the McDonald County Court for damages and expenses in rebuilding roads in that area?"

Article I, Section 8, Clause 17 of the Constitution of the United States, reads as follows:

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; * * * *."

By reason of the above section of the Constitution of the United States, Congress enacted Section 257, Title 40, page 76, United States Code Annotated, which reads as follows:

"In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer,

to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice."

Under the above United States law the government of the United States through the Secretary of the Treasury was empowered to bring condemnation proceedings for the acquiring of land and for public purposes, and also granted the United States' District Courts of the district where the real estate is located jurisdiction of the proceedings. Congress also enacted Section 258, Title 40, page 84, of the United States Code Annotated, the following:

"The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding."

Under the above Section 258 it provided that the procedure in a condemnation proceeding would be the same in the federal court as is prescribed in the state law. The state law of condemnation proceedings is covered by Article 2 of Chapter 8 of the Revised Statutes of Missouri 1939.

By reason of the above United States and State laws the government proceedings are carried on under their eminent domain procedure, and a petition of condemnation is filed in the federal court. After the commissioners have been appointed

by the federal court in compliance with the state law of condemnation an award is made by the commissioners. It is then paid into court and at that time the government takes possession of the lands in question. The procedure in the federal court is then the same as in the state court as to the time of appealing from the order of the commissioners. In the case of U. S. v. 8,557.16 Acres of Land in Pendleton County, W. Va. (D. C. W. Va. 1935) 11 F. Supp. 311, it was held that in condemnation proceedings by the United States federal courts must follow methods required by state statute, in addition to local law for condemnation of property, so far as required to meet needs of justice. It was also held in U. S. v. Crary (D. C. Va. 1932) 2 F. Supp. 870, that the condemnee claiming damages to residue of his land or estate has the burden of proving what the residue is and the injury to the market value thereof.

In the same case of U. S. v. Crary, supra, it held that against the federal government, state statutes authorizing award for damages to condemnees "adjacent property" must be deemed limited to residue of tract. Under the facts in your request you state that the roads adjoining the camp area have been closed by reason of the condemnation of the real estate for the use as a camp and fort. The government in case of a condemnation not only condemns the roads actually owned by the state, but also condemns the easement on property held by counties for road purposes. We do not know who the defendants were in the condemnation of the area now known as Camp Crowder, but if the government has followed its usual procedure and has filed a condemnation proceeding against the state for its roads, the adjoining property owner and the easement owned by the county on its roads, in such a case the county could set up, upon a trial of the case from the appeal from the commissioner, the fact that the adjacent roads upon which the county holds easements have been injured and would result in damages to McDonald County. This matter must be tried before the jury in the federal court upon the appeal from the award of the commissioner.

CONCLUSION.

It is therefore the conclusion of this department that the government by the closing of roads upon which the county

Hon. James L. Paul

(5)

December 1, 1941

owns an easement and the damage to the adjacent property owner for the roads which have been damaged is a matter to be passed upon by the jury in the federal court when the trial is had upon the appeal from the award of the commissioners.

It is further the opinion of this department that the county roads which have been closed are considered adjacent property rights of the county to that of the roads or easements on the property which has been condemned directly in the camp area.

Respectfully submitted,

W. J. DURKE

Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:CP

COUNTY TREASURER AND Section 11106 applies to compensation as
EX OFFICIO COLLECTOR: ex-officio collector and section 13450
does not.

March 29, 1941

Honorable L. A. Pickard
Presiding Judge
Dunklin County Court
Kennett, Missouri



Dear Sir:

This will acknowledge receipt of your letter of March 17, 1941, in which you ask for an opinion setting forth the fees which the treasurer and ex officio collector of Dunklin County is permitted to collect and retain in this office, and making specific inquiry as to whether the provisions of Section 13450, R. S. Missouri, 1939, would apply.

Section 13993, R. S. Missouri, 1939, Article XI, Chapter 101, relating to the compensation of the treasurer and ex officio collector in counties under township organization is as follows:

"The county treasurer in counties adopting township organization shall be allowed a salary of not less than \$100.00, per month by the county court to be paid as at present provided by law; the county collector for collecting and paying over the same shall be allowed a commission of two per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: Provided, he shall receive nothing for paying over money to his successor in office."

In addition to this section there are numerous other fees which a county collector is authorized to charge and collect found at various places in the statutes. Some of these are charges that are not frequently made. The numbers of these sections are not herein set out. A fee is prescribed in connection with the collection of income tax; for issuing auctioneer's license; for taking merchant's bond and statement; for notice of delinquent personal tax; for collecting delinquent city and town tax; for services in connection with delinquent stray list; for services in connection with the license of billiard and pool tables; for issuing ferry licenses and there may be some of these charges we have overlooked.

Inasmuch as these last mentioned items are in different articles and chapters of the statutes from the article and chapter in which section 13993, supra, is contained, the view might be advanced that these last mentioned fees would not apply to the office of treasurer and ex officio collector in counties under township organization. However, the writer thinks that all fees which are authorized to be charged by collectors should be charged and collected by the treasurer and ex officio collector of Dunklin County, unless there is some specific exemption for some fee. It is well settled law that in considering and construing statutes, all statutes on the same subject should be read and considered together. These are all items of fees of collectors as are the items set out in Section 13993, supra.

In the case of State ex rel. Davidson, v. Railway Co. 334 Mo. 127, 1. c. 132, the court said:

"The sections relate to the same subject, and although in different chapters, should be considered together in construing Section 12316. (In the matter of State ex rel. Bank v. Davis, 314 Mo. 373, 1. c. 388, 284 S. W. 464)."

In the case of State ex rel. Bank v. Davis, 314 Mo. 373, 1. c. 387-388, the court said:

"Sections 1177 and 1180 should be construed together and a meaning given to each which will not destroy the other, if this can be done. Notwithstanding what was said in State ex rel. v. Gantt, supra, said sections of the statute should be held in pari materia. The general rule is thus laid down in 36 Cyc. 1147:

"Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature, or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible, the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal and earlier one, unless it has done so in express terms; nor will it be presumed that the Legislature intended to leave on the

statute books two contradictory enactments.'

"This is the rule in Missouri. (Grimes v. Reynolds, 184 Mo. 679, 1. c. 688.)"

Section 13450, R. S. Missouri, 1939, mentioned in your letter is as follows:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. The foregoing clause shall not apply to any county or city not within a county in this state now containing or which may hereafter contain one hundred thousand inhabitants or more. After the first day of January, 1891, every such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to the truth, such officer shall be liable to the penalties of willful and corrupt perjury."

The only case we have been able to find in which this section is called in controversy is the case of State ex rel. Saline County v. Price, 296 Mo. 121, in which the constitutionality of the act was upheld. The court further ruled the amounts paid by the county court to the sheriff for boarding prisoners were not fees, and that fees did not include reimbursement for expense incurred in the discharge of official duties.

This section is general in its application and would apply to the treasurer and ex officio collector of Dunklin County unless there is some special law which would remove the treasurer

and ex officio collector from the operation of this section.

In the case of Collins v. Twellman, 344 Mo. 330, 1. c. 334, the court said:

"Appellant concedes that when one of two conflicting statutes must prevail then all else being equal a special statute must take precedence over the general law; also that all else being equal later statutes take precedence over earlier statutes."

In Article VIII of Chapter 74, R. S. Missouri, 1939, is found Section 11106 fixing the compensation of the collectors. The first paragraph of which section is as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more: * * * * *

Then follows fourteen paragraphs classifying counties according to the amount of taxes levied for the purpose of fixing the commission of collectors. Paragraph 15 of this section is as follows:

"For the purpose of enabling the state auditor to determine the compensation of the collector to be paid by this state, it is hereby made the duty of the clerk of any county court, immediately after such annual settlement made by the collector, to make out and forward a statement

to the state auditor, under the seal of the court, showing the aggregate of all such taxes and licenses levied for the year for which such settlement was made, including therein local, special and school and all other taxes: Provided, that no collector except as provided in subdivision fourteen herein, shall be allowed to retain commissions and fees in any one year in excess of the following amounts: In any county coming within the provisions of subdivisions one to seven, inclusive, hereof not more than \$2,500.00; in any county coming within the provisions of subdivision eight, not more than \$3,000; in any county coming within the provisions of subdivision nine, not more than \$3,500.00; in any county coming within the provisions of subdivision ten, not more than \$4,000.00; in any county coming within the provisions of subdivision eleven, not more than \$4,500.00; in any county coming within the provisions of subdivision twelve, not more than \$5,000.00; in any county coming within the provisions of subdivision thirteen, not more than \$5,500.00; and all fees and commissions coming into the hands of any collector from any source whatever in excess of the amounts herein specified except as provided in subdivision fourteen, shall be paid into the city, county and state treasuries in proportion to the amount received on taxes collected for each; and it shall be the duty of each collector, once in each year, to file in the county court in each county and in the office of the comptroller of each city not in a county, a statement, under oath of the amount of fees and commissions received by him and from what source, and shall immediately pay over the excess according to the order of county court or comptroller: Provided, however, that this section SHALL not apply to any county adopting township organization, so far as concerns the rate

March 29, 1941

of per cent to be charged for collecting taxes, but shall apply to counties under township organization so far as to limit the total amount of fees and commissions which may be retained annually by the county treasurer and ex officio collector for collecting taxes in such counties; Provided, that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current taxes, but shall not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes, and the compensation of the county collector for the collection of levee taxes and ditch taxes, collected for drainage purposes, shall be one per cent of the amount collected." (Underscoring ours).

This last section is a special section applying to collectors only, while Section 13450, R. S. Missouri, 1939, mentioned in your letter is general. It is the belief of the writer that Section 11106, R. S. Missouri, 1939, being a special section applying only to collectors, the amount of compensation therein limited would prevail over the limit fixed by Section 13450, R. S. Missouri, 1939.

159.260
159.270
Very truly yours,

APPROVED:

W. O. JACKSON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

C C Maryland Casualty Co.
Pierce Building, Kansas City, Mo.

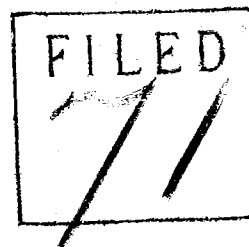
Hon. Harry Barlow
State Auditor's Office
Jefferson City, Missouri

WOJ/rv

COUNTY TREASURERS: House Bill 255 becomes effective October 10, 1941, but operation may be postponed to some treasurers.

August 20, 1941

Hon. Everett H. Pittman
Treasurer
Clinton County
Plattsburg, Missouri.



Dear Sir:

Under date of August 9, 1941, you wrote this office requesting an opinion as follows:

"House Bill No. 255 passed by our last General Assembly and signed by the Governor yesterday according to the press, this bill setting the compensation by statute of County Treasurer's instead, being set by our various County Courts.

"Here in the past, you no doubt know that our compensation is set by the Court as a matter of record when we enter office for our term and in my case, this being a matter of record, this compensation is paid during my term which is four years, I have always thought, that you could not increase or decrease the compensation during the term of office, however, what we wish to know, does this bill become effective during our present term of office, thanking you for this information,"

Section 36, Article IV of the Constitution of Missouri directs when all laws passed by the General Assembly shall become effective. This section of the Constitution is as follows:

"No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), The General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

House Bill No. 255, enacted by the Sixty-first General Assembly, has no emergency clause, nor is its effective date deferred by its terms, and it would therefore become effective ninety days after the adjournment of the Sixty-first General Assembly.

Recently an opinion was prepared by this office and furnished to Dwight H. Brown, Secretary of State, as to the effective date of the laws enacted by the Sixty-first General Assembly, a copy of which opinion is herewith enclosed. By that opinion all laws not containing an emergency clause, enacted by the Sixty-first General Assembly, become effective on the 10th day of October, 1941.

While House Bill No. 255, enacted by the Sixty-first General Assembly, will become a part of the law of the State of Missouri on the 10th day of October, 1941, as held in the opinion of this department to the Secretary of State, it is necessary to consider whether or not it will become operative on that date for the purpose of paying the compensation of all county treasurers included within its terms. A law may be in existence but be inoperative until a future date, as was held in *State ex rel. v. Dirckx*, 211 Mo. 568, at l. c. 578, as follows:

"* * * That a statute or constitutional provision may have a potential existence, but which will not go into actual operation until a future time, is familiar law. (State ex rel. v. Wilcox, 45 Mo. l. c. 464; State ex rel. v. Pond, 93 Mo. l. c. 625; Ex parte Snyder, 64 Mo. l. c. 61.)
*C*O* * * * *"

And again in the case of State ex rel. Otto v. Kansas City, 276 S. W. 389, at l. c. 395:

"It is familiar law that a statute or a constitutional provision may have a potential existence, though it will not go into operation until a future time. State ex rel. v. Dirckx, 211 Mo. 568, loc. cit. 578, 111 S. W. 1; Poindexter v. Pettis County, 295 Mo. 629, 246 S. W. 38, loc. cit. 40; State ex rel. Brunjes v. Bockelman (Mo. Sup.) 240 S. W. 209, loc. cit. 211. Where not prohibited by the Constitution, the Legislature may direct that different parts of the same statute shall go into effect at different times, and, even under constitutional provisions requiring all parts of a statute to take effect at the same time, it is sufficient that the statute becomes effective as an entirety at one time, notwithstanding that, as to some persons or matters affected by it, the statute becomes operative at different times. 36 Cyc. 1201. The time a particular statute shall take effect may be fixed by another statute passed at the same session. Honeycutt v. Ry. Co., 40 Mo. App. 674, cited with approval in State ex rel. Brunjes v. Bockelman, supra."

In your letter you state you are under the impression the compensation of an officer could not be increased or decreased during his term of office. This is an erroneous impression. There is no statutory or constitutional prohibition against decreasing the compensation of a state or county officer during his term of office, but there is a constitutional prohibition against increasing the compensation of any officer during his term of office. That is the reason we must consider whether or not House Bill No. 255, enacted by the Sixty-first General Assembly, becomes operative on all county treasurers included within its terms at the time it becomes effective. The constitutional prohibition against increasing the compensation of an officer during his term of office is contained in Section 8, Article XIV, of the Constitution, and is as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In connection with the foregoing remarks concerning the increasing of the compensation of an officer during his term, your attention is called to the case of *Givens v. Daviess County*, 107 Mo. 603. This was a case involving the compensation of a county treasurer and the following quotation is taken from page 608:

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. *Gammon v. LaFayette Co.*, 76 Mo. 675; *Koontz v. Franklin Co.*, 76 Pa. St. 154; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; *Walker v. Cook*, 129 Mass. 579; *Knappen v. Supervisors*, 46 Mich. 22; *City Council v. Sweeney*, 44 Ga. 465. In the

absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158; City of Hoboken v. Gear, 27 N. J. L. 278; United States v. Fisher, 109 U. S. 143."

Further, in deciding the case of Givens v. Daviess County, supra, the Supreme Court applied Section 8, Article XIV of the Missouri Constitution and, in so doing, used the following language, at l. c. 610:

"We do not think the order had the effect of accomplishing a change in the salary for services subsequent to its date for the reason that the terms used, 'in full of all demands as such treasurer,' does not express such an intention. Those terms imply rather that this payment was in full of salary to that date, but as such a construction would increase the salary, which could not be done under the constitution, (art. 14, sec. 8,) we must infer that it was only intended to cover the salary for two years, leaving the additional period for future adjustment.

"Again, we do not think the existing salary could have been detached from the office without notice to the officer. While the court had the right to decrease the compensation plaintiff had the right, which appears to have been his only remedy, to resign the office if dissatisfied with the change."

Hon. Everett H. Pittman

(6)

August 20, 1941

CONCLUSION.

The conclusion is reached that House Bill no. 255, enacted by the Sixty-first General Assembly, will become effective and a part of the law of the State of Missouri on the 10th day of October, 1941, and fixes the salaries of county treasurers included within its terms; except if, by its terms, it provides for an increased compensation for any county treasurer, it can not become operative as to such increase by reason of Section 8, Article XIV of the Constitution, until the commencement of the next term. If, by its terms, it reduces the compensation of any county treasurer such reduction becomes operative on the effective date of the law.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WOJ/rv

Enc.

18
OFFICERS: Probate Judge may be a notary public at the same time as the duties are not incompatible.

October 15, 1941

Honorable Jos. V. Pitts
Judge and ex-officio Clerk
Douglas County
Ava, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of September 22nd, 1941, which is as follows:

"Since 1902 - Oct. I have held a Notary Public's Commission - Renewing continuously down through the years.

"On July 18th. Our Honorable Governor honored me with the Appointment to Office of Probate Judge for Douglas Co. Mo.

"Question: Is there any conflict between the appointments?

"Should I surrender the Commission as N.P.?

"I have known our Prosecuting Attys. to hold a N.P. Commission but they might have been out of line.

"If in your opinion I should surrender my N.P. Commission, O.K. I desire to tract the Laws in all respects."

In a careful research we fail to find any statute or any section under the Constitution, which prohibits a person

from holding the office of probate judge at the same time that he holds a commission as a notary public. It has been repeatedly held that the State Constitution is not a grant but a limitation on legislative power, so the Legislature may enact any law not expressly or impliedly prohibited by the Federal or State Constitution. It was so held in the case of *State ex rel. Gaines vs. Canada*, 113 S. W. (2d) 783, 342 Mo. 121. And, since the holding by a probate judge of a notary commission is not prohibited either by the Constitution or statutes the same rule applies as applies in the common law. The Constitution does prohibit a state officer holding an office under the United States, as it appears in Section 4, Article XIV of the Constitution of Missouri. The Constitution of Missouri also prohibits, in counties or cities having more than 200,000 inhabitants, the holding, by anyone, of a state office and an office in any county, city or other municipality. This is set out in Section 18, Article IX of the Constitution of Missouri, which also specifically provides that the section shall not apply to notaries public. This section is not applicable to Douglas County.

After a careful research we further do not find any statute preventing a probate judge from holding a notary public commission. Since there is no constitutional or statutory prohibition under the Constitution or the statutes preventing a person from holding the office of probate judge and at the same time holding a notary public commission, we must refer to the common law. In the case of *State ex rel. Walker, Attorney-General vs. Bus*, 135 Mo. 325, which was passed upon by the Supreme Court of this State June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices, or a State office and a county office, should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of School Director of the City of St. Louis. In that case, at page 338, in setting out the rule of law as to whether or not any two positions are incompatible, the court stated as follows:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time."

At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

The case of State ex rel. Walker, Attorney-General vs. Bus, supra, was followed in the case of State ex rel. Langford vs. Kansas City, 261 S. W. 115, and in that case the court held that the office of deputy sheriff was not incompatible with the office of City Clerk. In paragraph one of the opinion the court said:

"II. The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S. W. 1159."

In that case the court, at page 116, further said:

"In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held

that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S. W. 639):

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two--some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Also, in the case of State ex rel. vs. Lusk, 48 Mo. 242, the Supreme Court of this State held that the office of clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was one originating in the Circuit Court of Cole County, Missouri.

Since the matter set out in your request must be considered according to the common law, which results in the fact that the ruling must be made in accordance with the facts in each separate case, the question is whether or not the duties of a probate judge are incompatible with the duties of a notary public. We are holding that the duties of the probate judge and that of a notary public are not antagonistic and in

Oct. 15, 1941

no way are their duties inconsistent.

CONCLUSION

In view of the above authorities it is the opinion of this department that since the duties of a probate judge and the duties of a notary public are not incompatible and are not inconsistent, a person can hold the office of probate judge and that of a notary public at the same time.

Respectfully submitted

W. J. BURKE
Assistant Attorney-General

APPROVED:

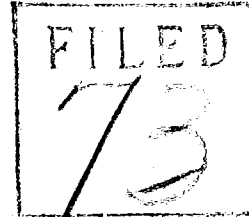
VANE C. THURLO
(Acting) Attorney-General

WJB:CP

HIGHWAY ENGINEERS - County Highway Engineers not
entitled to mileage in counties
of twenty thousand to fifty
thousand.

January 30, 1941

Hon. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Sir:

We are in receipt of your request for an
opinion, under date of January 2, 1941, as follows:

"By virtue of Laws 1939, page 674,
the County Surveyor becomes the High-
way Engineer of this county, and his
salary as highway engineer shall be
not less than twelve hundred dollars
per annum, nor more than two thousand
dollars per annum as shall be de-
termined by the County Court.

"Is the highway engineer entitled to
receive expenses, such as mileage, in
addition to the salary determined by
the County Court?"

Section 8011 as found in Laws of 1939, P.
674, is in part as follows:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8008, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: * * * * *

Provided, further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex-officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

An examination of Article 8, Chapter 42, R. S. Missouri, 1929, as amended by Section 8011, passed by the Sixtieth General Assembly, which article pertains to the office of county highway engineer, fails to disclose any statute or provision authorizing the

payment of mileage to a county engineer lawfully engaged in the discharge of his duties.

The courts of this State have consistently required an officer seeking compensation from the public treasury to point out the authority for the payment of such compensation. This rule may be illustrated by the two following cases: In *King v. Riverland Levee Dist.*, 279 S. W. 195, we find the rule set out as follows: (1. c. 196)

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. *State ex rel. Evans v. Gordon*, 245 Mo. 12 loc. cit. 27, 149 S. W. 638; *Sanderson v. Pike County*, 195 Mo. 598, 93 S. W. 942; *State ex rel. Troll v. Brown*, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in *State ex rel. Wedeking v. McCracken*, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled

to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra."

More recently the Supreme Court has affirmed the above principle in Nodaway County v. Kidder, 129 S. W. (2d) 857, 344 Mo. 795, 1. c. 801, where it is stated as follows:

"The compensation of a judge of the county court, in a county having less than 75,000 inhabitants is fixed at \$5 per day for each day necessarily engaged in holding court, plus five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, and such mileage shall be charged only once for each regular term. (Sec. 2092, R. S. 1929 (Mo. Stat. Ann., sec. 2092, p. 2664), as amended Laws of Mo. 1931, pp. 190-191.) In addition a judge of the county court is allowed \$5 per day for each day he sits as a member of the board of equalization and board of appeals. (Sec. 9818, R. S. 1929 (Mo. Stat. Ann., sec. 9818, p. 7915).)

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of

January 30, 1941

securing same. Such statutes, too must be strictly construed as against the officer. (State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.)

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. (State ex rel. Euder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645.)"

CONCLUSION.

In view of the foregoing, it is the conclusion of this Department that a county surveyor becoming the ex-officio county highway engineer by virtue of Section 8011, as amended in Laws of 1939, P. 674, in counties of not less than twenty thousand nor more than fifty thousand inhabitants is not entitled to any fees for mileage incurred in discharging his duties as such county highway engineer.

APPROVED:

Respectfully submitted,

COVELL R. HEWITT

(Acting) Attorney General

ROBERT L. HYDER

Assistant Attorney General

rlh;rw
enc -1

GARNISHMENT - Notice to a judgment debtor after general execution is not a prerequisite before issuing a writ of summons to a garnishee.

February 13, 1941

Hon. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

"The Sheriff of my County has called upon me for an opinion on a question which I have been unable to decide after a rather thorough investigation of the Statute and Authority and, therefore, request an opinion from you on the matter.

"The Sheriff has a large number of executions to serve wherein the defendants are working for the Pittsburgh Plate Glass Company of this County. Heretofore it has been the custom of the Sheriff to merely serve summons to garnishee upon the Company but he did not serve the defendant personally. The question is, is the Sheriff required to serve the defendant personally with the execution before he serves summons to garnishee on the Glass Company?

"This also gives rise to another question: If the Sheriff is required to serve the defendant with the execution, would service be good upon a member of his family, over the age of fifteen years, at his usual place of abode?

"I rather doubt whether the Sheriff is required to serve the defendant with an execution in which case he has been directed to garnish the defendant's wages but as this question is going to be of some concern to the Sheriff, I want to be sure about the matter.

"If you can get an opinion to me in the next week, I shall appreciate it, as the Sheriff has about one hundred executions in his possession now waiting to be served and it is going to be nearly an impossible task for him to obtain service on some of the defendants as they apparently try to avoid service."

And your supplemental request under date of January 30, 1941, which reads in part as follows:

"The judgments on which the executions are issued and garnishment writ served are judgments that were rendered in the first instance in the Circuit Court, or judgments that were rendered by Justices of the Peace, and transcripts thereof filed in the Office of the Circuit Clerk. However, all of the executions are issued by the Circuit Clerk and all of the judgments are rendered, not only in this State but in Jefferson County.

In all cases in which the Sheriff is interested, the judgments have first been obtained and the garnishment proceeding followed."

In the case of Ritter v. Boston Ins. Co., 28 Mo. App. 140, 1. c. 147, the Court had this to say:

"* * * 'Garnishment is one of the modes pointed out by the statute by which the writ (of execution) is executed, and it is not a new suit, but an incident, or an auxiliary, of the judgment, and a means of obtaining satisfaction of the same by reaching the defendant's credits. * * *'"

In the case of Chapman v. Yancey, 173 Mo. App. 132, 1.c. 145, the Court had this to say:

"* * * Under the statute, garnishment attempts to reach funds or property of judgment debtor, alleged to be in the hands of the garnishee. The subject-matter is that fund and its ownership. Beyond or outside of the determination of the right to that fund, the court, in that proceeding, has no jurisdiction whatever. (Connor v. Pope, 18 Mo. App. 86.) It has no right to go into any determination of the rights of the parties to anything outside of their respective rights to that fund; cannot adjust matters between them beyond the ownership of that fund. When

it has determined to whom the fund in the hands of the garnishee belongs and has made an order carrying that determination into effect, its jurisdiction is at an end, save to enforce the order."

In the case of State v. Harris, 69 S. W. (2d) 307, 1. c. 310, the Court made the following comment:

"Garnishment proceeding, under our statutes, is strictly legal, and is but an incidental remedy to judgment, and is but a means of obtaining satisfaction of a judgment by reaching credits due to a losing defendant in the main suit. Tinsley et al v. Savage, 50 Mo. 141; Sheedy v. Second National Bank, 62 Mo. 17, 21 Am. Rep. 407; Norman v. Pennsylvania Fire Ins. Co., 237 Mo. 576, 141 S. W. 618.

"The right to judgment against a garnishee depends upon it being made to appear that the garnishee owes the principal debtor, and the creditor can claim no right where the debtor himself could not maintain an action against the garnishee. People's Savings Bank v. Hoppe, 132 Mo. App. 449, 111 S. W. 1190; Fenton v. Block, 10 Mo. App. 536.

"The issues between garnishee and plaintiff are tried as are ordinary issues between a plaintiff and defendant. Section 2529, R. S. 1929 (Mo. St. Ann. sec. 2529, p. 2537). "

In 28 C. J. 236, par. 326, the Court has this to say:

"* * * In the absence of a statutory requirement, notice of ancillary garnishment proceedings need not be served on defendant, * * *."

And, in Shinn on Attachment and Garnishment, Vol. 2, P. 999, we find the following:

"* * * Where, however, a garnishment process is issued upon a judgment, i. e., in aid of an execution, it is not generally necessary that notice of the garnishment be given to the judgment-debtor."

In reading Article 5, of Chapter 8 R. S. Mo., 1939, we do not find any specific section which requires that the judgment debtor shall be given notice where a writ of garnishment is issued. However, it will be observed from reading the cases, supra, that in Missouri the ruling is that a garnishment proceedings is but an incidental remedy to judgment and is but a means of obtaining satisfaction of a judgment by reaching the credits due to a losing defendant in the main suit. In other words, it is a continuation of the original suit and there being no express statute requiring that notice be given, then it is our opinion that a notice is not required, as was said by Shinn in his works on attachment and garnishment in Vol. 2 at P. 999. The purpose of a notice is to inform the judgment debtor of his rights or credits and exemptions.

It will be noted in the statute, Section 1588 R. S. Missouri, 1939, that no wages shall be attached or garnished before personal service is had or obtained upon the judgment debtor, unless the suit be brought in the county where the judgment debtor resides, or in the county where the debt is contracted, and the cause of action arose or accrued. The Section further provides that the petition, or statement, filed in the cause and the writ or summons of attachment or garnishment shall affirmatively show the place where the debt is contracted, and the cause of action arose.

It is our view, and the view of the cases, that this Section throws a protection around the judgment debtor, where it is sought to attach wages, and, through the observance of this mandatory statute the judgment debtor would be fully apprised of the suit commenced against him in the first instance. It will also be observed that Section 1562 R. S. Missouri, 1939 provides in part as follows:

"* * nor shall any person be charged as garnishee for more than ten per cent of any wages due from him to a defendant in his employ for the last thirty days' service: Provided, such employee is the head of a family and a resident of this state; * * * ."

It will be noted that this Section fully takes care of the judgment debtor where he is the head of a family.

We call your attention to the cases of Norvell v. Porter, 62 Mo. 309, and also Epstein v. Salorgne, 6 Mo. App. 352. These cases explain the proper method of service of the summons upon a garnishee and the proper return to be made by the sheriff.

Hon. W. Oliver Rasch

-7-

February 13, 1941

CONCLUSION.

In conclusion, we are of the opinion that under the Missouri law, when an execution is placed in the hands of the sheriff or a writ of summons for a garnishee, that it is not necessary that the sheriff also serve the judgment debtor; for, if the original suit was properly brought, and the judgment regular in all particulars, then this would be sufficient notice to the judgment debtor, especially in view of the fact that garnishment under the Missouri statutes is strictly legal, and is an incidental remedy to judgment.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

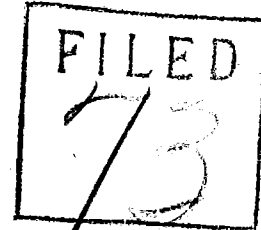
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MOTOR VEHICLES: Dealer's license plates may not be used in the demonstration or transportation of farm tractors.

April 10, 1941

4/19

Captain W. J. Ramsey
Acting Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of March 28th based on the following statement of facts:

"2. A dealer, as defined in the Motor Vehicle Law, in Ford automobiles, also sells Fordson farm tractors in connection with his dealership. For the purpose of demonstrating a farm tractor, this dealer recently loaded a tractor on a company-owned trailer bearing his dealer tags, which trailer was pulled by a company-owned car, also bearing dealer tags, and hauled this farm tractor to and from the place of demonstration.

"3. Please advise if, in the opinion of the Attorney General, this is a legitimate use of dealer tags.

"4. The question seems to be whether or not the tractor agency is a part of the registered dealer's business and if dealer tags might be used in the demonstration or transportation of these tractors."

Section 8367, R. S. Mo. 1939, provides that:

"Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows: * * * * *

'Dealer.' Any person, firm, corporation, association, agent or sub-agent engaged in the sale or exchange of new, used or reconstructed motor vehicles or trailers. * * * * *

'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors. * * * "

The sale or exchange of new, used or reconstructed farm tractors is not included within the statutory definition of the term "dealer" and farm tractors are excepted within the statutory meaning of the term "motor vehicle."

Section 8371, R. S. Mo. 1939, provides that:

"(a) All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make application upon a blank to be furnished by the commissioner for a distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain: (1) a brief description of each type of motor vehicle manufactured or dealt in, including character of the motive power, amount thereof, stated in figures of horsepower, and (2) the name and business address of such manufacturer or dealer; (3) the weight and rated live load capacity of commercial motor vehicles.

"(b) Fees and plates for manufacturers and dealers; On the payment of a registration fee of \$21.00 there

shall be assigned to such manufacturer or dealer a certificate of registration in such form as the commissioner shall prescribe, and two sets of number plates bearing such number. As many duplicate sets of number plates as may be desired may be obtained upon the payment of a fee of \$10.50 for each duplicate set.

"(c) Display of duplicate number plates: Such duplicate number plates may be displayed on any motor vehicle used in the business of the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer used for the private purposes of any such manufacturer, dealer or their employees, or on any motor vehicle or trailer hired or loaned to others.

"(d) The commissioner of motor vehicles shall use all due diligence to ascertain whether applicant is a dealer in fact, and he may regulate the number of plates furnished each dealer."

Under the above section license plates are issued to dealers to be legally used only for the purposes actually incident to the demonstration and sale of motor vehicles or trailers. In the instant case the dealer's license plates are not used on trailers for the purpose of demonstrating and selling same (although same would be sold if there were a buyer) but are used for private purposes, viz., transportation and demonstration of farm tractors.

In the case of *People v. Wirth*, 188 N. W. 390, 1. c. 391, the defendant, employed as a truck driver for the Dodge

Brothers automobile manufacturers, was at the time of his arrest driving a Packard Truck owned by his employer, and carrying dealers license plates. The truck contained a load of automobile parts which were taken to the freight depot.

The Supreme Court of Michigan in passing on the above case had before it a statute very similar to Section 8731, supra. The court said:

"Defendant claims the truck he was driving falls within the provision of the statute permitting a general distinctive number for all motor vehicles owned or controlled by Dodge Bros. With this we cannot agree. The motor truck he was driving was employed in the conduct of the business of Dodge Bros. The statute relates to motor vehicles manufactured by any person or company, and the shipment, delivery, demonstration, and operation thereof in the course of sale upon highways. A motor truck employed in the conduct of the business, whether purchased from another maker or made by the company so devoting the same to purely commercial purposes, such as the trucking business of the company, does not fall within the permitted registration of motor vehicles by manufacturers. Such use is in its very nature a private one, and clearly outside of permitted operation upon the public highways of the motor vehicles manufactured by the company. Nothing in other sections of the statute militates against this view. The law does not admit of manufacturers operating motor trucks upon the highways, in the general conduct of the business of the factory, under a manufacturer's number.

"Every manufacturer of motor vehicles may, instead of registering each motor

April 10, 1941

vehicle so manufactured,' make application for and obtain 'a general distinctive number or numbers for all motor vehicles owned or controlled by such manufacturer,' but may not employ motor vehicles under such number or numbers upon the highways in the industrial conduct of the business of the company."

Consequently, we are of the opinion that a registered "dealer" may not use dealer's license plates on trailers which are used in the demonstration or transportation of farm tractors.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

LW:EG

MOTOR VEHICLES: Highway Patrol unauthorized to keep slow
HIGHWAY PATROL: moving, heavily loaded motor vehicles off
highways.

September 4, 1941

Missouri State Highway Patrol
Jefferson City, Missouri

Attention: Captain W. J. Ramsey
Acting Superintendent

Gentlemen:



This will acknowledge receipt of your letter under date of August 19, enclosing a copy of a letter from Captain Lewis B. Howard of Troop "C" at Kirkwood, Missouri, requesting the following opinion.

"1. Please refer to Section 12, page 234, Laws 1931, State Highway Patrol Law, which is quoted in part: 'Duties of the Highway Patrol: It shall be the duty of the patrol to police the highways constructed and maintained by the Commission, to regulate the movement of traffic thereon.....'"

"2. Please refer, also, to Section 15, page 235, entitled 'Must Stop on Signal of Member of Patrol - Penalty.'

"3. The opinion of the Attorney General as to whether or not members of the patrol, under these sections, would be within their authority in requiring slowly moving trucks to stay off of narrow, crowded highways during the hours of congested traffic whenever their slow movement constitutes a serious hazard is requested. It is granted that

these trucks have complied with the Motor Vehicles Law and the Bus and Trust Law and are guilty of no specific offense, but because of their slow movement pack up behind them long strings of automobiles from which some drivers attempt to cut out and pass at hazardous locations. If it is possible to deny these trucks the use of certain highways during a seven to eight hour period of congestion on weekends, the movement of traffic will be considerably expedited and a real hazard removed."

The Highway Patrol was created by the legislature and has no authority except that granted it by the legislature. (Lamar Township v. City of Lamar, 261 Mo., 1.c. 189.)

The two provisions mentioned in your request are now Sections 8358 and 8361, R. S. Missouri 1939, and read as follows:

"8358. It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any im-

proved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

"8361. It shall be the duty of the operator or driver of any vehicle or the rider of any animal traveling on the highways of this state to stop on signal of any member of the patrol and to obey any other reasonable signal or direction of such member of the patrol given in directing the movement of traffic on the highways. Any person who wilfully fails or refuses to obey such signals or directions or who wilfully resists or opposes a member of the patrol in the proper discharge of his duties shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law for such offenses."

It will be noted that Section 8358, supra, provides that it shall be the duty of the Highway Patrol to regulate the movement of traffic on the highways constructed and maintained by the Commission. This is not all that is required of the Highway Patrol under this provision of the law. It further requires the Patrol to enforce and prevent thereon the violation of laws relating to size, weight, and speed of commercial motor vehicles. Section 8383 R. S. Missouri 1939 provides what speed motor vehicles shall be driven in this State and reads as follows:

"Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive but not conclusive, of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools: Provided, however, that no person shall operate a solid tire commercial motor vehicle having a rated live load capacity of two (2) tons and less at a rate of speed exceeding twenty miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than two (2) tons and not more than five (5) tons at a rate of speed exceeding fifteen miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than five (5) tons at a rate of speed exceeding ten miles per hour; and provided further, that no person shall operate a motor vehicle equipped with iron or other metal tires at a greater rate of speed than six miles per hour."

While Section 8358, *supra*, does authorize the Highway Patrol the right to regulate the movement of traffic upon the highways, this does not by any stretch of the imagination direct the Highway Patrol to regulate the movement of traffic to such an extent as to exceed or violate any provision of the law. To permit that would in fact be permitting the Highway Patrol to legislate and not merely administer the act as passed by the legislature.

It is fundamental that there are three distinct branches of the government, the legislative, executive and the judicial, and under judicial construction by the courts of this state none can infringe upon the duties of any other branch of the government. (Article III, Constitution of Missouri.)

In *Clark v. Austin*, 101 S. W. (2d) 977, l.c. 981, the Supreme Court en banc in speaking on the separation of departments and powers in this State said:

"In *re Richards*, 333 Mo. 907, 914, 63 S. W. (2d) 672, 675. Speaking to a like question in *State ex inf. v. Washburn*, 167 Mo. 680, 691, 67 S. W. 592, 594, 90 Am. St. Rep. 430, this court en banc said: 'All governmental powers are in their natures either legislative, executive, or judicial. The constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that belong to one department from those that belong to the two others are discernible to the learned mind. But in that article of the constitution all the powers of the state government are disposed of, and every one who lawfully exercises any state governmental function is able to trace the source of his authority to one of the three departments there named. The power, whatever its character, can be exercised only by or under authority of the separate magistracy to which by the constitution it is assigned.'"

In *Sawyer v. U. S.* 10 Fed. (2d) 416, 1.c. 420, the United States Court of Appeals laid down a general proposition of law regarding regulations, which reads as follows:

"Authority to make rules and regulations necessary for carrying out the purposes of legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right given by the act."

In *State ex rel. Kaser v. Leonard*, 129 A. L. R. 1125, 1.c. 1135, the court said:

"The following language which we have taken from *Maryland Casualty Co. v. United States*, 251 US 342, 40 S Ct 155, 157, 64 L. ed 297, is much quoted: 'It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.'"

In *Marsh v. Bartlett*, 121 S. W. (2d) 737, 1.c. 744, the court in construing the word "regulate" as contained in the constitutional amendment creating the Conservation Commission of the State of Missouri said :

"The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. *Sluder v.*

St. Louis Transit Co., 189 Mo. 107,
88 S. W. 648, 5 L.R.A., N.S., 186.
Regulation and legislation are not
synonymous terms. In re Northwest-
ern Indiana Tel. Co., 201 Ind. 667,
171 N. E. 65, 70.

42 C. J., page 619, Section 22 lays down the gen-
eral principal of law regarding regulation by certain public
officers or boards.

"The power of supervising and mak-
ing rules and regulations as to
administrative matters, in carry-
ing out the statutory regulations
of motor vehicles, may be conferred
upon designated public officers or
boards, such as upon the state
highway commission, or, within a
city, upon police or traffic of-
ficers. Such officers or boards
may make rules and regulations
only as to matters within the pow-
ers delegated; and they are presum-
ed not to be vested with power to
make a regulation in a matter al-
ready regulated by statute. But
if the rules and regulations
adopted by them are within the
general purpose of the authority
granted and tend to make it effec-
tive, they are not subject to the
criticism that they are an unlaw-
ful delegation of authority. The
legislature, however, cannot
delegate to such officers or boards
its legislative functions, and
therefore cannot confer upon them
power to establish a maximum rate
of speed, less than the rate estab-
lished by law, over a particular
part of the highway. Thus, where
the state highway commission,
under its power to regulate, estab-
lishes a maximum rate of speed over

a bridge, at a rate less than that allowed by law, such regulation if viewed as an attempt to legislate is unauthorized and void; or if viewed as a regulation, is unenforceable, where the legislature has fixed no penalty for its violation."

See also State v. Smith, 49 S. W. (2d) 74, 1.c. 76. In other words the legislature is the only branch of the government that may enact laws. The executive department merely administers acts passed by the legislature. The legislature may delegate power to the executive branch to promulgate rules and regulations or regulate traffic as in the instant case, but not to exceed the law as enacted by the legislature. Such regulations are merely for the purpose of carrying out the provisions of the act.

Your request states that it is granted that these trucks have complied with the motor vehicle act and the bus and truck law and are guilty of no specific offense. Therefore any regulations of traffic which would require such trucks to abandon a highway constructed and maintained by the Commission would be in direct violation of the law permitting the use of such highways, and such a regulation would in fact exceed the law and be invalid.

Section 8383, supra, in part requires certain trucks to travel over the highways in this State at a rate of speed not to exceed six, ten, fifteen or twenty miles per hour depending upon the capacity of said trucks. Certainly, we cannot hold that the Highway Patrol can ignore such a law and in lieu thereof exercise their authority to enforce regulations of traffic upon the highways of this State and thereby keep these trucks off the highways for the reason said trucks travel so slowly that it creates a hazardous condition by reason of the fact certain drivers of motor vehicles will take chances and pass a long line of cars at hazardous locations. Such reckless drivers attempting to pass slow moving motor vehicles at hazardous locations should be apprehended under the law and not the truck drivers who are complying with the law in every respect.

Section 8383, supra, further provides that persons operating motor vehicles on the highways of this State shall drive the same in a careful and prudent manner, and shall

exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, and further provides that a rate of speed in excess of twenty-five miles per hour for a distance of one-half mile shall be considered as evidence presumptive, not conclusive, of driving at a rate of speed which is not careful and prudent. There are many things to be taken into consideration as to whether said motor vehicles are being driven in a careful and prudent manner, such as the time of the day, the amount of vehicular and pedestrian traffic, conditions of the highway and the location with reference to intersecting highways, curves, residences and schools.

In Booth v. Gilbert, 79 Fed. (2d) 790, 1.c. 794, the court quotes from many of the Missouri appellant courts' decisions that a person driving a motor vehicle upon the highways may be guilty of driving at an excessive speed even though driving at a rate of speed less than twenty-five miles an hour. The test of excessive speed is not whether the driver has or has not driven at a rate in excess of twenty-five miles per hour, but whether he drove his car in a careful and prudent manner exercising in so doing the highest degree of care, having due regard, we repeat, to his situation and surroundings.

"(9,10) It will be noted that this statute fixes no definite limit, in miles per hour, of the speed at which a car may lawfully be driven on the public highways of Missouri. (In passing, it may be observed that no ordinance of the city of St. Louis is involved, because no such ordinance is either pleaded or proved.) The statute simply requires that a car shall be driven in a careful and prudent manner; that the driver shall exercise the highest degree of care; and that the rate of speed shall not be such, or so great, as to endanger the life, limb, or property of others. True, the statute does say that a speed in excess of twenty-five miles an hour, when

maintained for a distance of one-half a mile, shall be presumptive evidence, but not conclusive evidence, of the lack of care and prudence. But even if the rate of speed so named be exceeded, the statute says the burden is still on the prosecution to show, by proof of the surroundings and situation--which may include, weather, time of day or night; intersections with other highways; curves in the highway, or lack thereof; density of population, and of pedestrian and vehicular traffic, and condition of the road--that the speed exercised was not, the time and place regarded, careful and prudent, and was therefore excessive. On the other hand, it seems fairly plain, from the language of this statute, that a driver may be guilty of driving at an excessive speed, even though he shall drive at a speed less than twenty-five miles an hour. *Wilson v. Spuhler* (Mo. App.) 20 S. W. (2d) 556. The statutory test of excessive speed, *vel non*, is therefore not whether the driver has, or has not, driven at a rate in excess of twenty-five miles per hour, but the test is whether he drove his car in a careful and prudent manner exercising in so doing the highest degree of care, having due regard, we repeat, to his situation and surroundings, or some of them above set out. (Cases cited.) * * "

Therefore, it is the opinion of this Department that the Highway Patrol may regulate traffic, but not to such an extent that said regulation goes beyond the law and in fact attempts to repeal said law; that under Section 8383, *supra*, the Highway Patrol may not by regulation restrict those trucks from using the highways of this State as provided

September 4, 1941

by law. Since the statute provides that certain trucks of certain capacity shall travel over the highways at a specified rate of speed, such trucks may continue to travel at that rate of speed and no regulation should prevent their use of the highways. This is a matter for the consideration of the legislature and cannot be adjusted by regulation.

We realize that often-times slow moving motor vehicles on the highway do tie up traffic and certain persons who are in a hurry grow impatient and take chances, thereby endangering the property and lives of many other persons. But as long as these motor vehicles are complying with the law in every respect, as you stated they are doing, then the only possible way to remove such slow moving motor vehicles from the highways of this State is for the legislature to amend or repeal the present law and enact legislation restraining them from the use of the highways. Under the present law the provision authorizing the Highway Patrol to regulate traffic upon the highways is not sufficient authorization to prohibit such slow moving motor vehicles from operating upon the highway so long as they are being operated in a careful and prudent manner and at a rate of speed not to endanger the property and lives of other persons.

Respectfully submitted,

AUBREY R. HAMNETT, JR.
Assistant Attorney General

APPROVED:

VARE C. THURLO
(Acting) Attorney General

ARIH:EAW

MOTOR VEHICLES: "Push-a-Bike" is a motortricycle within the meaning of the motor vehicle act.

September 30, 1941

Captain W. J. Ramsey
Acting Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri



Dear Captain Ramsey:

We are in receipt of your letter of September 22d wherein you request an opinion based on the following facts:

"1. Attached is a folder describing a Push-a-Bike motor. A ruling is requested as to whether these motors, when attached to a bicycle, make the said bicycle a motor vehicle, and, therefore, require a license.

"2. If this ruling makes it a motor vehicle, then any person under the age of sixteen cannot operate it legally. There are several children ranging from the ages of twelve to sixteen in this district having these Push-a-Bike motors. They are used principally in going to and from school and riding around after school hours.

"3. Also, if this ruling specifies these as motor vehicles it will require them to have the necessary head and tail lights and to come under the laws of the Motor Vehicle Act.

"4. Please give us a clear-cut definite ruling covering all phases, so that, if necessary, we can inform local law enforcement officers, Prosecuting Attorneys, Justices of the Peace, etc., regarding this ruling."

From the attached folder we learn that "Push-A-Bike is no toy! Push-A-Bike is a well engineered gasoline motor designed specifically to propel a bicycle over any type road surface at a safe speed. It converts your bicycle into a practical, economical, and trouble-free motor vehicle." The motor "rides on its own pneumatic double-tube tire," thus converting the bike into a motortricycle.

Section 8367, R. S. Mo. Mo., 1939, provides that:

"Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows:
* * * 'Motorcycle.' A motor vehicle operated on two wheels. 'Motortricycle.' A motor vehicle operated on three wheels, including a motorcycle while operated with any conveyance, temporary or otherwise, requiring the use of a third wheel. 'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors. * * *"

It is to be noted that the above section after defining "Motortricycle" as "a motor vehicle operating on three wheels," goes on to provide that it includes "a motorcycle while operated with any conveyance, temporary or otherwise, requiring the use of a third wheel."

The fact that "Push-a-Bike" is not operated with any conveyance, would not take it out of the definition of a motortricycle, since the word "including" is not a word of limitation, rather "it is a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it." In *Re Goetz's Will*, 75 N. Y. Supp. 750, 1. c. 751.

A "Push-a-Bike" would also come within the meaning of a motor vehicle as being "any self-propelled vehicle."

Section 8369, R. S. Mo. 1939, provides that every owner of a motor vehicle which shall be operated or driven upon

Sept. 30, 1941

the highways of this State, must register same with the Commissioner of Motor Vehicles and pay a registration fee for "motortricycles \$7.50."

From the foregoing we are of the opinion that when a bicycle is fitted with a gasoline motor, which motor rides on its own tire, that said vehicle when so operated and driven on the highways of this State becomes a motortricycle within the meaning of Section 8369, supra, requiring it to be registered, together with the payment of a registration fee.

We are further of the opinion that said motortricycle comes within the meaning of Section 8401, sub-section "1", R. S. Mo. 1939, making it an offense for any person under the age of sixteen years to operate a motor vehicle on the highways of this State, and is also within the meaning of the motor vehicle act requiring motor vehicles to be equipped with proper head and tail lights. Senate Bill 200, Laws of Missouri, 1941, p. 438.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG

CRIMINAL LAW: Affidavit sufficient to charge the crime of Grand Larceny under Section 4456 R. S. Mo., 1939 - Larceny and Embezzlement distinguished.

September 10, 1941

Hon. Charles H. Rehm
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

10-1
FILE

Dear Sir:

We are in receipt of your request for an opinion, under date of August 30th, 1941, which reads as follows:

"I have a question of criminal procedure that I would like to have your opinion concerning.

"An affidavit for a state warrant was issued charging Embezzlement by Bailee and the defendant was arrested for that charge. He was placed under bond and released. For the charge that he was arrested, my county lacked venue for the conversion took place in Illinois. However if it can be proved that he had a wrongful intent at the time he was given possession of the goods the crime is that of Grand Larceny. At the preliminary hearing, (without any other papers being filed), the judge found that there was probable cause for binding him over to the circuit court on a charge of Grand Larceny. His bond read that he was to appear before a justice and answer a charge of Embezzlement by Bailee. Objection was made at the preliminary hearing to our showing that he was guilty of another crime.

"Can I just go ahead and file an information in the Circuit Court charging grand larceny, or must I have a new affidavit signed and have him rearrested and give

Hon. Charles H. Nehm

(2)

September 10, 1941

him another preliminary hearing?
I have been unable to determine
this for myself. Both charges
arose out of the same set of facts."

We are also in receipt of your supplemental request,
under date of September 8, 1941, in which you state:

"The original affidavit filed, charging
'embezzlement by bailee', was as follows:

"One "A" to the best of affiant's
knowledge and belief with specific criminal
intent, did then and there willfully,
unlawfully and feloniously, did feloniously
steal, take and carry away from the
possession of one "B", 55 wood ties, all
of the aggregate value of over \$30.00,
the personal property of the said "B"
then and there, being, unlawfully and
and feloniously did then and there steal,
take and carry away with the intent to
then and there deprive the owner of the
said goods and personal property of the
use thereof; and to convert the same to
his own use, without the consent of the
owner; contrary to the form of the
Statutes in such cases made and provided
and against the peace and dignity of the
State!

"The authority for this action is Section
4473 of Mo. Revised Statutes, 1939. The
authority for an action that I intend to
bring now, charging Grand Larceny, is
Section 4456.

"I think that under the cases of 'State
vs. Scott', 301 Mo. 409; 'State vs. Buck',
186 Mo. L. C. 19; and 'State vs. Mintz',
189 Mo. L. C. 283, the defendant can be
convicted, under the facts, of Grand
Larceny."

Section 4456 R. S. Mo., 1939, provides as follows:

"Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

Section 4473 R. S. Mo., 1939, provides as follows:

"If any carrier, bailee or other person shall embezzle or convert to his own use, or make way with or secrete, with intent to embezzle or to convert to his own use, any money, goods, rights in action, property or valuable security or other effects which shall have been delivered to him, or shall have come into his possession or under his care as such bailee, although he shall not break any trunk, package, box, or other thing in which he received them, he shall, on conviction, be punished in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, taken or secreted."

In the case of State v. Flannery, 263 Mo. 579, 1. c. 592 the Court had this to say:

"The examining magistrate is not expected, or empowered, to determine the guilt or innocence of the accused, or to nicely or irrevocably determine the precise offense of which he is guilty. The statute says: 'If it appear that a felony has been committed' (not the felony), 'and that there is probable cause to believe the prisoner guilty thereof' (Sec. 5036, R. S. 1909), he may let him to bail if the offense be bailable (Sec. 5039, R. S. 1909), provided the preliminary examination is not to be had when accused sees fit to waive it. (Laws 1913, p. 225, supra.)

"What does he waive? Clearly, I think he waives that which the magistrate was required to find, viz., that a felony had been committed, and that there was probable cause to believe the accused committed it. And by a waiver of such examination accused in effect admits, for all and singular but only for the legal purposes, objects and intents of the preliminary examination, all that such magistrate was required to find, viz., that a crime has been committed and there is probable cause to believe that accused is guilty of its commission. Thereafter it is left to the prosecuting attorney to determine the exact legal name and nature of the offense committed. (State v. Anderson, 252 Mo. 83.) The law then, this view considered, ought not to be, neither do I think it is, that for every small error of a magistrate unlearned in the extreme niceties of the law, prosecutions must be halted after informations are filed and the case sent back for a technically correct preliminary hearing. * * * ." (Secs. 5036 and 5039 R. S. Mo., 1909, mentioned in this case are now Secs. 3873 and 3876 R. S. Mo., '39, respectively.)

September 10, 1941

In the case of State v. Bauer, 12 S. W. (2d) 57, 1. c. 59, the Court, in referring to the Flannery case, supra, had this to say:

"* * * To hold that a complaint authorized to be filed under such conditions should conform to the rigid rules of criminal procedure would be to destroy the purpose of the statute, which, in addition to the objects stated, provides a way by which the defendant may be legally arrested and, if probable cause is found to exist, detained until an indictment or information may be preferred against him. His legal arrest is, therefore, of equal importance and of more effective force in the administration of the criminal law than the filing of the complaint upon which the warrant of arrest is based. Having accomplished this purpose, the defects and informalities of the complaint, unless it fails utterly to state the substance of the offense with which the accused is charged, should not be held sufficient to invalidate the subsequent proceedings." (Our italics.)"

In the case of State v. Kennedy, 239 S. W. 869, the Court had this to say:

"BLAND, J. Defendant was convicted upon an information charging that he 'did * * * unlawfully and feloniously steal, take and carry away' certain electrical goods and material of the aggregate value of \$400 belonging to the American Electric Company, a corporation. Upon a trial the jury returned a verdict finding him guilty of petit larceny, and assessed his punishment at six months in the county jail."

* * *

"In order for defendant to have been guilty of the crime of embezzlement it was necessary that he either have actual or constructive possession of the goods, and that his intention to steal them was conceived only after he came into lawful possession of the same. If felonious intent existed at the time of the taking, then he was guilty of larceny. * * * "

In the case of State v. Scott, 256 S. W. 745, 1. c. 747, the Court had this to say:

"It is not contended that the evidence in this case would show embezzlement, or that the action of the court in taking that charge away from the jury's consideration was improper. If, after receiving the money, the defendant had conceived the idea of converting it to his own use, it would have been embezzlement. The evidence shows that when he received the money he intended to convert it to his own use."

In the case of State v. Cochran, 80 S. W. (2d) 182, 1. c. 184, the Court had this to say:

"Embezzlement is an offense created by statute. A fundamental distinction between embezzlement and larceny, universally recognized, is that in embezzlement the money or property is lawfully obtained and unlawfully con-

verted, while in larceny the taking must always be unlawful. 20 C. J. 410, section 3, and cases there cited. The elements necessary to constitute the crime of embezzlement are stated in 20 C. J., page 413, section 4, as follows: 'To make out a case of embezzlement under the statutes it is necessary to show first, that the thing converted or appropriated is of such a character as to be within the protection of the statute; second, that it belonged to the master or principal, or someone other than accused; third, that it was in the possession of the accused at the time of the conversion, so that no trespass was committed in taking it; fourth, that accused occupied the designated fiduciary relation, and -- that the property came into his possession and was held by him by virtue of his employment or office; fifth, that his dealing with the property constituted a conversion or appropriation of the same; and sixth, that there was a fraudulent intent to deprive the owner of this property.' (Italics ours.)"

It will be noted in reading the affidavit set forth in the opinion request that it follows very closely the wording of Section 4456 R. S. Missouri, 1939, and also the wording used in the information in the case of State v. Kennedy, supra. We think that the above cases clearly hold that the wording of the affidavit would be sufficient to charge the defendant with the crime of grand larceny, as defined in Section 4456, supra. We are of the opinion that this affidavit would not be sufficient to charge the defendant with embezzlement. As said in the case of State v. Kennedy, supra, in order for a defendant to be guilty of the crime of embezzlement, it is necessary that he either have actual or constructive possession of the goods. It will be noticed in the affidavit that

it is directly charged that the ties were taken "away from the possession of one 'B'." Further, in the light of the necessary elements to be proved in a case of embezzlement, as set forth in the case of State v. Cochran, supra, it must be proved that the accused occupied the designed fiduciary relationship, that the property was given into his possession and was held by him by virtue of his employment or office. The affidavit does not charge this, but, on the contrary, specifically charges that "B" possessed the property, thereby making it one of the necessary allegations to sufficiently constitute the crime of larceny, under Section 4556 R. S. Missouri, 1939.

We call your attention to the case of State v. Ancell, 62 S. W. (2d) 443, 1. c. 446, where the Court said:

" * * The justice found that the felonious act charged, in other words a felony charged in the complaint, had been committed. It was not incumbent upon him to determine the precise degree of the crime found to have been committed nor, in our opinion, could his attempted determination thereof preclude the prosecuting attorney from filing an information charging the higher degree."

It will be noted in this case, as well as in reading the cases, supra, that the affidavit can be made by a layman and does not have to be drawn with the precision as does an information or indictment. Further, the Justice before whom the preliminary hearing is held is only charged with the duty to ascertain, first, whether a felony has been committed, and second, whether there is probable cause to believe the accused committed it.

As we understand the facts, from your opinion request, the Justice bound the defendant over to the Circuit Court, after a preliminary hearing held upon the affidavit above set forth. Certainly the defendant was fully informed that he was charged with the crime of

larceny under Section 4456, supra. However, if the evidence before the Justice in no wise followed the affidavit, then it could be said that the defendant, though charged under one Section of the statute was subject to an inquiry under a different set of facts than those alleged in the affidavit, and would, in truth and in fact, have not had a preliminary hearing, should he be charged in the information under a different statute from that about which the witnesses were interrogated. In other words, the defendant is charged with a statutory crime, both in the affidavit and the information and the preliminary hearing accorded him ought to be conducted so that the evidence adduced before the Justice explains and substantiates the charge made against him.

CONCLUSION.

We are of the opinion that the affidavit set forth in your opinion request sufficiently charges the crime of grand larceny under Section 4456 R. S. Missouri, 1939, and the defendant charged in the affidavit was given a preliminary hearing, thereunder, unless the testimony before the Justice in no way followed the charge made in the affidavit and completely proved a different crime other than the one charged under said Section.

Respectfully submitted

APPROVED:

B. RICHARD S. CREECH
Assistant Attorney General

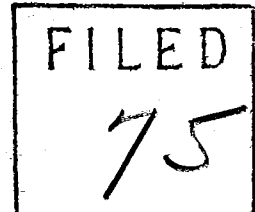
VANE C. THURLO
(Acting) Attorney General

BRC:RW

PARENT & CHILD: Valid marriage affects emancipation of child from parental control, and parental consent for vaccination of married minor not necessary.

July 18, 1941

7-19



Dr. Mary M. Richardson,
Supervisor, State-wide Health Project
National Youth Administration for Missouri
412 East High Street
Jefferson City, Missouri

Dear Doctor Richardson:

Under date of July 2, 1941, you wrote this office requesting an opinion as follows:

"On May 9, 1941, you gave us a ruling in regard to the vaccination of minors who are working on the National Youth Administration program. According to this ruling it is necessary that we have the written permission of the parent or guardian for the vaccination.

"Beginning with the new fiscal year the NYA will register married men and women between the ages of 17 and 25 years. Heretofore only single men and women have been eligible for this program work.

"We would, therefore, like your opinion as to whether or not we will need the written permission of the parent or guardian to vaccinate a youth who is married but still a minor."

Section 374, Article XVI, Chapter 1, R. S. Missouri, 1939, declares who are minors. This section is as follows:

"All person of the age of twenty-one years shall be considered of full age for all purposes, except as otherwise provided by law, and until that age is attained they shall be considered minors: provided, however, that when any person under twenty-one years of age is married to an adult who has or claims any interest in real estate and wishes to convey, encumber, lease, or otherwise dispose or affect the same, such minor shall be deemed of age for the purpose of joining with his or her adult spouse in the execution of any instrument affecting such spouse's real estate."

It will be observed that this section contains no exception and only one proviso releasing a minor from the disabilities of minority, which permits minors, when married to an adult, to join with the adult spouse in the execution of an instrument affecting the real estate of the adult spouse.

Section 375 of the same article and chapter declares the parents to be the natural guardians of their children, and to be entitled to custody and control of them.

Section 378 of the same article and chapter provides generally for the appointment of guardians for minors. This section is as follows:

"If a minor have no parent living, or the parents be adjudged incompetent or unfit for the duties of guardianship, the probate court, or judge or clerk thereof in vacation, subject to the confirmation or rejection of said court of the county of the minor's domicile, or if the minor have no domicile in this state, then the probate court, or judge thereof in vacation, of the county where the minor may at the time be actually

residing, shall appoint guardians to such minors under the age of fourteen years, and admit those above that age to choose guardians for themselves, subject to the approval of the court at its next term thereafter. Unfitness or incompetency of parents, after ten days' notice to the parents shall be decided in the probate court by the judge thereof, or by a jury, if one be demanded."

Section 394 of the same article and chapter defines the powers of guardians and curators. This section is as follows:

"The guardian of the person, whether natural or legal, shall be entitled to the charge, custody and control of the person of his ward, and the care of his education, support and maintenance; the curator shall have the care and management of the estate of the minor, subject to the superintending control of the court; and the guardian of the person and estate of the minor shall have all the powers and perform all the duties both of a guardian of the person and a curator."

There are other sections of the statutes relating to guardians of minors, which are not mentioned or set out, as the matters pertinent to this opinion are covered by the above quoted and referred to sections.

The question to be determined is what effect, if any, the marriage of a minor has upon the relation of parent and child, with reference to the right of custody and control by the parent, when the new status of husband or wife is established for the minor.

The Laws of Missouri recognize the right of minors to marry by authorizing the issuance of marriage licenses to minors under certain conditions. The section of the statute

which does this is Section 3370, Chapter 20, R. S. Missouri, 1939, and is as follows:

"No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age: Provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable, and no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties applying for same, one or either of both of them, are of age, or whether the male is under the age of twenty-one years, or the female under the age of eighteen years, and if the male is under the age of twenty-One years or the female is under the age of eighteen years, the name of the father, mother or guardian consenting to such marriage."

(Underscoring ours)

By marriage a minor takes on a new status, one that is incompatible with that of a child under the laws relating to parents and children. A parent is entitled to the care, custody and control of a child and the benefit of the child's services. Under the marriage relationship, a male minor owes to his wife the duty to provide for and maintain his wife. A married

female owes her services to her husband, and the husband is entitled to the benefit of them.

The State of Missouri has no statute bearing directly on the question, and we have failed to find any Missouri cases directly in point. However, in Tiffany on Domestic Relations, Third Edition, where the emancipation of children is under discussion, we find the following at page 360:

"Emancipation may also be effected by operation of law, and even against the will of the parent. It is so effected by the valid marriage of the child. * * * * *"

There are cases in other states which bear directly on the point under consideration. The leading case in the United States seems to be a Minnesota Case - State ex rel. Scott v. Lowell, reported in 78 Minnesota Reporter, at page 116, and in the Northwestern Reporter, Volume 80, at page 877. We quote from this case, l. c. 878:

"Now the question of the right of the respondent, as father of the relator's wife, to restrain her from going to her husband, must be determined upon the basis that the marriage is valid. The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child. 1 Bish. Mar. & Div. Sec. 275; Schouler, Dom. Rel. Sec. 267. The correctness of this proposition as a general rule is admitted, but it is claimed on behalf of the father that it does not apply to this case, because the husband cannot enforce his marital rights without the consent of the wife, and that she cannot, by giving her consent to a voidable marriage, free herself from parental

control, and, further, that she cannot do so until she reaches the age when she can legally affirm the marriage; that to hold otherwise would enable a girl under 12 and over 7 years of age to emancipate herself by consenting to a voidable marriage. This course of reasoning ignores the fact that the marriage, until set aside, must be, for all civil purposes, treated as valid, and that it is her new and inconsistent status as a wife which emancipates her from the control of her father. A wife -- and this girl must be regarded as such for the purposes of this case -- certainly has the capacity to consent to live with her husband. Whether the marriage of a child under 12 years of age and over 7 years would emancipate her, we need not determine. It would seem, however, that the operation of natural laws would incapacitate her in fact from assuming the new and inconsistent relations which emancipate a minor from parental control. Our conclusion is that the respondent is not legally entitled to detain his daughter, if she elects to return and live with her husband. Therefore it is ordered that Sadie Scott, the wife of the relator, Alex W. Scott, be freed from the restraint of her father, the respondent Fred L. Lowell, and that he surrender her to the relator, if she elects to live with him as her husband. Let judgment be so entered."

The Statutes of Missouri, while containing no direct provision on the matter, at least in one instance recognize the changed status of a married minor. This is in the law relating to divorce and alimony, where it is provided that parents living apart are entitled to an order of court respecting the custody, control, services and earnings of their unmarried minor children. This recognition of the different

status of a married minor is in Section 1526, Article III, Chapter 8 of R. S. Missouri, 1939.

From the foregoing it would seem that the contracting of a valid marriage by a minor would effect an emancipation of the minor from the parental control. The following brief quotation on emancipation is taken from the case of Brosius v. Barker, 154 Mo. App. 657, at l. c. 662:

"Complete emancipation is an entire surrender of all the rights to the care, custody and earnings of the child, as well as a renunciation of parental duties. (Lowell v. Newport, 66 Me. 78.) And the test to be applied is that of the preservation or destruction of the parental and filial relations. (Sanford v. Lebanon, 31 Me. 124.)

"There are two kinds of emancipation--express and implied. Express emancipation takes place when the parent agrees with his child, who is old enough to take care of and provide for himself, that he may go away from home and earn his own living and do as he pleases with the fruits of his labor. Implied emancipation is where the parent, without any express agreement by his acts or conduct, impliedly consents that his infant child may leave home and shift for himself. (Rounds Bros. v. McDaniel, supra, Lowell v. Newport, supra.)

"Emancipation was in early time, evidenced and perfected by the formality of an imaginary sale. Subsequently this was abolished, and the simple process of manumission before a magistrate substituted. (Everett v. Sherfrey, 1 La. 358.) In Louisiana the matter is expressly regulated by statute.

But in the absence of statute, the rule now is that emancipation need not be evidenced by any formally executed instrument, or by any record act, but is a question of fact which may be proven from circumstances and direct proof is not required. (Canover v. Cooper, 3 Barb. 115; Benson v. Remington, 2 Mass. 115; Everett v. Sherfrey, supra.)

"The question of emancipation must be determined upon the peculiar facts and circumstances of each case, and nothing more than general rules can be declared which will be applicable in all cases. (Inhabitants of Carthage v. Inhabitants of Canton, 54 Atl. 1104.)

"Emancipation is never presumed, and if relied upon as a defense, must be proven. (Singer v. Railroad, 119 Mo. App. 112, 95 S. W. 944.)"

CONCLUSION.

It is the conclusion of this Department that it would not be necessary to have the consent of the parents to vaccination of a married minor, because of the emancipation affected by marriage.

Respectfully submitted,

W. O. JACKSON,
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

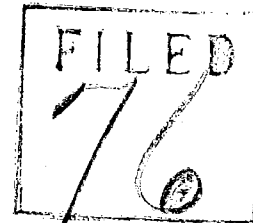
WOJ/rv

NEPOTISM:
OFFICERS APPROVING
APPOINTMENTS:

A member of the County Court voting for approval of his son-in-law as assistant county engineer violates the nepotism act; but if other members of the court vote for such approval without the connivance, understanding or agreement of the related member then the act is not violated.

January 23, 1941

Mr. Russell D. Roberts
Prosecuting Attorney
Adair County
Kirksville, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you submit the following request:

"Our local County Court asks the question, whether or not the County Engineer and Surveyor recently elected has the authority to appoint as an employee working under him the son-in-law of one of the County Judges.

"I am interested in knowing whether in your opinion the power of the County Engineer and County Surveyor is absolute enough to remove any question of nepotism in such an appointment."

Section 13 of Article XIV of the Constitution of Missouri, pertinent to nepotism, provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have

the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

In the case of State ex rel. McKittrick v. Whittle, 63 S. W. (2d) 100, 1. c. 101, the Supreme Court of Missouri said that the nepotism act was adopted for the following reasons and purposes:

"(1) It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state and its political subdivisions.

"(2) It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. To remedy this widespread evil, the convention proposed to the people an amendment to the Constitution, designated therein section 13, art. 14, * * * *."

And the court also states:

"* * * The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. * * * * If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. * * * *"

Section 8011, R. S. Mo. 1929, in so far as it applies to the question of appointing an assistant county engineer, provides as follows:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8008, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his

office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: * * * *"

It will be noted that the appointment of the assistant engineer is not complete until it is approved by the county court. In other words, the act of approval is a part and parcel of the appointment. We think this statement is supported by the rule announced in *Schulte v. City of Jefferson*, 273 S. W. 170, 1. c. 172 in the following language:

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; *Meachem's Public Office and Officers*, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84."

However, there might be an exception to the foregoing statement in a case where the members of the court who are not related to the appointee approve the appointment. In that case, if such members voting for the approval do not have an understanding with the related member that they vote for the approval, and if and provided further that they vote for the approval as their free official act and deed, and there is no conspiracy between them and the related member to so vote, then such appointee may be approved and the related member would not be guilty of a violation of the nepotism act. This rule is announced and applied by the Supreme Court of Missouri in *State ex rel. McKittrick v.*

Becker, et al., 81 S. W. (2d) 948, 951, where the court said:

"Now, in the instant proceeding, it is freely conceded that in the intended appointment there is not in fact or in semblance any connivance, agreement, confederation, or conspiracy between the majority members of the Court of Appeals as between themselves or as between them, on the one hand, and the non-voting member on the other, or any common design between any two of them, that the two should accomplish in behalf of any or all a prohibited purpose. The sum of the matter is that Judges Becker and McCullen are about, honestly and in good faith, to exercise their official power in securing for the Court of Appeals the continued and uninterrupted services of a commissioner whose record of integrity of character, untiring industry, and distinguished judicial service, has met with the unqualified approval alike of his associates on the Court of Appeals and the bench and bar of the state.

"In view of the foregoing considerations, we are of the opinion that the threatened action of the respondents is not beyond or in excess of their jurisdiction as members of the St. Louis Court of Appeals and is not in violation of section 13 of article 14 of our State Constitution."

CONCLUSION.

It is, therefore, the opinion of this department that the county engineer may appoint a son-in-law of one of the

county judges. We are further of the opinion that since it is the duty of the county court to approve such appointment then the member of the court related to the appointee would be violating the provisions of the nepotism act if he voted for the approval of the appointment. We are further of the opinion that if only the members of the county court not related to the appointee vote for the approval and if their voting is not by connivance or agreement or understanding with the related member that they so vote, then the related member would not be guilty of a violation of the nepotism act if such appointment is finally approved by the other members of the county court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

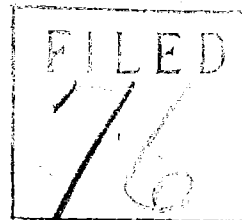
COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

TAXATION: County Court authorized to make additional
levy under provisions of Section 22 of Art.
SPECIAL ROAD AND X of the Constitution for special road and
BRIDGE TAXES: bridge taxes.

January 24, 1941

Mr. Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Sir:

This is in reply to yours of recent date wherein
you submit the following facts and request:

"On the 1941 Budget form #1, page 1,
furnished by the Auditor to the County
Clerk, entitled Tax Rate and Valuation,
at item #1 there are the following
entries under the general heading Tax
rate for all revenue purposes preceding
year:

(a) General county revenue operating
fund \$_____, Per \$100 Assessed Valua-
tion.

(b) County road and bridge fund (Sec.
7890, R. S. Mo. 1929) \$_____ Per \$100
Assessed Valuation.

"It has been the custom in this county
for the County Court to make a 35¢ levy
for \$100 assessed valuation, which is
known as the general county revenue oper-
ating fund, and the county in the past
has also assessed a special 20¢ per \$100
assessed valuation as a Special Road and
Bridge Fund. Under the form that the
Court has received for 1941, Section (B)
as above mentioned entitled County road

and bridge fund, Sec. 7890, R. S. Mo. 1929, would indicate that the 20¢ additional road and bridge fund should be levied under Section 7890. My investigation has indicated to me that Section 7890 for a 20¢ levy and should be included in the general county revenue fund and be in the 35¢ per \$100 assessed valuation, and that the Special road and bridge fund that the county has been assessing in this county, should be levied under Section 7891, which provides for a Special road and bridge levy. In checking through the constitution, I noticed that Article 10, Section 11, provides for the general revenue fund of 35¢ in counties similar to Saline County, and that Article 10, Section 22, provides for the Special road and bridge levy and apparently corresponds with Section 7891 of the R. S. of 1929. Our County Court is preparing its budget for the coming year and is anxious to get this matter cleared up for, in my opinion, if this special levy was made under 7890, the County would likely be limited to only a 35¢ levy and would not be able to make the additional 20¢ levy for roads and bridges as they have done in the past."

We find that this office, on December 15, 1938, by an opinion to Miss Thela Shuck Henry, Prosecuting Attorney of Shannon County, held that the county road and bridge tax is, by virtue of the provisions of Section 7890, a part of the levy for county purposes. We are enclosing a copy of this opinion for your information.

From this opinion, applying the facts to your county, which comes within the brackets under the Constitution which limits the levy to 35¢, your county court would be required to include the levy authorized by Section 7890 R. S. Mo. 1929 in the 35¢ levy for county purposes. As a

suggestion, however, it might be advisable for the county court to make a levy of some amount under said Section 7890 in order that it may be authorized to make the levy under Section 7891 and under Section 22 of Article X of the Constitution. We suggest this for the reason that both Section 7891 of the statute and Section 22 of the Constitution start off with the words: "In addition to the levy authorized by". This clause of these sections indicates that the writers of the Constitution and the Legislators contemplated that some levy would be made under the county road and bridge fund sections.

Referring to Section 22 of Article X of the Constitution and Section 7891, R. S. Mo. 1929, which was enacted by the General Assembly by virtue of the authority of said Section 22, we find that the courts have held that the levies authorized under these sections are not to be included in the limitations placed on the county courts by the provisions of Section 11 of Article X for county purposes.

The Supreme Court, in the case of State ex rel. Johnson v. A. T. & Santa Fe Ry. Co., 310 Mo. 587, 1. c. 596, in speaking of Section 22, Article X of the Constitution, which authorizes the levy for special road and bridge purposes, said:

"This section is a grant of power, and not a limitation of power, except as to the amount. The two sections (11 and 22) must be construed together and both permitted to stand, if they can be reconciled. Upon its very face, Section 22 of Article X is a provision for an additional tax, not contemplated in Section 11. When construed together, the two sections mean that, in addition to the allowable and limited tax specified in Section 11, the county, in the discretion of the county court,

Jan. 24, 1941

can levy an additional special road-and-bridge tax not to exceed twenty-five cents on the \$100. To make it plain, if the county can levy fifty cents on the \$100 under Section 11, it can in addition levy as much as twenty-five cents per \$100 more for the special road-and-bridge fund of the county. In other words, construing the two sections together, the levy for all county purposes (and the special road-and-bridge fund is for a county purpose) may reach the total of seventy-five cents on the \$100. *

* * *

So, in your case, where the limit of levy for county revenue purposes is thirty-five cents on the assessed valuation, then the county court would be authorized to levy as much as sixty-cents on the \$100 assessed valuation, which would include the twenty-five cents levy authorized under Section 22 of Article X of the Constitution and Section 7891, R. S. Mo. 1929.

CONCLUSION.

8527 It is, therefore, the opinion of this department that the special road and bridge tax levy authorized by Section 22 of Article X of the Constitution and Section 7891 R. S. Mo. 1929 may be made in addition to the limitations placed on the county under Section 11 of Article X of the Constitution.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney-General

COVELL R. HEWITT
(Acting) Attorney-General

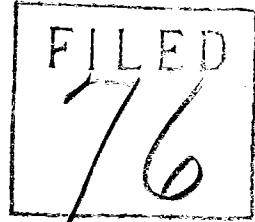
TWB:CP

SPECIAL ROAD DISTRICTS: Cannot use funds derived from special road tax to pay bonded indebtedness.

February 12, 1941

2-13

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Sir:

Receipt of your letter of January 2, 1941,
asking for an opinion as follows:

"This inquiry is made at the instance of the Commissioners of the Sweet Springs Special Road District of Saline County, Missouri.

"In addition to the 20% levy made by the county, which goes to the General Fund of the Sweet Springs Special Road District, the road district has also issued and sold bonds for gravelling of roads within the district, and for that purpose have made a 25% levy which is paid into the interest and sinking fund of the district, and is sufficient for the purpose of retiring bonds and interest as they become due.

"There is however, a surplus of approximately \$6,000.00 in the General Fund, which is created by the 20% levy.

"The question the Commissioners would like for you to decide, is whether or not they can transfer the \$6,000.00 surplus or any part thereof not needed for maintenance of the highway, to the interest and sinking fund, so that they may reduce the levy of 25% for the retirement of bonds and interest. In other words, may a Special Road District use General Fund money for retirement of bonds, and at the same time reduce the levy for interest and sinking fund?"

Hon. Marion Robertson. - 2 -

February 12, 1941.

was acknowledged in our letter of January 20th, in which information was requested concerning the matters referred to in the above letter, concerning which the opinion was asked.

Under date of January 29, 1941, you replied as follows:

"In reply to your letter of January 20, 1941, as to what Article of the statutes this road district was organized, I am informed that it was Article 9, Chapter 42, R. S. Mo. 1929, beginning at Section 8024; that the Special levy of 20¢ that the County Court made was authorized by Section 7891, R. S. Mo. 1929, and that the original bonded indebtedness which the district voted, was authorized by Sections 7961 and Section 7962."

You state that a 20¢ tax was levied in accordance with the authority contained in Section 7891 R. S. Mo. 1929. This Section was enacted under authority of Section 22 of Article X of the Constitution. These sections of the Constitution and Statutes are as follows:

Section 22 of Article X of the Constitution:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

Also Section 7891 R. S. Mo. 1929:

"In addition to the levy authorized by the preceding section, the county courts of the

counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

It will be observed that Section 22 of Article X of the Constitution, and Section 7891 R. S. Mo. 1929, both direct that the funds derived on the levy of this special road tax shall be used for road and bridge purposes, and for no other purpose.

February 12, 1941.

Vol. 61 C. J. paragraph 2 of section 2235, at page 1521:

"Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose, and neither can funds derived from taxes levied and collected for particular purposes be legally utilized for, or diverted to, any other purpose, some constitutional provisions expressly so providing."

Inasmuch as funds derived through the levy of this special road tax can be used for no other purpose, it remains to be determined whether or not the applying of such funds can be reverted to the payment of bonded indebtedness.

In the case of *Newport v. McLane* 77 S. W. (2d), page 27, 96 A.L.R. 655, is found the following definitions of divert and diversion:

"We shall hereafter use the term 'divert,' or 'diversion' in the sense of turning money belonging to one fund, permanently, from its purpose or the final appropriation of it, to some other use of the city. *Gates v. Sweitzer*, 347 Ill. 353, 179 N. E. 837, 79 A.L.R.1151."

This was a case in which suit was brought against certain city officers, because they had transferred funds from a sinking fund created for the purpose of paying a bonded indebtedness to other funds, and the court further said at l. c. 660:

"The courts, indeed all authorities, seemingly without an exception agree that when a tax is levied, whether by a fiscal court, city council, or a board of commissioners of a city, or trustees of a town, or other legislative body, by a resolution, ordinance, or other legislative procedure, specifying distinctly the purpose for which it is levied, the legislative body making the levy, after the tax shall have been collected, does not thereafter have any legislative authority over it for the purpose of diverting is so long as the purpose for which it was collected exists. A fortiori those ad-

February 12, 1941.

ministrative officials into whose custody and control the law intrusts the same with the authority to invest, preserve, or pay it out are without authority to divert it."

The special road tax was levied and collected for road and bridge purposes only, and when in the county treasury, it is required to be kept in a separate account. The funds raised by the levy to pay the bond issue must be similarly treated. Also the funds derived from the bond issue could be used for the purpose of purchasing right-of-way for the construction of new roads, which is a use not permitted of funds derived from the special road tax. It can hardly be said that the payment of a pre-existing debt, even when incurred for the construction of roads, would be road and bridge purposes within the meaning of Section 22, Article X of the Constitution, and Section 7891 R. S. Mo. 1929.

Your letter also states that the Sweet Springs Special Road District was organized in accordance with Article IX of Chapter 42, R. S. Mo. 1929. This Article contains Section 8047, which is as follows:

"The fund received from the poll and road tax of said district shall constitute a general district road fund, and shall be disbursed only as hereinbefore provided, and shall be used only for working, repairing and improving the public roads of such district as herein provided, and for no other purpose; and no part thereof shall be used for paying damages and costs for opening new roads, but all such damages and costs for opening new roads paid by the county shall be paid out of the other county revenue, except as this article may otherwise provide."

CONCLUSION.

The conclusion is reached that no funds derived from the levy and collection of the special road tax authorized by Section 22 of Article X of the Constitution

Hon. Marlon Robertson. - 6 -

February 12, 1941.

and Section 7891 R. S. Mo. 1929, can be applied to the payment of a bonded indebtedness.

Respectfully submitted,

W. C. JACKSON
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

WOJ/me

ELECTION CONTESTS: In absence of statute the county clerk cannot receive any compensation for additional expense in recounting ballots in gubernatorial contest. The county court cannot reimburse him because the claim is not a valid claim and the court is precluded from paying the same by the County Budget Law.

April 17, 1941

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Sir:

You have submitted to this department the question of expense for the recounting of ballots in the contest of the election for governor. Your letter is as follows:

"C. W. Piper, County Clerk of Saline County, has been served with a writ for the recount of ballots to contest the election of Forrest C. Donnell, Governor of the State of Missouri, which election was held November 5th, 1940. The contestant and the contestee are both represented by Marshall attorneys. Mr. Piper has fixed April 24th as the day on which the ballots will be opened and a recount made. According to his instructions in the writ served upon him, the contestor and contestee may, by mutual agreement, have present during said recounting, an equal number of tally clerks and stenographers, in addition to the assistants provided by the County Clerk.

The recounting of the ballots will necessitate hiring additional clerks and stenographers, and there will probably be additional expenses that will have to be paid. The Clerk has taken the matter up with the Saline County Court to pay

April 17, 1941

for the cost of the recount. They want to know if they have authority, as County Court of Saline County, to pay the expenses of this recount, and have authorized me to write you for your opinion."

In arriving at a conclusion, it will be necessary to determine whether there is any liability for additional costs occasioned by the recount, and if such liability exists who, if anyone, is liable for the additional costs. The legislature has issued the writ for the recount of the ballots under Sections 11654 - 11658, inclusive, R. S. Mo. 1939. The sections provide in substance that after the petition is presented to the General Assembly setting forth the points on which will be contested, together with the facts, the legislature votes by yeas and nays whether the prayer shall be granted. After the granting of the prayer the joint committee is appointed to take the testimony of contestor and contestee. The committee has the power to send for witnesses, to issue warrants under the hand of the chairman and to take the depositions of witnesses. All of the above mentioned statutes are based on the authority given to the legislature by Section 8 of Article VIII wherein contested elections, with the exception of governor and lieutenant-governor, are vested in the courts, and Article V, Section 25, wherein contested elections for governor and lieutenant-governor are to be decided by both houses of the General Assembly in such manner as may be provided by law.

With these preliminary remarks, we proceed to determine the authority for costs of the contest insofar as the recounting of the ballots is concerned by the county clerk. Under Article VIII, Chapter 76, R. S. Mo. 1939 the procedure for election contests to all offices is set forth. Section 11637 R. S. Mo. 1939 is as follows:

"In all contested elections, costs may be adjudged against the unsuccessful party, and the payment thereof enforced

as in civil cases."

We interpret the above section to refer to contests in the different courts of our state and not contests instituted in the legislature. The above section was under construction in the decision of Steele vs. Wear 54 Mo. 531, l.c. 535:

"By the 58th section of the statute concerning Elections, (Wagn. Stat., 574,) it is provided that, 'In all contested elections costs may be adjudged against the unsuccessful party, and the payment thereof enforced as in civil cases.' This section it will be observed from its connection with the other sections of the act, and from the whole subject matter only applies to contests of elections which can be had before the courts where costs can be adjudged and the payment thereof enforced as in civil cases by execution on fee bill or in some other manner provided for in the courts. In the very nature of the case, no costs could be adjudged or enforced by the House of Representatives, where they decide the contest by resolution of the House. No judgment is rendered or could be rendered or adjudged in such cases, and no payment could be enforced as costs are enforced in civil cases. It could not, therefore, have been intended by the legislature that this last quoted section should apply to any contests but those authorized to be contested in the courts of the country. It may be hard in such case for the plaintiff to be put to costs, which he had no means provided by law by which he could recover it back from the unsuccessful party; but the common law gives him no remedy, in such case, and we

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do not think he has any by statute."

In the decision of Hoover vs. Pacific Railway Company 115 Mo. 77, the decision of Steele vs. Wear is followed and the general statute relating to civil actions wherein the party prevailing can recover his costs against the other party, except in cases where a different provision is made by law, is discussed and the conclusion reached is that no final costs are recoverable by either party unless by express statute and further that no costs were recoverable at common law. Incidentally, we refer to the case of Lowe vs. Summers 69 Mo. App. 637, which deals with the power of the General Assembly to punish for contempt not only by persons in their presence but by ignoring or treating with contempt the General Assembly's lawful process. The question of contempt is not germane to the questions you present. ~~You~~ merely comment on the fact that the county clerk must follow out the terms of the writ for the recount of the ballots. The rule in the Wear case, likewise in the cases of Veldt vs. M.K.T. Railway Co. 109 Mo. App. 102; Thompson vs. The Union Elevator Co. 77 Mo. 520 and State ex rel Houser vs. Olliver 50 Mo. 217, is to the effect that the right of costs is a statutory right and does not exist independent of the statute and that all statutes relating to costs must be strictly construed.

Sometimes the costs in an equity case are left to the discretion of the court. Supreme Council vs. Nidelet 85 Mo. App. 283. The general rule, as expressed in the Wear case and followed by later decisions in Missouri, is also adhered to by foreign states. We quote from 106 A.L.R. 928 as follows:

"It appears to be well settled that, in the absence of express statutory authority the court or other tribunal deciding an election contest may not

render judgment for costs in favor of the prevailing party or order that he be reimbursed for expenses which he has incurred in the contest."

In the decision of *Graham vs. Peters* 248 Ill. 50 it was held that in the absence of any authority in the statute for taxing costs for tellers or others designated to recount ballots, such tellers or others were not entitled to have taxed as costs their services in an election contest.

Without citing further authorities, we are of the opinion that there is no statute by which the county clerk is entitled to any compensation for carrying out his duties under the writ for the recount of ballots issued by the committee of the General Assembly. The legislature has overlooked or intentionally failed to provide for any compensation for the officials who are to recount the ballots. It having been made their duty by the legislature, we think the late decision of *Nodaway County vs. Kidder* 129 S. W. (2nd) 857, 1.c. 860, is applicable insofar as the question of payment for their services is concerned:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 28, 149 S. W. 638; *King v. Riverland Levee Dist.*, 218 Mo. App. 490, 493, 279 S. W. 195, 196; *State ex rel.*

Wedeking v. McCracken, 60 Mo. App.
650, 656."

We next proceed to the question of whether or not the county court can pay for the additional costs, assuming that it is willing to do so. The financial structure of a county is governed by the County Budget Act, Article II, Chapter 73, R. S. Mo. 1939, Sections 10910 - 10918, inclusive, in counties of the population of Saline. In Section 10911, the proposed expenditures of a county are classified under six general classes. The act further places the mandatory duty on all officers who are mentioned in the act to classify and sacredly preserve the priority of classes. We know as a matter of fact that the time has elapsed when your county has made its annual estimate and that the budget is now on file in your county and with the state auditor. Hence, there was no provision made and none can be made at the present time for the payment of the additional costs of recounting the ballots out of the first five classes for the reason that they are definite in their purposes. Class 6 is as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

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Assuming that your county may have a balance in class 6 and there are no outstanding warrants or obligations of previous years now existing, may the county court expend the balance for any "lawful purpose"? What is a "lawful purpose" as used in the statute? County courts are only agents of the county and can bind the county only when acting strictly within the scope of their statutory authority. *Cape Girardeau County vs. Hatton* 102 Mo. 45, *Sturgeon vs. Hampton* 88 Mo. 203. The county court has certain duties to perform with reference to the holding of an election and the conduct of same. There is no provision in any statute to the effect that the county court has any duties to perform or any authority with reference to the counting of ballots, or any other costs incurred in connection with a gubernatorial contest. The expression "lawful purpose" has been defined by the courts in accordance with the manner in which it was used in the statute and is conceded to be general in character [but must be germane to or connected with the business] and purposes of the corporation or county. In *Re Waterloo Oregon County* 134 Fed. 341. *Guernsey vs. No. Cal. Power Company* 117 Pacific 906.

CONCLUSION

We are of the opinion that in the absence of any statute and in view of the fact that costs in election contests could not be collected even at common law that the county clerk of your county cannot receive remuneration or compensation for additional expenses incurred in making a recount of the ballots on the gubernatorial contest.

We are of the further opinion that the county court cannot use the funds of the county to compensate or to hire additional clerks or pay the additional expense incurred by the recounting of the ballots for the reason that such duties are mandatory on the county clerk and

Hon. Marion Robertson

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the statute having provided no compensation is presumed to carry out the duties gratuitously, and that remuneration by the county court would not constitute a lawful purpose within the meaning of the statutes relating to the County Budget Law. In other words, it is not a valid claim which the county court is authorized to pay.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General

OWN:RT

TAXATION AND REVENUE: (1) Nonresident owner may, through a legally constituted attorney in fact, redeem his land sold under the Jones-Munger law, within the statutory period of redemption.
(2) Answered by an opinion rendered to Mr. Bryan A. Williams, Prosecuting Attorney, Marble Hill, Missouri.

April 22, 1941

Honorable Russell D. Roberts
Prosecuting Attorney
Adair County
Kirksville, Missouri



Dear Mr. Roberts:

We desire to acknowledge your request for an opinion on April 15, 1941, which is as follows:

"Our local Collector desires an opinion on the following questions:

"I. If a non-resident owner of a tract of land offered and sold at an Annual Tax Sale executes a power of attorney authorizing the redemption of such tract by an attorney in fact, does such power of attorney grant authority to the County Collector to issue a Certificate of Redemption, of lands thus offered and sold at an Annual Tax Sale?

"II. If a tract of land is sold at an Annual Tax Sale and the party to whom such tract was assessed executes a deed of conveyance on same during the two year period of redemption to a party other than the party that holds a Certificate of Purchase issued by the County Collector, does a County Collector have authority under the Statutes of the State of Missouri to issue Certificate of Redemption to party to whom such tract was assessed and sold at an Annual Tax Sale."

We are presuming that the second part of your inquiry might be clarified by marking out the words "assessed and" and "at an annual tax sale" and adding the words "by such owner" in the last line thereof so that the last line of such inquiry shall read as follows:
"sold by such owner."

I.

Section 11145 R. S. Mo. 1939, relating to the manner of redeeming property sold for delinquent taxes on real estate is as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

April 22, 1941.

Section 11130 R. S. Mo. 1939, provides for final sale at a third offering of land for delinquent taxes, and from such sale there can be no redemption. Therefore, redemption lies only in case of first and second offerings of such lands.

The Jones-Munger law is a remedial or procedural law relating to the collection of delinquent taxes on real estate and, as such, it was not intended to nor does it affect laws of private contract relating to conveyances of real estate nor any interest therein.

Therefore, a resident or nonresident "owner or occupant of any land * * * or any other persons having interest therein" may, invest proper agents with authority under lawful instruments to act in their behalf. Such agents should be recognized by a collector as agents of such interested parties for the purposes expressed in such instruments. Parties having the right to redeem themselves, may redeem through lawful agents, absent a prohibitory statute.

The right of the certificate holder is defined in *Hilton v. Smith* 134 Mo. 499, 509 as follows:

"At the time the back tax suit was commenced interpleader Smith held certificates of the purchase of the land at collector's sales for taxes levied for the years 1874 and 1875. The time allowed by the law (Wag. Stat., p. 1202, sec. 208) in which the owner could redeem had expired and he was, and for some time had been entitled to a deed.

"What title to, interest in, or lien upon land a certificate of purchase secures to the holder is a question upon which there is a difference of opinion. It may be said generally that the right is no larger than the statute gives. The law of 1872 only gives the right to the redemption money in case the land is redeemed, and to a deed when the time of redemption has expired.

"In the absence of provisions of law defining the rights of the holder of a certificate of purchase the generally accepted rule is that, until the delivery of a deed, he takes no title to the land, either legal or equitable. Black on Tax Titles, sec. 322; Burroughs on Taxation, p. 321.

"The rule is announced by this court in Donohoe v. Veal, 19 Mo. 335, 336, as follows: 'If the law did not propose to give the purchaser the title to the land until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period, and the right of the purchaser was to receive his money, with a high penal interest, during the delay of redemption. It appears very clearly to be the design of these two acts, that the title of property sold for taxes shall remain undisturbed, until the deed is actually executed by the register; and that, until that act is performed, the title is in the former owner.'"

* * * * *

"After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector. The law thereafter gives him no lien upon the land for any sum, except that, in case his title fails, he may secure a lien under section 219, 2 Wagner's Statute, page 1206. Pitkin v. Reibel, 104 Mo. 511."

We are unable to find any provisions in the Jones-Munger statute that would make the above rule inapplicable.

CONCLUSION

Therefore, a nonresident owner of real estate in Missouri may, through his legally constituted attorney in fact, redeem his land sold under the Jones-Munger law for delinquent taxes within the statutory period of redemption.

Hon. Russell D. Roberts.

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April 22, 1941

II.

This inquiry, as clarified, is answered by an opinion rendered by this Department to Mr. Bryan A. Williams, Prosecuting Attorney, Marble Hill, Missouri, November 12, 1939, a copy of which is enclosed herein.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

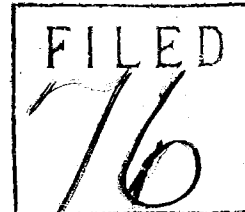
VANE C. THURLO
(Acting) Attorney General

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Enc.

MUNICIPAL CORPORATIONS: In cities of the third class the mayor
CONFLICT OF LAWS: only has the power of appointment of
non-elective officers. City ordinance
conflicting with state law absolutely
void.

August 16, 1941

Mr. Arthur Rogers
City Attorney
Richmond, Missouri



Dear Sir:

We are in receipt of your request for an opinion
from this department which reads as follows:

"Mr. Robert S. Lyon, Mayor of the
City of Richmond, has requested
that I write your office for an
opinion on the interpretation of
Section 6733, R. S. Mo., 1929,
which Section reads as follows:

"May Appoint What Officers.--
The Mayor, with the consent and
approval of a majority of the mem-
bers elected to the city council,
shall have power to appoint a street
commissioner and such other officers
as he may be authorized by ordinance
to appoint.

"The Council of the City of Richmond,
being of the opinion that the above
section reserves to the Council the
authority to appoint all city of-
ficers (except those elective) except
the street commissioner, repealed an
ordinance granting such power to the
mayor and took away the mayor's
authority to appoint any such officer ex-
cept the street commissioner.

"The mayor is of the opinion that this
section is not a limitation on the
mayor's right and authority to appoint
and is intended to mean that the mayor
shall appoint a street commissioner and
all other officers to fill departments

which the council may set up and provide.

"Would you, at your earliest convenience, give us your opinion on this question."

The section above set out, 6733, R. S. Missouri 1929, is now Section 6879, R. S. Missouri 1939. This section reads as follows:

"The mayor, with the consent and approval of a majority of the members elected to the city council, shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint."

It will be noticed in the above section that these words are used, "The mayor, * * shall have power to appoint * *" The part omitted by the asterisks is as follows: "* * with the consent and approval of a majority of the members elected to the city council, * *" In other words, in construing this section it specifically states that the mayor shall have power to appoint and does not give that power to a majority of the members elected to the city council. "Shall" has been construed as being mandatory. It was so held in 119 S. W. (2d) 941, where the court said, par. 7:

"It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."

Under our interpretation and the interpretation of many holdings of the Supreme Court by the use of the word "shall" in Section 6879, supra, it is mandatory that the mayor make the appointment but the majority of the members elected to the city council shall consent and approve his appointment.

Section 6879, supra, was partially construed in Boonville ex rel. v. Stephens, 238 Mo. 339, 1. c. 356, where the court said:

"It is claimed that Capt. Ravenel was not city engineer; for the reason that no ordinance was shown in evidence

creating such office, and that there can be no officer de facto where there is no de jure office. We cannot unqualifiedly agree to that proposition. The statute does not create the office of city engineer. Section 5765, Revised Statutes 1899, gives the mayor power, with the consent of the council, to appoint 'a street commissioner and such other officers as he may be authorized by ordinance to appoint.'

"Subdivision 8 of section 5858 required the city engineer or other proper officer to make the estimate. There can be no doubt then that the city council had the power to create the office of city engineer. Capt. Ravenel had acted as such city engineer for the period of eight or ten years. He was recognized as such officer by the city council in the ordinances concerning this improvement. Every one connected with the city government for that long period, and every one concerned in city matters wherein the engineer's services were necessary, was evidently under the impression not only that there was an office of city engineer, but that Ravenel was such officer.

"Now the objection is made that because no ordinance is shown creating such office, the foundation has fallen from under these taxbills. Such a result is a non sequitur."

The above holding was to the effect that the mayor should appoint "a street commissioner and such other officers as he may be authorized by ordinance to appoint."

In reading the above quotation, and in reading the statutes, it is very clear that the Legislature intended that the mayor should appoint for the reason that it specifically states "as authorized by ordinance to appoint."

Also, in passing upon Section 6879, supra, the court, in *Menefee v. Taubman*, 159 Mo. App. 318, l. c. 320, in passing upon the above section, said:

"* * * The elective officers of cities of the third class do not include the office of city engineer (R. S. 1909, sec. 9147) and no successor to Duncan was elected. But the statutes provide (sec. 9157) that 'the mayor with the consent and approval of a majority of the members elected to the city council shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint.' Pursuant to this statute an ordinance was enacted June 23, 1904, entitled 'An ordinance appointing a city engineer of the city of Lexington and fixing his compensation,' and Wilson succeeded Duncan by appointment under this ordinance. "

Also, in the case of *Weesner v. Bank*, 106 Mo. App. 668, l. c. 671, the court, in passing upon the same matter, said:

"The act governing cities of the third class does not in specific terms provide for a city engineer. Section 5765, R. S. 1899, provides: 'The mayor, with the consent and approval of a majority of the members elected to the city council, shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint.' But as section 5848 provides that certain duties shall be performed by a city engineer, or other officer, there can be no doubt but what the city may, under said section 5765, appoint a city engineer. But under said section 5848 an officer other than the city engineer may perform the duties required in regard to

sewers. Under said section the language used is the 'city engineer or other officer.' By the act of May 9, 1899, amending section 5858, the words used are: 'The city engineer or other proper officer.' We take it that the word proper is a limitation upon the word officer requiring that he have proper qualifications for the work.

"But it is contended that the duties imposed by the statute must be performed either by the city engineer or by an officer of the city, and as Grieb was neither, his acts were void. Section 5777 construes the term officer as follows: 'The term officer whenever used in this article shall include any person holding any situation under the city government or any of its departments with an annual salary or for a definite term of office.' As Grieb's appointment did not provide for an annual salary for his services, nor for a definite term of office, he was not an officer within the meaning of said section.

"Appointive officers--other than that of street commissioner--as provided by said section 6765 can only be appointed in cases where there is an ordinance authorizing such appointment. No evidence of such an ordinance is found in the record. There was, then, no such an officer as a city engineer. And it is clear that the statute contemplates that the city engineer be an officer. The language, 'the city engineer or other officer' implies at least that he must be an officer."

In none of the quotations as set out in the above cases does the court doubt the fact that the mayor should make the appointment of all officers under an ordinance passed by the city council. The city council in cities

of the third class passes the ordinances and the mayor has no power to vote upon an ordinance except in a tie. Section 6871, R. S. Missouri 1939, specifically states that the mayor shall have no power to vote on ordinances except in case of a tie vote in the city council. This section should be used in construing Section 6879, supra, upon which section this opinion is based.

The word "appoint" as used in Section 6879, supra, is not ambiguous and is not subject to construction as it is a word that has an ordinary meaning, but the above section sets out that the appointment must be considered by a majority of the city council and approved by them. In the case of *Better Built Homes & Mortgage Co. v. Nolte*, 211 Mo. App. 601, 1. c. 608, the court, in construing the word "approve" which approval was made by one person in a case where the appointment was made by another person, said:

"* * * * Counsel for respondents also argue that from the very language of the statute itself it appears that the duty of the Board of Aldermen is not ministerial but involves the exercise of a discretion; that the word 'approve' is used, and therefore it necessarily follows that a discretion is involved. The word 'approve' does not necessarily indicate that a discretion is contemplated. The word must be considered in connection with the subject matter to which it is applied, and the connection in which same is found. * * "

Also, to the same effect is the case of *Cunio v. Franklin County*, 285 S. W. 1005, 1. c. 1008, where the court said:

"The statutes say 'the circuit judge shall designate or appoint * * * ' a probation officer.

"The word "designate," when used by the appointing power in making an appointment to office, is equivalent to the word "appoint." Words and Phrases, vol. 3, p. 2027, citing *Peo-*

ple v. Fitzsimmons, 68 N. y. 514, 519.

"The word 'appointed' means named or designated for or assigned to an office.' Words and Phrases, vol. 1, p. 458, citing Brown v. O'Connell, 36 Conn. 432, 447, 4 Am. Rep. 89."

Also, in the case of State v. Caulfield, 62 S. W. (2d) 818, 1. c. 823, the court, in construing the word "approval" where a certain act or thing was done by another, said:

"Among the decisions involving matters cognate to those instanced above and bearing on the question now under consideration, the power of approval, reference will be made to two, these being typical of a number of others.

"In the case of State v. Rhein, Treas., 149 Iowa, 76, 100, cit. 80, 127 N. W. 1079, 1081, a statute was under construction which authorized the county treasurer to select depositories 'to be approved by supervisors,' and the court held that the supervisors had no power of selection, saying: 'Had it been the purpose of the Legislature to empower the board to designate the depository, the easy and the obvious thing was to say so in plain unambiguous terms. * * * To "approve" or give "approval" is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another.'

"In Thaw v. Ritchie, 5 Mackey (16 D. C.) 200, 225, it was held that, as used in the act of 1798, providing that the chancellor should 'approve' a decree of the orphans' court for the sale of the lands of a ward, 'approve' implies a revisory proceeding, as the term is only appropriate

to such an act, and the statute clearly contemplates a previous decree by the orphans' court to receive the approbation of the chancellor."

In view of the quotations set out in the three above cases and in construing Section 6879, supra, the fact that the appointment by the mayor should be consented to and approved by a majority of the members of the city council does not mean that the members of the city council should have the power of appointment. The question of approval was also passed upon in *Baynes v. Bank of Caruthersville*, 118 S. W. (2d) 1051, 1. c. 1053, where the court said:

"But we do not believe that ends the matter or that the determination of the case, so far as the court is concerned, turns alone on the use of the word 'fix' in the statute. One section authorizes the Commissioner to employ deputies and counsel but provides that no salaries or fees shall be paid 'unless approved' by the Circuit Court. The other section provides that the Commissioner shall pay his deputies and counsel from the funds in his hands subject to the 'approval' of the Circuit Court. This is the section which says that the Commissioner shall 'fix' the fees of his deputies and counsel.

"As used in the statute the words 'approved' and 'approval' must be considered in at least two connections--first, with the duty of the court and second, in connection with the word 'fix.' There are instances when the words 'approve' and 'approval' as used in the statute contemplate the doing of a purely ministerial act. *Better Built Homes & Mortgage Co. v. Nolte et al.*, 211 Mo. App. 601, 249 S. W. 743. But as applied to a court whose duty it is to supervise, in a large measure, the liquidation of a state bank within

its jurisdiction the words do not contemplate the court's approval as a purely ministerial act or duty. The words as here used call for the exercise of judicial discretion and determination, a hearing and judgment by the court passing on the matter before it. 6 C. J. S., Approve, p. 129."

In the request it states that the city council repealed an ordinance granting such power of appointment to the mayor and took away the mayor's authority to appoint any other officer except the street commissioner. In reading the authorities set out heretofore in this opinion, it has been the unanimous opinion of the different courts that the mayor has the power to appoint, under Section 6879, supra, the street commissioner and any other officer authorized by ordinance to appoint. Some of the cases even go so far that they authorize the mayor to appoint a city engineer where no such office had ever been authorized by an ordinance of the city council.

Section 7442, R. S. Missouri 1939, reads as follows:

"Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

Under the above section any ordinance passed by a city council which would nullify the state law would be absolutely void. It was so held in the case of John Bardenheier Wine & Liquor Co. v. City of St. Louis, 135 S. W. (2d) 345, par. 2, where the court said:

August 16, 1941

"We examine first the assignment that the section of the ordinance mentioned is invalid because in conflict with the provisions of the state liquor control act, and particularly sections 21 and 25 thereof, Mo. St. Ann. sections 4525g--23, 4525g--29, p. 4689. The rule that municipal ordinances regulating subjects, matters and things upon which there is a general law of the state, must be in harmony with the state law (Sec. 7289, R. S. '29, Mo. St. Ann. section 7289, p. 5874; Ex parte Tarling, Mo. Sup., 241 S. W. 929) is not controverted by respondents. * * * * *

Also, the same holding was held in State ex rel. Nigro v. Kansas City, 27 S. W. (2d) 1030, 325 Mo. 95.

CONCLUSION

In view of the above authorities it is the opinion of this department that under Section 6733, R. S. Missouri 1929, which is now Section 6879, R. S. Missouri 1939, the mayor only has the power of appointment and the majority of the members elected to the city council can only consent and approve his appointment.

It is further the opinion of this department, in view of the cases herein set out, that the mayor only can appoint, not only the street commissioner but also any other officer as he may be authorized by ordinance to appoint.

It is further the opinion of this department that the ordinance passed by the city council which repealed an ordinance which granted the mayor the power to appoint non-elective city officers other than the street commissioner, is absolutely void for the reason that it cannot be harmonized with the state law as set out in Section 6879, supra.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General

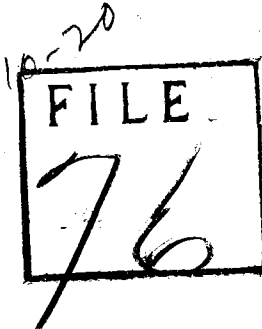
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42

BURIAL INSURANCE SOCIETIES: Persons or corporations doing
burial insurance business without authority
from Insurance Department subject to punishment.

October 17, 1941

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Sir:

In your letter of August 23, 1941, you wrote this
office requesting an opinion as follows:

"My attention has been called to a recent criminal suit filed against a man named Meister, owner of a Boonville Funeral Home, and Roberson for violation of the Burial Association regulations.

"I have read the recent Supreme Court opinion in the case of State ex inf. Williamson versus Black and others which held that Burial Associations must operate solely under the supervision of the Insurance Department.

"There is a concern in Marshall that sells policies for the Barry County Burial Association of Cassville. I understand that the recent legislature failed to pass a bill regarding the Burial Associations of this state.

"I would like to have your opinion as to whether or not this Association and its agents in Saline County are violating the law and if they are subject to prosecution."

October 17, 1941

Your letter fails to state any facts as to how the concern mentioned does business.

In your letter mention is made of the case of State ex inf. Williamson v. Black, et al., 145 S. W. (2d) 406. As you know, this case held unconstitutional and void the sections of the statutes under which numerous burial insurance societies had been incorporated and were doing business, and the following language was used at l. c. 409:

" * * * It seems obvious that the Act of 1917, and present Sections 5014-5019, provide for incorporation, as benevolent corporations, of associations which would actually be business corporations authorized to operate solely upon an insurance basis. Therefore, these sections conflict with and violate Section 21, Article 10 of our Constitution, and we must hold them unconstitutional and void in so far as they are thus in conflict with the Constitution."

By this decision, all persons who had been doing a burial insurance business by reason of an attempted incorporation under the above numbered sections were placed in the position of never having had authority to do such business. An unconstitutional law is no law. State ex rel. Miller v. O'Malley, 342 Mo. 641, l. c. 652.

"An unconstitutional statute is no law and confers no rights. (12 C. J., sec. 168, p. 748; 6 R. C. L., sec. 117, p. 117). This is true from the date of its enactment, and not merely from the date of the decision so branding it. (12 C. J., sec. 228, p. 800; Gilkeson v. Mo. Pac. Ry. Co., 222 Mo. 173, 204, 121 S. W. 138, 148, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763; Pederson v. Patterson, 124 Ore. 105, 109, 258 Pac. 204.)"

Hon. Marion Robertson

-3-

October 17, 1941

Section 6020, Chapter 37, Article X, R. S. Missouri, 1939, provides a penalty for any association of individuals and any corporation transacting any insurance business without being authorized by the Superintendent of Insurance to do so. This penalty is to be recovered by ordinary civil action.

Section 6014, Chapter 37, Article X, R. S. Missouri, 1939, makes it a misdemeanor for any person or persons to act as agent or solicitor for any individual, association of individuals, or corporation engaged in insurance business before such individual, association of individuals or corporation are licensed and authorized to do business.

As above mentioned, your letter contains no statement of facts as to how the concern therein mentioned does business.

CONCLUSION

It is the conclusion of this department that any persons doing an unauthorized burial insurance business are subject to prosecution.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

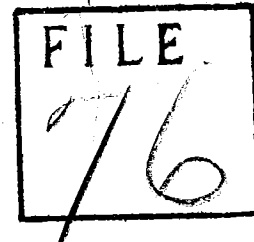
VANE C. THURLO
(Acting) Attorney General

WOJ:VC

TAXATION: Surplus from tax sale should be paid to persons entitled thereto. In case of doubt or dispute of such surplus, the collector should pay the same into the county treasury for the use and benefit of such person or persons.

✓✓6
November 10, 1941

Hon. Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri:



Dear Mr. Robertson:

This is an acknowledgement of your request for an opinion relating to the Jones-Munger law on November 5, 1941, which is as follows:

"The question has arisen in this county as to the matter of delinquent tax sales, as to who should pay the taxes that have accrued for the current year, where there is a surplus left from the third-year sale? The instance I have in mind, the property was advertised on the 2, 9th and 16th days of October. The amount of taxes that were advertised due was \$162.22, and the current 1941 tax is \$23.20. The property actually brought \$335.00. The purchaser insists that the 1941 taxes should be paid out of the surplus from the sale. Our Collector would like to know just what disposition should be made of the surplus."

Section 11109 R.S. Mo. 1939 is as follows:

"The taxes due and unpaid on any real estate which has heretofore been returned delinquent, and which has not been forfeited to the state, and the taxes due and unpaid on any real estate which has been forfeited to the state for the nonpayment of such taxes, shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained on each such tracts and lots of real estate to the amount of the taxes due thereon, and also the interest and costs accruing under this chapter."

Section 11132 thereunder is in part as follows:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto."

Section 11133 thereunder is in part as follows:

"* * * If the purchaser bid for any tract or lot of land a sum in excess of the delinquent tax, penalty, interest and costs for which said tract or lot of land was sold, such excess sum shall also be noted in the certificate of purchase, in a separate column to be provided therefor.* * *"

The back tax lien in favor of the state, which is provided in section 11109 supra, is a lien against realty and must be enforced under the provisions of what is commonly known as the Jones-Munger law, which provides for the foreclosure of such lien by summary action.

The surplus in such foreclosure proceedings must, under the provision of section 11132 supra, be paid to the person entitled thereto; or if the collector has doubt, or a dispute arises as to the proper person, he shall pay the same into the county treasury to be held for the use and benefit of the person entitled thereto.

In the case of Holly v. Rolwing 230 Mo. App. 33, a controversy arose as to who was entitled to a surplus in the hands of the sheriff. A drainage and levee district claimed the surplus as junior lienors. The sheriff filed a suit in the nature of interpleader asking the court to determine to whom such surplus should be paid.

On page 38 of said decision the court said:

"The appellants have divided their brief into several heads, but really there is only one point before us for consideration, and that is, who, under the facts agreed on, is entitled to this surplus fund? The districts contend that the surplus should be considered as realty, and that their liens which they admittedly had upon the land, should be construed by the courts to be upon the surplus.

"There is no question here as to the proper organization of the two districts, nor is there any contention but that the liens of the two districts were subject to and inferior to the lien for the State and county taxes."

On page 42 thereto the court held:

"As we read the statute with reference to collection of delinquent levee taxes we find no provision that would authorize such an action as herein brought that would establish a lien upon the surplus money left after a sale by the State for the collection of general taxes. Nor do we find any authority by the courts of this State that would authorize our so holding.

"Since there is no provision in the statute giving the drainage or levee districts the right to follow the surplus derived from a sale under a procedure to collect general taxes, and since the statutes do give to drainage and levee districts sufficient methods of procedure to protect their interest, if followed, it is our conclusion that the finding of the trial court was proper, and that this judgment should be affirmed."

Hon. Marion Robertson

-4-

November 10, 1941

Therefore, it is our opinion that a surplus arising from a sale of lands for the payment of delinquent taxes for certain years cannot be held for the payment of taxes for subsequent years but that such a surplus must be paid to the person entitled thereto by reason of ownership of some interest in and to such realty; or if the collector has doubt as to who is entitled thereto or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person or persons entitled thereto.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

SVH/aw

APPROVED:

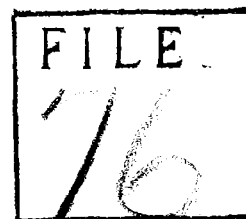
Vane C. Thurlo

(acting) Attorney General

OFFICERS : Treasurer^d can not receive extra compensation
COUNTY for taking care of accounts of county toll
TREASURERS: bridges.

11-26
November 19, 1941

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Sir:

Under date of October 20, 1941, you wrote this office requesting an opinion as follows:

"I have been requested by the County Court and Mr. H. C. Young, Treasurer of Saline County, to write you for an opinion as to whether the county can pay Mr. Young a salary in addition to the salary as determined by Sec. 13465 of the Laws of Missouri, 1941, for taking care of the Saline County-Miami Bridge Fund. Since the bridge has been built Mr. Young has taken care of all the accounts for the county; has collected all fees and is still doing so. Since Section 13465, above mentioned, reduces his salary approximately \$500 a year, the County Court would like to know if they can pay him additional compensation for his services in looking after the Miami Toll Bridge Fund. The amounts of the accounts which he supervises are as follows: Saline County Miami Toll Bridge, interest and sinking fund \$30,657; Revenue Fund \$2,667.47, and operation and maintenance on hand \$16.57. There are two other funds, namely, Saline County

Hon. Marion Robertson

(2)

Nov. 19, 1941

Miami Toll Bridge Construction Fund
No. 1 \$6,276.73, and Saline County
Miami Toll Bridge Construction Fund
No. 2 - \$524.28.

"Since this bridge adds many additional duties to those that the County Treasurer already has, the County Court is interested to know if they may compensate the Treasurer for these duties."

Later information was received from you to the effect that what reads Section 13465 in the letter of request should read Section 13800. This opinion is written with the understanding that your request pertains to Section 13800, R. S. Missouri, 1939, as enacted by the Sixty-first General Assembly, Laws of 1941, page 534.

The new Section 13800 as enacted by the Sixty-first General Assembly, definitely fixes the salary of the county treasurer in certain counties, Saline County falling into one of the classes for which the salary of the Treasurer is fixed. After fixing the salaries the Act contains the following:

"* * * * * Provided, salaries set out and prescribed in this section shall be in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind for county treasurers in all counties of this state to which this section, by its terms, applies, the provisions of any other statute of this state to the contrary notwithstanding."

By Section 8347, Article IV, Chapter 46, R. S. Missouri, 1939, the authority is conferred upon counties and other political or civil subdivisions to acquire, construct, operate and maintain toll bridges.

Section 8548 of the same Article and Chapter prescribes the method of financing the acquiring and constructing of such toll bridges. This section is as follows:

"In order to secure funds for the purpose of acquiring, constructing, owning and operating, improving or extending, and maintaining toll bridges, and approaches thereto, all public agencies named in the preceding section may issue negotiable toll bridge revenue bonds and sell such bonds to the United States Government, or any authorized agency thereof, or other investor or investors. In the event of the issuance and sale of bonds authorized by this act by a public agency, such agency shall charge a reasonable toll for the use of any such toll bridge, the amount of which toll shall be sufficient to pay the reasonable cost of maintaining, repairing and operating such bridge and to provide a sinking fund sufficient to amortize and repay any such loan, including interest and financing cost, on such dates and within such period of time as may be agreed upon between the borrower and the original purchaser of such revenue bonds, and said tolls shall be used for no other purpose; and any public body which shall issue bonds under the provisions of this act is hereby authorized and required to make all necessary provisions for the payment of principal and interest on any such bonds by the fixing, collecting, segregating, and allocating of the tolls and other revenues received from the operation of said bridge or bridges. Such public agencies enumerated above may execute liens in proper form, pledging the revenue derived from the toll from such toll bridges or parts thereof which are constructed or acquired with funds borrowed as aforesaid, to the retirement of

such bonds: Provided, however, that no revenue bonds or any liens securing such bonds shall be repaid in whole or in part from any funds arising from taxation, nor shall any such bonds or liens given under authority of this act constitute a lien on any other property of any such public agency or a pledge of the credit of such agency; and provided further, that at such time when all moneys borrowed as aforesaid shall have been repaid, together with interest and charges thereon, no further toll shall be charged for the use of such bridges by the traveling public. Such bonds may be made negotiable, may bear interest not to exceed 6 per cent, per annum, and may mature annually or semi-annually, and may be sold at such time and in such manner as the issuing authority may determine upon."

Bonds issued in accordance with Section 8548, supra, do not create an indebtedness of the municipality issuing them. State ex rel. City of Hannibal v. Smith, 74 S. W. (2d) 367. The bonds not being considered an indebtedness of the municipality and being payable solely from tolls collected from persons using the bridge might lead to the conclusion that the funds collected to be applied to the payment of the bonded indebtedness through the collection of tolls were not public funds, but were rather in the nature of trust funds. However, the Supreme Court of Kentucky, in the case of Louisville Bridge Commission v. Louisville Trust Company, 81 S. W. (2d) 894, in discussing the status of similar bonds issued by the City of Louisville held the funds collected to pay such bonds were public funds.

Inasmuch as the funds gathered for the purpose of paying such bonds by the collection of tolls from the users of the bridge are public funds, it remains to be determined whether or not a county treasurer who handles the accounting

of such public funds, in a county where a toll bridge has been built under the provisions of the aforementioned sections of the statutes, may lawfully be paid added compensation for such work.

No compensation may be paid to an officer unless there is some law authorizing the payment. In the case of Smith v. Pettis County, 136 S. W. (2d) 282, it is said at l. c. 285:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. (2d) 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. (2d) 182. * * * * *"

The above mentioned Sections of the statutes are the only ones dealing with the acquiring or constructing and operating of toll bridges by counties. In neither of them is there any authority to pay to the county treasurer compensation for services he might render. Section 8548, supra, authorizes the collection of tolls, segregating and allocating of the tolls received. And it may be argued from this authorization to do these acts there is authority to pay for their being done. For a municipality has the implied power to do those things which are necessary to carry out express powers. In the case of State ex rel. City of Hannibal v. Smith, supra, it is said l. c. 372, 373:

"This point involves only the question of whether the relator has the authority to permit the highway commission and the federal government to participate in the building of the bridge. We will later discuss if their participation is a gift.

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others; (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied." Dillon on Municipal Corporations (3d Ed.) Sec. 89.

"We have repeatedly approved this quotation, and very recently in the case of State ex rel. Blue Springs v. McWilliams et al., 74 S. W. (2d) 363, not yet reported (in State reports.)"

And there is a rule of law that an officer may be given extra compensation for services not incident to his office. The leading case on this point is in Converse, Administrator v. The United States, 18 L. Ed. 192, and the rule is also recognized in United States v. Hill, 30 L. Ed. 627, and in numerous cases, in the state courts. In the case of In re Village of Kenmore, 110 N. Y. S., 1008, is the following at l. c. 1014:

"The salary of the village clerk is fixed at \$250 a year. Mr. Pratt, the village clerk during the past two years, has charged and been paid the sum of \$100 for typewriting work. This is for work outside of the transcribing of the minutes of the proceedings of the board of trustees, which has been done by the clerk with a typewriting machine. It does not clearly appear what work is charged for in the item of \$100,

nor that it is of such a character as is not comprehended within his official duties as prescribed by section 82 of the village law. He is entitled to no extra or additional compensation for his official work in addition to his salary. A public officer with a fixed compensation is bound to perform the duties of his office for the compensation provided by law. If such duties become too onerous, he must secure a lawful increase of salary, resign, or submit. *Merzbach v. Mayor, etc.*, 163 N. Y. 16, 57 N. E. 96. For services not incident to his office he is not debarred from receiving compensation from the village. This rule applies as well to policemen upon whom new duties are cast *ex officio*."

Also, in *City of Detroit v. Redfield*, 19 Mich. 382 and *Groesbeck v. Auditor General*, 261 Mich. 243.

If the services being performed are not incidental to the office under the above rules, it might be possible to compensate the county treasurer for his services. But the funds are the public funds of the county and there is only one proper custodian of the public funds of the county, the treasurer.

CONCLUSION.

As the handling of the toll funds derived from the operation of toll bridges by the county treasurer is incidental to the office of county treasurer, no extra compensation can be given for such service.

Respectfully submitted,

APPROVED:

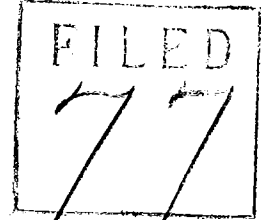
W. O. JACKSON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

SHERIFFS: Special election to fill vacancy.

January 18, 1941

Hon. J. E. Rowland
Presiding Judge
County Court
Rolla, Missouri



Dear Sir:

This will acknowledge receipt of your letter of January 14, 1941, in which you request an opinion on four questions concerning a special election to be held in your county to fill a vacancy in the office of sheriff. The four questions you asked are herein set out, and are as follows:

"1. Shall candidates for the office of sheriff to be voted on at this special election be selected by the Central Committees of the 2 political parties and the names of the candidates so selected by the Committees certified to the County Clerk to be printed on the ballot, or if not by that manner, in what manner shall candidates for the office be officially placed on the ballot?

"2. Is it necessary to print and furnish ballots similiar to ballots used at the general election?

"3. Is it necessary to provide voting places in all the precincts of the county as in general elections and with the full number of judges and clerks as provided under the general election laws?

"4. Does the sheriff elected at this special election serve the full remaining 4 year term or does he serve only until the next regular general election?"

The office of sheriff is a constitutional office being provided for in Section 10, Article IX of the Constitution.

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D., 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office, they shall give security in the amount and in such manner as shall be prescribed by law, and shall be eligible only four years in any one period. Whenever a county shall be hereafter established, the Governor shall appoint a sheriff and coroner therein, who shall continue in office until the next succeeding general election and until their successors shall be duly elected and qualified."

And the filling of a vacancy occurring in the office of sheriff is also provided for in the Constitution, Article IX, Section 11.

"Whenever a vacancy shall happen in the office of sheriff or coroner, the same shall be filled by the county court. If such vacancy happen in the office of sheriff more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold office until the person chosen at such election shall be duly qualified; otherwise, the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified. If any vacancy happen in the office of coroner, the same shall be filled for the remainder of the term by such county court. No person elected or appointed to fill a vacancy in either of said offices shall thereby be rendered ineligible for the next succeeding term."

In accordance with the last section above the General Assembly has enacted Section 11523, Article 2, Chapter 73, directing the method of filling a vacancy in the office of sheriff, this section is as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; but while such vacancy continues, any writ or process directed to the said sheriff and in his hands at the time such vacancy occurs, remaining unexecuted, and any writ or process issued after such vacancy, may be served by any person selected by the plaintiff, his agent or attorney, at the risk of such plaintiff; and the clerk of any court out of which such writ or process shall issue shall indorse on such writ or process the authority to such person to execute and return the same, and shall state on such indorsement that the authority thus given is 'at the request and risk of the plaintiff;' and the person so named in said writ or process may proceed to execute and return said process, as sheriffs are by the law required to do. Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, and if there should be no newspaper published in said county, shall then give notice, by ten written handbills, posted up in ten of the most public places in the county, for twenty days prior to the day of holding such election. Upon the occurrence of such vacancy, it shall be the duty of the presiding justice of the county court, if such court be not then in session, to call a special term thereof, and

cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

It will be observed that this section requires the special election therein provided for to be held in accordance with the provisions of the section and the laws regulating general elections. Inasmuch as the laws regulating general elections provide for the furnishing of ballots by the county clerk, the erection of booths and for the appointment and qualifications of judges these provisions would necessarily have to be followed in a special election to fill a vacancy in the office of sheriff.

A search of the statutes reveals there are three methods of making nominations, by primary election in accordance with the terms of Article 5, Chapter 61, of the Revised Statutes of 1929. Inasmuch as by the terms of Section 10253 of this article and chapter it does not apply to elections to fill vacancies, there can be no election by primary election.

"Hereafter all candidates for elective offices shall be nominated by a primary election held in accordance with this article. This article shall not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, to town, village or school district officers."

Section 10246 R. S. 1929, authorizes the making of nominations by the central committee of a political party to fill vacancies occurring after the holding of the primary election or where no one offers himself as a candidate. And this method is not available. In the case of State ex rel. v. Roach 269 Mo. 500, the Supreme Court in discussing the meaning of Section 5870 R. S. 1929, which is not section 10246, said at l. c. 504:

"The word 'Vacancies' used in this statute has reference only to vacancies upon the tickets nominated August 1st, and to no other vacancies.

There was no vacancy upon any ticket nominated August 1, 1916, and this part of the statute affords no authority for relator's nomination. There was no vacancy upon the ticket for this office because his office at the date of the primary was not an office to be filled and therefore could not have been upon such primary ticket."

This leaves as the only method of making nominations by certificate signed by the requisite number of electors in accordance with Article 4, Chapter 61, R. S. 1929, the number required being set out in Section 10241, which is as follows:

"The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent, of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made: provided that said signer shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

As to how long the person elected at this special election shall hold the office of sheriff, the Constitution of Missouri in Section 11 of Article IX, supra, recognizes this right of the people to fill vacancies in elective offices by election and directs the filling of the office of sheriff as soon as possible by election. By general election if a general election is to be held within nine months after the vacancy occurs and if no general election is to be held within nine months after the vacancy occurs, then by special election. The person appointed by the County Court, in either event, to serve until a person is properly elected and to fill the vacancy and the person elected would serve until the end of the term.

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office itself, and an appointment to fill such vacancy can only be for the unexpired portion." State ex rel. v. Smiley, 263 S. W. 825, 1. c. 827.

Hon. J. E. Rowland.

- 6 -

January 18, 1941.

CONCLUSION.

It is the conclusion of this Department that at a special election to fill the office of sheriff the nominations should be made by certificate signed by the required number of electors; that the law pertaining to the furnishing of ballots, erection of booths and appointment of judges as set out for the conduct of general elections should be followed; that the person elected should fill out the unexpired term.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney-General.

COVELL R. HEWITT
(Acting) Attorney-General

WOJ/mc

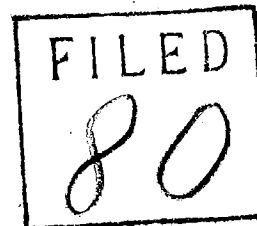
JOURNALISM SCHOOL:
LINCOLN UNIVERSITY:
REASONABLE TIME:

Establishment of journalism school 7 months
after demand is within a reasonable time.

8/8

August 7, 1941

Honorable Sherman D. Scruggs, President
Lincoln University
Jefferson City, Missouri



Dear President Scruggs:

This is in reply to the request for our opinion by
your letter dated July 19, 1941, which is in the following
terms:

"Some days ago the Supreme Court of the
State of Missouri handed down its
decision in the case 'State of Missouri,
at the Relation of Lucile Bluford,
Appellant, vs. S. W. Canada, Registrar
of the University of Missouri, Respond-
ent.'"

"The Board of Curators for Lincoln
University would be interested in an
interpretation of a certain aspect of
this decision, namely, the meaning or
construction placed upon the expression
'after a reasonable time' which appears
in the paragraph preceding the last one
of the text of the decision. The full
paragraph is quoted herewith:

"The present session of the General
Assembly will, no doubt, shortly adjourn.
The Lincoln Board will then know the
amount of funds at its disposal and be
in position to determine whether and
when a journalism course can be instituted
at that school. If, upon proper demand
and after a reasonable time, the desired
course is not available at Lincoln,
Appellant will be entitled to take the
course at Missouri University."

August 7, 1941

"Further, the Board of Curators finds itself in a difficult position to provide a course of study in journalism up to the standard offered at the University of Missouri as required in Section 9618, Revised Statutes of Missouri for the year 1939, with the amount of \$65,000.00 to include housing of the same."

"There is no space on the campus at present to provide adequate quarters for the operation of the School of Journalism. To provide necessary minimum space will require the allocation of a part of the appropriation grant for the erection of suitable quarters, even of a temporary nature."

"Should the amount allocated to the erection of the temporary quarters not exceed \$15,000.00, there remains the sum of \$50,000.00 to provide salaries for administration and instruction, the purchase of minimum necessary equipment facilities, and the operation costs."

"The amount of \$50,000.00 will provide the salaries, equipment purchase and operation cost for a period not to exceed twelve months."

"Temporary quarters can be erected and made ready for occupancy not sooner than November first at the rate materials can be secured in these times."

"It would seem reasonable for the Board of Curators to announce the opening of the course to Miss Bluford not earlier than the beginning of the second semester of the school term, 1941-1942, which is February 1, 1942. It seems that the Board may be in the better position to offer the course then, provided no unforeseen unavoidable delays interfere,

Honorable Sherman D. Scruggs

August 7, 1941

since in this time it would erect the quarters as described above, assemble the faculty, purchase equipment, and organize the work for readiness on the date (February 1, 1942) suggested above."

"The Board of Curators would be advised whether in the opinion of the Attorney General this date of opening would be reasonable and fair for all persons concerned in the light of the decision. The Board shall await the earliest opinion of the General."

The opinion of the Supreme Court of Missouri to which you refer was handed down on July 8, 1941, and a motion for rehearing was overruled on July 25, 1941. The Clerk of the Supreme Court of Missouri has informed us that no further steps have been taken in that case in his office. Of course, the opinion is not yet published.

You also sent us a copy of a letter written by Miss Bluford, dated July 17, 1941, which is in the following terms:

"Dr. Sherman D. Scruggs
Lincoln University
Jefferson City, Missouri

Dear Dr. Scruggs:

I herewith make application for a graduate course in Journalism, looking forward to the M. A. degree in journalism, at the beginning of the autumn term, 1941, provided I can get courses substantially equal to those offered in the Graduate School and School of Journalism at the University of Missouri.

When I applied for admittance to your School of Journalism in 1940, you wrote me that Lincoln University would not be able to open a Journalism School until February, 1941, but when I went to your

Honorable Sherman D. Scruggs

August 17, 1941

campus to enroll in February, 1941, the school still had not been established. Eight months have passed since then and I am anxious to know whether your school of Journalism will be established this fall so that I may begin my graduate work without further delay.

Please let me know at once whether Lincoln University will offer the graduate courses I desire with faculty members of substantially the same qualifications and experience as those at the University of Missouri. Please send me an application blank and all information pertaining to your Journalism School."

Your reply dated July 19, 1941 was, omitting caption and signature, in the following terms:

"Dear Miss Bluford:

I shall bring your letter of July 17 to the attention of our Board at its next meeting, August 9, 1941. Your request for admission will be considered at that time."

In the case of State ex rel Bluford v. Canada, mentioned above, the court ruled that it is not the duty of the Board of Lincoln University to establish a new school of journalism at all until demand therefor has been made. This is fully explained by the following pertinent portions of the opinion:

"Since 1865 this State has maintained free public schools for negroes and it has been, and now is, the public policy of Missouri, established by our constitution and statutes, to segregate the white and negro races for the purpose of education in the common and high schools of the State. This policy also applies to our institutions of higher education."

August 7, 1941

"It is the duty of this court to maintain Missouri's policy of segregation so long as it does not come in conflict with the Federal constitution. It is also our duty to follow the interpretation placed on the Federal constitution by the Supreme Court of the United States. The Supreme Court has many times approved the policy of segregation. Mr. Chief Justice Hughes, citing authorities, again approved the policy in the Gaines case, provided substantially equal facilities for colored persons be furnished within the State. Since that opinion, Missouri, by legislative enactment, has ordered that equal facilities be provided within her borders and has designated the Board of Lincoln University as the proper authority to furnish such facilities. The duty of the Lincoln Board to open new departments on proper demand is now mandatory. True, the Board can not operate without funds. If its funds are insufficient to provide all courses taught at Missouri University, the Board should allocate its funds to the courses most needed. But that very fact entitles the Board to have a demand made upon it before being required to open a new department, for surely the Board is not required to maintain departments for which there are no students. We think also that the Board is entitled to a reasonable time in which to open a new department after demand is made. If, upon proper demand, the Lincoln Board had refused to establish a course in journalism within a reasonable time, or had informed appellant that it was unable to do so, appellant would have been entitled to admission to that course in the Missouri University. The proof does not make that kind of a case. It

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shows no demand upon or refusal by, the Lincoln Board. On the contrary, it shows a desire and effort by the Board to establish the course by February 1, 1941, which, if accomplished, would have delayed appellant for two semesters, reckoned from the date of suit, or for one semester reckoned from the date of trial. For that matter, appellant might have avoided all delay in receiving instruction by making demand on Lincoln University a reasonable time in advance of the opening of the school term. We do not think that is an unreasonable requirement. The purpose to attend school is not often the result of a sudden impulse or happening, but is usually planned well in advance. That is true of appellant as shown by her own testimony. She had formed the purpose to take a graduate course in journalism many months before she made her application, but her purpose was to take it at the Missouri University, not at some other school in Missouri."

"We are now faced with a different problem. Here, because of the lack of a previous demand on Lincoln University, appellant was not entitled to admission to Missouri University at the time of her application and respondent committed no wrong in denying her application. Therefore, we are not authorized to make the writ permanent or to remand the case for determination of appellant's right to admission at the beginning of the next school term."

"The present session of the General Assembly will no doubt shortly adjourn. The Lincoln Board will then know the amount of funds at its disposal and be in position to determine whether and when a journalism course can be instituted at that school."

August 7, 1941

If, upon proper demand and after a reasonable time, the desired course is not available at Lincoln, appellant will be entitled to take the course at Missouri University."

The decision was based in part on Sec. 10774 R. S. Mo. 1939, therein quoted.

As shown by the quoted portion of the court's opinion, it was ruled that Miss Bluford had made no demand upon Lincoln University for the furnishing and opening of the new department in journalism. We note that Miss Bluford's letter to you was written on July 17, nine days after the opinion was handed down on July 8. In our opinion Miss Bluford's letter should be regarded as the demand contemplated in the court's opinion. It then became the duty of the Board of Lincoln University to open and furnish the new journalism department, within a reasonable time after said demand.

What is a reasonable time cannot be measured by a fixed rule applicable to all cases; it must depend upon the circumstances of each particular case. 52 Corpus Juris p. 1182-1184, Sec. 2, states:

"Reasonable Time: A relative and flexible term, which cannot be defined by any prescribed rule and the meaning of which in a particular case depends on the context and attendant circumstances, and not upon mere opinion or expectation; something more than 'directly.' It has been variously defined as meaning as soon as circumstances will permit; as soon as convenient; conveniently can; so much time as is necessary under the circumstances, conveniently to do what should be done; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstance; such promptitude as the situation of the parties and the circumstances of the case will allow; such time as a prudent man could exercise or employ in or about his own affairs; such time as is necessary

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conveniently to do what should be done; such time as may be supposed to have been contemplated; that time which, as rational men, the parties to a contract ought to have understood each other to have in mind; that time which preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer; the time which persons of ordinary care and prudence take to do a certain thing; what was reasonable time under the circumstances."

"When it begins to run. Reasonable time will not begin to run until some one interested in the matter calls for something to be done respecting it."

In Kostrean Realty Company v. Steinke, 263 S. W. 448, 1. c. 450, 215 Mo. App. 30, the St. Louis Court of Appeals said:

"'A reasonable time' is a relative term, and depends upon all of the attending facts and circumstances in each particular case."

To the same effect are many authorities collected and analyzed at 36 Words and Phrases (perm. ed.) 382, 391 et seq.

The question here is what is a reasonable time for the establishment and furnishing of a new department in journalism, in the circumstances of this case.

House Bill No. 581, passed by the General Assembly of Missouri, and approved by the Governor of this State on July 31, 1941, appropriated \$65,000.00 for establishment and maintenance of the School of Journalism of Lincoln University, and by virtue of its emergency clause became effective on the date it was approved. As pointed out in the court's opinion and in your letter, it will be necessary to allocate these funds, and plan the various necessary steps. Temporary quarters must be erected on the campus. Equipment must be purchased. A faculty must be procured. Undoubtedly it will be necessary to make some study of methods employed by other universities in the establishment and operation of journalism departments. Doubtless there are many other problems which are not apparent to one not conversant with educational work. The next semester of the university commences on the tenth day of

Honorable Sherman D. Scruggs

August 7, 1941

September, and the following one commences on February first.

Obviously it would be impossible for the Board to establish the new department in the circumstances of this case, in the short space of less than two months between the demand on July 17, and the commencement of the semester on September 10. The decision of the Supreme Court plainly said it would be reasonable to require that the demand be made within "a reasonable time in advance of the opening of the school term." It is universally recognized that schools must be conducted in fixed terms. That the whole University schedule should be disrupted by establishment and furnishing of a new department between regular terms was, in our opinion, not required by the opinion of the court. This demand was not made within a reasonable time in advance of the commencement of the term or semester. Therefore, it is not the duty of the said Board to open and furnish the new department in journalism for and during the semester commencing September 10, 1941.

Your letter addressed to this office states that the new journalism department probably can be established and furnished for and during the term commencing on or about February 1, 1942. That would allow less than seven months from time of demand. The above quoted definitions of a reasonable time allow for the care and prudence necessary to do the particular thing involved. Establishment of the new department by February 1, 1942 appears distinctly to be the minimum time within which the same can be done consistently with the standards of excellence now prevailing at Lincoln University; it would be well within a reasonable time.

CONCLUSION

In our opinion, establishment and furnishing of a new department of journalism at Lincoln University for and during the term commencing on February 1, 1942 -- less than seven months after demand therefor -- would be well within a reasonable time. It is not the duty of the Board to furnish said department sooner.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney General

APPROVED:

ROBERT L. HYDER
(Acting) Attorney General

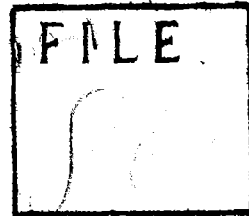
EH:NS

SCHOOLS:

LINCOLN UNIVERSITY: Rules made by Board of Curators with reference to paying Negro school students' tuition outside of State are reasonable; 1% of fund can not be used for administrative purposes.

September 6, 1941

✓ / ✓ 2
Dr. Sherman D. Scruggs, Pres.
Lincoln University
Jefferson City, Missouri



Dear Doctor Scruggs:

On August 26, 1941, you submitted to this department a letter containing two questions for an official opinion. The first question embodies the following facts:

"1. For some time the Board has had the responsibility for distributing the funds appropriated out of General Revenue for the payment of Out-of-State Tuition Aid to students in attendance at institutions outside of the State of Missouri, pursuing courses of study offered at the University of Missouri and not offered at Lincoln University. The authority for this Responsibility is set forth in the Revised Statutes of Missouri, 1939, Section 9622."

"The demands upon this fund are heavy and certain of the individual amounts requested seem excessive and unreasonable. In an attempt to make the most economical use of the fund and to distribute to all applicants the amounts which are reasonable in comparison with the costs which an individual would be required to pay if he were in attendance at the University of Missouri and at the same time grant the just amount to the applicant, the Board of Curators has devised a procedure, a copy of which is enclosed herewith, which it would follow when granting tuition aid to the applicants."

"The Board would like to have an appraisal of this procedure by your office and a statement as to whether the device is a fair instrument for use and in keeping with the provisions of the Statute."

September 6, 1941

We assume that the Board of Curators has formulated the attached conditions or rules and regulations with reference to the payment of tuition of colored students in compliance with the authority as contained in Section 10779, formerly, as stated in your letter, Section 9622, R. S. Mo. 1929. Said section was reenacted by the General Assembly in 1939 and now reads as follows:

"Pending the full development of the Lincoln University, the Board of Curators shall have the authority, if and when any qualified negro resident so requests, to arrange for his attendance at a college or university in some other state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

In order that the Board may have the funds to carry out the terms of the above quoted section, the Legislature has appropriated under House Bill 583 the sum of \$40,000.00, it being Section 2, page 23, and as follows:

"Tuition of Negro college students. -- There is hereby appropriated out of the State Treasury for Lincoln University, payable out of the General Revenue fund for the years 1941 and 1942, the sum of Forty Thousand Dollars (\$40,000.00), for the payment of reasonable tuition fees of Negro residents of the State of Missouri at the University of any adjacent State where the Board of Curators of Lincoln University shall have arranged for the attendance of such students to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at Lincoln University."

Section 10779 places the duty on the Board "to arrange for his attendance at a college or university in some other state" and "pay the reasonable tuition fees for such attendance."

We now consider what we term to be the conditions a prospective student must meet before such arrangement for the tuition by the Board is accepted and granted to the student, and the conditions of the attached copy in your letter. It is recognized as a rule of law, and in many instances by statute, that boards of education, teachers and officials in charge of schools and colleges have the power and authority to make needful and reasonable regulations for the conduct of such schools. Although the statute does give the Board of Curators direct authority to make rules and regulations affecting the entrance of a colored student in a school in a foreign state, we think the power is inherent in the Board of Curators. (Deskins v. Gose, 85 Mo. 485; Englehart v. Serena, 200 S. W. 268).

Having scanned each one of the conditions as outlined by the Board which must be adhered to or agreed to by a prospective colored student, we find none of them which appear to be unreasonable, and the test, when a board has the power to make rules and regulations, is whether such rules and conditions are reasonable. They must pertain to the subject which they are supposed to govern, be without malice or prejudice, and not include collateral matters. (King v. Jefferson City School Board, 71 Mo. 628).

Finding no conditions which appear to be unreasonable or harsh, we are of the opinion that the attached rules and conditions necessary for a colored student to receive tuition under the provisions of Section 10779, quoted supra, may be followed and maintained by the Board.

"2. The Board of Curators finds it quite expensive to administer the Out-of-State Tuition Aid fund. The enormous amount of correspondence requires almost the full time of a clerk to dispose of it and properly file claims for payment. The cost of postage and office supplies further adds to the expense of its distribution. For the defrayal of these costs no provisions are indicated. At present this cost has been borne by the Board of Curators and paid out of General Revenue funds appropriated for institutional operation."

September 6, 1941

"In view of the fact that the institutional funds for operation are greatly limited and must be used to meet the rightful demands of this rapidly expanding institution, it seems that the cost of the administration of the Out-of-State Tuition Aid fund should be borne by the fund itself and not made the financial and service burden to be borne by the already too restricted operation budget of the Institution."

"The Board would seek your honorable opinion. It would know if it can be permitted to set aside one per cent of the tuition aid fund for its own administration."

In answering your first question, we have quoted that portion of the Appropriation Act which set aside funds for the payment of the tuition of Negro students in schools outside the State. The appropriation act contains the provision "for the payment of a reasonable tuition fee of Negro residents of the State of Missouri." It is silent as to any item for the operation or disbursement of the fund. In order for it to be valid for you to deduct or to set aside one per cent of the amount, the statute would have to be broad enough to include such an item. In the decision of State Ex rel Bibee v. Hackman, 276 Mo. 110, 1. c. 116, the question arose as to the authority of the State Board of Equalization to employ a stenographer. The Court denied the Board the right to employ such a stenographer, stating that the authority must be bottomed on some statute. A like principle was involved in the decision of State Ex rel Bradshaw v. Hackman, 276 Mo. 600, 1. c. 607. The decision of State v. Weatherby, 344 Mo. 848, is also considered as authority for the above statement.

We are, therefore, of the opinion that one per cent of the tuition fund cannot be set aside for the administration of same.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN:NS

BUILDINGS) Public bodies must enter into contracts
LINCOLN UNIVERSITY:) for labor and materials in the construction
and repair of public buildings and improvements.

✓ / ✓ 2
September 19, 1941

Dr. Sherman D. Scruggs
President
Lincoln University
Jefferson City, Missouri



Dear Dr. Scruggs:

We are in receipt of your request for an opinion under date of September 12th, wherein you state as follows:

"We are faced with a difficulty in facilitating the erection of our building to house the new School of Journalism.

"We have our own staff of architects and building crew. These facilities are a part of our instructional program in mechanic arts courses which we offer here. With the use of this staff and the young men whom we are training in these courses, we can erect, or construct, most of the small buildings and structures on our campus.

"By directing these activities as a part of instruction we effect considerable financial economies, particularly savings in the costs of labor, as well as provide the real instructional material for our students.

"In the purchase of materials and supplies for these constructions we must go to the market for these commodities. These commodities must be purchased through the Purchasing Agency of the

State, of course. We shall want to do this. However, inasmuch as this whole construction of the smaller buildings is within our ability to carry forward, and in view of the fact that such constructions are instructional projects, and further, inasmuch as financial savings are made and greater economies are effected in general revenues of the State, we would appreciate the opinion of the Attorney General as to whether we are correct in our planning for such a construction and can proceed under such a plan to get this building, and such other buildings of like nature, under construction at once and without the necessity of submitting the entire construction and materials to bids. In other words, we shall like to know if we may proceed to erect, or construct, such building without submission of the entire job to outside bid.

"The time and delays in the delivery of materials due to Defense priorities make it necessary to request the General to give us his opinion as early as it is convenient for him. We would eagerly await his advices in this matter."

You have subsequently advised us that the proposed improvements will be in excess of \$5,000.00.

The funds you propose to use for the construction of the Journalism School are those funds appropriated by the Legislature in Section 78 of House Bill 581:

"Lincoln University. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, for Lincoln University, for the 1941-1942 biennium, the sum of Sixty-Five Thousand Dollars (\$65,000.00) for the use of the Board of Curators of Lincoln University for the purpose of establishing, maintaining and operating a School

of Journalism, and for the payment of the necessary salaries. Additions, Repairs and Replacements and Operative expenses incurred by said Board of Curators for instituting, maintaining and operating said School of Journalism."

There is nothing in the above appropriation act which designates the manner in which the Journalism School is to be constructed. Consequently, we must look to the general statutes for guidance.

In the case of Blanchard v. Hamblin, 162 Mo. App. 242, 1. c. 251, the court said:

"The very highest policy of a state is its statutory law and if there is legislation on the subject the public policy of the state must be derived from such legislation (Moorshead v. Railways Co., 203 Mo. 121.)"

And in the case of State v. Robinson, 163 Mo. App. 221, 1. c. 226, the court said:

"In the interpretation of statutory language the meaning must be given that is most consonant with the policy or obvious purpose of the statute * * *."

An examination of Chapter 117, of the Revised Statutes of Missouri, 1939, reveals a definite policy on the part of the State to allow construction, improvement, alteration or repairs of public buildings only on contracts based on public bids.

Section 14939, R. S. Mo. 1939, provides as follows:

"No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys

provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing 500,000 inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

It might be argued that the above section does not prohibit boards or other public bodies from using their own labor, providing same is available, in the construction of public buildings or improvements, and that said section was only applicable in those cases when a contract was necessary. Statutes must be construed however, if possible, "so as to harmonize and give effect to all of their provisions." *Sayles v. Kansas City Structural Steel Co.*, 128 S. W. (2d) (Mo. Sup.) 1046, 1. c. 1051.

Section 14940, R. S. Mo. 1939, provides as follows:

"All appropriations made by the general assembly amounting to five thousand dollars or more, for the erection of new buildings on state account, or for the

repairing of buildings already erected on state account, shall be drawn from the state treasury only in the manner herein provided. After being furnished with satisfactory evidence that a bona fide contract has been entered into for the erection or repairing said building or buildings, and not less than thirty days after the contractor has commenced work, the state auditor may draw his warrant on the state treasury, in favor of the contractor entitled thereto, for 85 per cent of the value of all labor and materials incorporated in the work, or for materials which have been delivered on the site of the building and accepted by the architect or engineer in charge, such value being calculated in proportion to the contract amount; and thereafter not oftener than once each month the state auditor may draw his warrant on the state treasury in favor of the contractor for 85 per cent of the value of all labor and materials furnished and computed in the same manner, less all previous payments made; and upon being furnished satisfactory evidence that the contract has been satisfactorily completed and the work accepted, the state auditor shall draw his warrant on the state treasury in favor of the contractor, for the balance due on contract: Provided, that all estimates of labor and materials furnished shall be prepared and certified correct by the architect or supervising engineer in charge, and approved by proper officials of the institution, commission, or board responsible for such construction: Provided further, that in no event shall an amount exceeding 85 per cent of the entire contract price be paid to the contractor until the final payment is made after the contract is satisfactorily completed and

work accepted; and provided further, that in no case shall the amount contracted therefor exceed the amount appropriated by the general assembly for such purpose."

Said section by its terms contemplates clearly "that a bona fide contract" must be entered into for the erection or repairing of public buildings or improvements.

Of course, we readily appreciate the fact that it may be wiser and more economical for the State to permit the use of its own labor and facilities for the construction and repair of public buildings and improvements, rather than to enter into a contract for such services. However, the wisdom or unwisdom of particular acts of legislation is for the decision of the General Assembly, and not for us to determine. State v. Balsiger, 151 S. W. (2d) 521, 1. c. 523.

From the foregoing we are of the opinion that it will be necessary that Lincoln University obtain public bids and enter into a contract covering both labor and materials for the construction of its proposed Journalism School.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

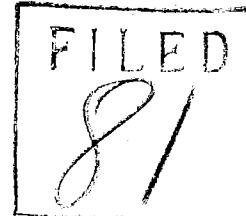
VANE C. THURLO
(Acting) Attorney-General

MW:EG

GENERAL ASSEMBLY: Power to investio election returns
prior to seating executive officials.

January 9, 1941 1/9

Democratic Caucuses
c/o Honorable L. N. Searcy
Missouri Senate
Capitol Building
Jefferson City, Missouri



Gentlemen:

We acknowledge receipt of the letter from
the Democratic Senate Caucus requesting an opinion,
which reads as follows:

"The General Assembly desires and
requests that you furnish us with
an opinion on the following ques-
tion, that is:

Can the General Assembly proceed
with an investigation of the elec-
tion and election returns for the
office of Governor without filing
a formal contest and without seat-
ing the person who apparently, from
the election returns, received the
highest number of votes for that
office?"

Within the limited time that we have had to
examine the authorities and to study the question
presented, we have arrived at the conclusions here-
inafter set out.

At the outset it becomes necessary to consider
the following statutes and provisions of the Missouri
Constitution:

Article V, Section 3, of the Constitution of Missouri reads:

"The returns of every election for the above named officers shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the House of Representatives, who shall, immediately after the organization of the House, and before proceeding to other business, open and publish the same in the presence of a majority of each House of the General Assembly, who shall for that purpose assemble in the hall of the House of Representatives. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more shall have an equal and the highest number of votes, the General Assembly shall, by joint vote, choose one of such persons for said office."

Section 10169, R. S. Mo. 1929, provides:

"After each election of governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney-general, and superintendent of public schools, the secretary of state shall, immediately after the organization of the house of representatives, deliver to the speaker thereof the returns of the votes given for the last named officers, who shall thereupon immediately notify the senate of the same, and that the house is ready to receive the senate in joint session to open and publish the same, whereupon the senate

shall immediately repair to the hall of the house of representatives; and the speaker of the house shall, before proceeding to other business, in the presence of a majority of the members elected to each house of the general assembly so assembled in joint session, open and publish the same. In case of an alleged mistake in any return, or when more than one return has been made for any of said officers from any county or city or precinct, the two houses shall, in joint session, correct such mistake, if any, and determine which is the true and correct return by a vote of a majority of the members present, and the same shall be counted by the speaker, under the direction and control of the two houses thus assembled. The person having the highest number of votes for any of said offices shall be declared by the speaker of the house to have been duly elected."

It is clear the question here presented concerns only the legislative branch of our government. Taylor v. Beckham, 56 S. W. 177; 178 U. S. 547; 44 L. Ed. 1187.

Section 3 of Article V of the Missouri Constitution, supra, provides the following steps as the procedure before the General Assembly:

First, the returns of every election for the Governor and other officers named in the Constitution shall be transmitted by the Secretary of State to the Speaker of the House of Representatives.

Second, the Senate and House shall meet in the hall of the House of Representatives in joint session,

Third, the Speaker of the House, before proceeding to other business, shall open the returns and publish the same in the presence of a majority of each house of the General Assembly.

Fourth, the members of each house of the Assembly shall, by their vote, declare one or the other of the candidates for the office (in the instant case that of Governor) elected.

We believe that in determining the power of the General Assembly to perform the duties enjoined on it by the Constitution that the following generally accepted rule should be considered, as set out in the case of *Wire Co. v. Wollbrinck*, 275 Mo. 350:

"* * It is well to note the true function of the Legislature as the representative of the people, in the enactment of laws for their government, and its true relation to the Constitution of the State. That it is vested, in its representative capacity, with all the primary power of the people, unless fettered by the Constitution, is a proposition which is the corner stone of our State government, and one whose stability is unquestionable, and which has been enunciated by this court whenever the relation of the Legislature to the Constitution was held in judgment."

It is provided in Article V, Section 3, of the Constitution of Missouri, and also in Section 10169, R. S. Mo. 1929, that, "The person having the highest number of votes shall be declared duly elected." Does the highest number of votes, as used in the Constitution and the statutes, mean the result shown by the face of the returns, or does it mean the legal votes cast at the General Election for Governor?

"Votes" have been defined by the Supreme Court of Missouri in State ex rel. Chaney v. Grinstead, 314 Mo. 55, 282 S. W. 715, 1. c. 718, as follows:

"The word 'votes' means ballots cast by those authorized to vote by law; in other words ballots cast by legal voters."

The above constitutional and statutory provisions use the words "duly elected." "Duly" is defined as "proper" or "according to law." 19 C. J., p. 833.

Therefore, the Legislature should determine whether the purported votes cast for any candidate shown by the returns published to the joint session were, in fact, legal votes and cast for the particular candidate by qualified voters.

It is apparent the framers of the Constitution did not intend to limit the General Assembly to the mere ministerial act of witnessing the opening and publication of the returns by the Speaker of the House, but placed on it the responsibility of ascertaining and determining which candidate actually received the highest number of legal votes cast.

Any other conclusion could lead to the absurd result of forcing the General Assembly to seat a candidate even if it had conclusive knowledge that he was not qualified under other provisions of the Constitution, or that the returns before them were fraudulent. Assume, for instance, that the General Assembly knew beyond any doubt that certain returns had been fraudulently altered; that such returns showed on their face that more votes were cast in a county than there were inhabitants; or that a return received by the Speaker was blank as to the candidate for Governor; assume, further, that the records showed that a candidate for Governor did not have the qualifications necessary to hold that high office, although such candidate received the highest number of votes as shown by the returns, then under

any of the above circumstances, if the provisions of Section 3 of Article V, supra, compel the General Assembly to declare the candidate elected as shown by the face of the returns, then, it would be placed in the strange position of merely having the authority to ratify fraud, to seat a candidate in violation of other provisions of the Constitution, or to vest the powers and duties of the office of Governor in a person not duly elected or qualified under the provisions of the Constitution.

The General Assembly itself has construed its authority as being greater than the mere perfunctory duty of declaring elected the candidate shown by the face of the returns to have received the highest number of votes. Section 10169 R. S. Mo. 1929, supra, clearly authorizes the General Assembly to correct any "alleged mistake in any return". "Mistake" is defined in Webster's New International Dictionary, Second Edition, as follows:

"An apprehending wrongly; a misconception; a misunderstanding. A fault in opinion or judgment; an unintentional error. (2) Misconception or error of the mind leaving a person to do an act which he otherwise would not have done; also, the act or omission so arising, as an intentional act or omission arising from ignorance, surprise, imposition, or misplaced confidence."

The construction placed on a statute or constitutional provision by the Legislature is entitled to great weight. 59 C. J. Section 612, page 1033. Furthermore, the General Assembly in the past has construed Section 10169 R. S. Missouri 1929 and Article V, Section 3 of the Constitution of Missouri as authorizing it to institute and conduct an investigation of alleged mistakes, errors and irregularities in the returns for the office of Lieutenant Governor before seating the candidate shown on the face of the returns to have received the highest number of votes.

In 1909, the committee appointed by the joint session of the General Assembly to canvass the returns of the previous general election, reported that it found alleged mistakes in the returns and also found amended returns and corrections certified by the county clerks with other irregularities which, had been called to its attention. It reported further that by reason thereof it was unable to definitely and correctly report the vote cast at said election for the office of Lieutenant Governor. This committee asked the General Assembly for authority to investigate such mistakes, errors and incomplete returns, which was granted it by the joint assembly. Pursuant to such authority, said committee commenced and conducted an investigation of such alleged errors, mistakes and incomplete returns before the Lieutenant Governor was declared elected.

It is true that under the provisions of Section 10361, R. S. Mo. 1929, any person may present a petition to the General Assembly to contest the election of Governor or Lieutenant-Governor. This statute giving third persons the right to file a petition for contest, however, does not in anyway affect the right and authority of the General Assembly under the provisions of Section 3 of Article V of the Constitution and Section 10169, R. S. Mo. 1929. In other words, the General Assembly must exercise its power to determine which candidate received the highest number of legal votes and who has been duly elected.

Section 25 of Article V of the Constitution of Missouri provides that contested elections of the Governor and Lieutenant-Governor shall be decided by the General Assembly in such manner "as may be provided by law." Pursuant to such constitutional provision, the Legislature enacted Section 10361, R. S. Mo. 1929, which permits third persons to file petitions for contests. Any contention that this section is exclusive and prohibits the General Assembly from exercising its statutory and constitutional powers, is untenable.

In the case of State v. Wymore, 119 S. W. (2d) 941, the defendant contended that the statutory method of removal of officers was exclusive.

Section 7 of Article XIV of the Constitution provides that "Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

In pursuance to such constitutional provision, the Legislature enacted a statutory method for the removal of such officers. The defendant in the above case contended that such statutory method was exclusive. The court held, however, that the statutory method providing for removal of officers was not exclusive, and that an officer could be removed by the constitutional remedy of quo warranto.

We have failed to find any Missouri case interpreting either the constitutional provisions or the statute above quoted. A search disclosed that many states have constitutional provisions identical with Sections 3 and 25 of Article V of the Missouri Constitution.

The case of State v. Elder, 47 N. W. 710, decided by the Supreme Court of Nebraska in 1891, was a case in which the Speaker of the House of Representatives presided at a meeting of both houses of the Legislature under a constitutional provision similar to our own, and refused to open and publish the election returns transmitted to him by the Secretary of State and which purported to certify the number of votes cast for candidates for the office of Auditor of Public Accounts. The court interpreted the opening and publishing of the returns to be a ministerial duty, and, by its opinion, compelled the performance of such duties by mandamus. However, in that case there was no attempt to force the members of the Joint Session to declare either candidate elected, the court apparently recognizing that such an act on the part of the Assembly involved the exercise of discretion.

There is only one case, so far as we have been able to ascertain, which bears directly on the question

at hand, Goff v. Wilson, 32 W. Va. Rep. 393. An examination of the Constitution of West Virginia discloses that it contains a provision identical with Sections 3 and 25 of Article V of our own Constitution. The facts were that the plaintiff was a candidate for the office of Governor at the General Election held November 6, 1888; that the commissioners of the various counties in said state transmitted the returns of the election to the Secretary of State in sealed envelopes, directed to the Speaker of the House, as required by the Constitution. The Speaker opened and published the returns at a joint session of the two houses of the Legislature, and they were submitted to a joint committee for the purpose of reporting on the verity of the returns. The committee returned a report, finding one A. B. Fleming to have received more legal votes than plaintiff, and the joint session, in adopting the report, declared the said A. B. Fleming duly elected. We find the following in the opinion of the court: (1. c. 398)

"In this condition of the law the legislature, when it assembled in January last and found, that there was a contest pending between Gen. Goff and Judge Fleming for the office of governor, was confronted with this very grave and serious question: Was it their duty to declare either of the claimants elected to the office of governor, until after the contest could be decided? If they or the speaker of the house should at the commencement of the session, or during the term fixed by law for its continuance in regular session, declare either Goff or Fleming governor, the inevitable consequence would be, that the person so declared would have to assume the duties of the office, before it would be possible to try the contest or determine his right to the

office under the existing law. The result of this might be to place in the high and responsible office of governor and at the head of the state government a person, who had never been elected or otherwise designated by either the constitution or the law to discharge the duties of that office; for, if the trial of the contest should result in favor of the other claimant, his title would relate to the date of his election, and he would be the de jure governor from the commencement of the term fixed by the constitution. The decision upon the contest would be simply the determination of a fact. It would not create a fact or a right nor confer the office. The election gives the right to the office, and the decision of the tribunal fixed by law to try the contest simply declares the title upon the evidence but does not create or confer it; and if a person has the title by virtue of his election, his qualification entitles him to exercise the duties of the office. Bier v. Gorrell, 30 W. Va. 95, 100, (3 S. E. Rep. 30.) This being so, it is plain, that the person thus placed in the office before the decision of the contest would be there without any legal right. He would be a mere intruder, because he had never been elected, and was never legally entitled to the office.

* * * * *

It is scarcely possible to believe, that it was contemplated by those, who made and adopted our constitution, that we should ever have the anomaly of a person discharging the high and responsible

January 9, 1941

duties of the chief executive office of the state, who had never been elected or otherwise designated by law to perform the duties of that office."

CONCLUSION

It is the opinion of this office that it is not mandatory that the General Assembly accept the result of the election of Governor as evidenced by the returns certified to the Speaker of the House, but it has the power to ascertain and determine by investigation or otherwise, before declaring any candidate duly elected, whether such returns are true and correct, and whether or not the candidate who has the greatest number of votes as shown by the returns was in fact the duly elected Governor of the State of Missouri.

Respectfully submitted,

ROY MCKITTRICK
Attorney General

RM:EMW

GOVERNOR: Veto of Resolution No. 3 passed in Joint Session
by Sixty-first General Assembly is a nullity.

January 20, 1941 ^{1/2}

Honorable L. N. Searcy, Senator
Honorable W. B. Weakley
Honorable B. L. Cowherd
Honorable Roy Hamlin
Members of the House of Representatives
State Capitol
Jefferson City, Missouri



Gentlemen:

On January 10, 1941, the Senate and House convened in a joint session in the House of Representatives pursuant to the provisions of Section 3 of Article V. Among the proceedings was the passage of a resolution. (House Journal, page 37; Senate Journal, page 32). It was denominated "Joint Resolution No. 3". The resolution was adopted by a vote of - ayes 102, noes 63, absent 19, present but not voting, 1. (House Journal, page 44). After the passage of the resolution, the joint session dissolved.

On Wednesday, January 15, 1941, the Governor of the State of Missouri returned to the General Assembly in joint session a copy of the resolution showing his disapproval and in a special message cited Section 12 of Article V of the Constitution of Missouri as his authority therefor.

You submit, for an opinion, the following question, and have attached copies of the resolution and the Governor's special message:

"Did Governor Stark under the powers of his office of governor of the State of Missouri have the constitutional authority to veto the resolution?"

2.

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I.

It is a rule of law that the veto power of the governor must be strictly construed. It was said in the case of *Strong vs. People*, 220 P. 999 (Colo.), 1. c. 1002, concerning this power:

"It can only be exercised when clearly authorized by a specific provision
 * * * * *
 because, being a power in derogation of the general principle of the state government, the language conferring it must be strictly construed."

In arriving at a conclusion, it will be necessary to consider first, what is a joint resolution as contemplated by Article V, Section 12 of the Missouri Constitution? This provision of the Constitution is as follows:

"The Governor shall consider all bills and joint resolutions, which, having been passed by both houses of the General Assembly, shall be presented to him. He shall, within ten days after the same shall have been presented to him, return to the house in which they respectively originated, all such bills and joint resolutions, with his approval indorsed thereon, or accompanied by his objections: Provided, That if the General Assembly shall finally adjourn within ten days after such presentation, the Governor may, within thirty days thereafter, return such bills and resolutions to the office of the Secretary of State, with his approval or reasons for disapproval."

The above provision authorizes the governor to approve or disapprove "joint resolutions * * * passed by both houses of the General Assembly." The use of the language "both houses of the General Assembly" means that a joint resolution must originate in one

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or the other of the houses and be acted upon separately. Otherwise, no meaning can be attributed to the words "both houses." In the second sentence of said section, the governor is directed to return joint resolutions with his approval or disapproval to the "house in which they respectively originated." This conclusively shows that a joint resolution is one originating in one or the other of the houses. If it does not so originate, this provision of the Constitution has no meaning. The rule laid down in *State ex rel. Crowe vs. Hostetter*, 137 Mo. l. c. 646, is that "a construction of the Constitution which renders meaningless any of its provisions should not be adopted," and adhering to that rule we cannot apply a construction that renders meaningless the phrases "both houses" and "house in which they respectively originated."

Another provision which must be considered with Section 12, Article V, is Section 14, Article V, of the Missouri Constitution, which provides:

"Every resolution to which the concurrence of the Senate and House of Representatives may be necessary, except on questions of adjournment, of going into joint session, and of amending this Constitution, shall be presented to the Governor, and before the same shall take effect, shall be proceeded upon in the same manner as in the case of a bill: Provided, That no resolution shall have the effect to repeal, extend, alter or amend any law."

It is to be noted that this section uses the language, that "every resolution to which the concurrence of the senate and house of representatives may be necessary." This broad language includes the joint resolutions mentioned in Article V, Section 12.

By this section, the framers of the Constitution excepted from the requirements of Article V, Section 12, all joint resolutions concerning adjournments, going into joint session and amending the Constitution, and further prescribed the procedure to be followed in passing a joint resolution.

The word "concurrence" as used in Section 14, when considered with Section 12, is to be given its ordinary and accepted meaning. It means, consent of the other house of the General Assembly. A resolution to which concurrence of the other house is necessary is a joint resolution within the meaning of Section 12, Article V.

In the decision of Oklahoma News Co. vs. Ryan, 224 P. 969 (Okla.), the same constitutional provisions as in Missouri were under consideration. The court defined a joint resolution as follows, 1. c. 972:

" * * * It further appears that the joint resolution contemplated was the joint act of both branches of the Legislature, being first agreed to in one branch and then sent to the other for its concurrence."

We next consider the question as to whether or not a joint resolution must be passed in the same manner as a legislative bill. It appears beyond controversy that Section 14 requires a joint resolution and a bill passed by the General Assembly to follow the same procedure so far as passage is concerned.

In the decision of State ex rel. Wilcox vs. Draper, 50 Mo. 24, 1. c. 27, a joint resolution is regarded as a bill:

"Whilst in American legislation a joint resolution regularly passed is regarded as a bill (Cush. Law and Practice in Legislative Assemblies, Sec. 2403), yet we willingly concede that a simple resolution passed by one house only cannot abrogate, modify or affect a general law."

The procedure relating to the enactment or passage of bills is contained in Article IV of the Constitution. Section 26 relates to the origin of bills and provides in substance that bills may originate in either house and

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must be read on three different days in each house; section 27 provides that no bill shall be considered for final passage unless it has been reported on by a committee and printed for the use of the members; section 31 provides that no bill shall become a law on its final passage unless the vote is taken by yeas and nays, and a majority of the members elected to each house be recorded as voting in its favor. This means seventy-six votes in the House and eighteen votes in the Senate, voting separately - a constitutional majority. "Each house," as used in Section 31, refers to Section 1 of Article IV wherein the Constitution states the legislative power shall be vested in a senate and house of representatives, and also refers to Section 57 of Article IV wherein the Constitution declares "The legislative authority of the state shall be vested in a legislative assembly consisting of a senate and house of representatives * * * ."

The words "each house" as used in Section 31, due to the provisions of Sections 1 and 57, can mean nothing other than the two different branches of the Assembly must vote separately and not in joint session on bills, thus, clearly proving that bills cannot be enacted by the General Assembly while sitting in joint session.

After a bill is passed, certain procedure must be followed to make it a valid law. Section 37 of Article IV provides that after a bill has been voted upon and passed by each house of the General Assembly, it is to be signed by the presiding officer of each of the two houses; Section 38 requires the Secretary of the Senate, if the bill originated in that body, or the Chief Clerk of the House of Representatives, if the bill originated in that body, to present the same immediately to the Governor.

Having established that a joint resolution and a bill must be passed in the same manner, it follows that a joint resolution must originate in one of the houses, be referred to a committee, printed, read on three different days and adopted by a constitutional majority of that house, then be sent to the other house and follow the same procedure. Thereafter, a joint resolution must be signed by the presiding officer of each house; the procedure required by Section 29, Article IV (as amended, Laws 1933, page 479) followed and then be presented by the proper officer (Secretary of the Senate or Chief Clerk of the House of Representatives) of the house, in which it originated, to the governor.

Joint resolutions, passed in compliance with the procedure heretofore set out, must be presented to the Governor of Missouri.

Is Resolution No. 3 a joint resolution within the meaning of the Constitution?

Without considering the contents and the real purport of the resolution, we shall proceed to show the procedure followed in passing the resolution does not meet the constitutional requirements of a joint resolution. The resolution did not originate in one or the other of the houses; it was not referred to a committee and reported upon; it was not printed for the use of the members; it did not have a constitutional majority of each house voting separately in their individual branches, that is, it did not receive seventy-six votes of the members of the House sitting as the House of Representatives and eighteen votes of the members of the Senate sitting as the Senate; the provisions of Section 29, Article IV, as amended, were not followed; it was not signed by the presiding officer of each of the two houses in open session; and, not having originated in either house, it could not have been presented to the governor in person by the proper officer (Secretary of the Senate or Chief Clerk of the House of Representatives) of the house in which it originated.

The title calling the resolution a joint resolution does not make it such. The principle of law to be followed is that the substance and circumstances surrounding the passage of the resolution determines what it is. In *City of Springfield to the use of McEvilly vs. Knott*, 49 Mo. App. 612, the city council passed an act providing for the curbing and guttering of streets. This act was entitled a resolution. When attacked on the ground that it was not an ordinance, the court looked to the formalities followed in passing the same, and determined that it was an ordinance. In *Kelley vs. Secretary of State*, 112 N. W. 978 (Mich.), the state legislature passed an act entitled a resolution. When attacked because not a bill, the court looked to the substance and formalities observed in the passage and determined that it was a bill.

From the above and foregoing, we are of the opinion that the governor had no authority to disapprove or veto resolution No. 3, and his attempt in so doing constituted

unwarranted usurpation of power not vested in him by the Constitution, and is, therefore, a nullity.

II.

There is another reason that may be stated for holding the governor's purported veto of this resolution is a mere nullity in that his veto power extends only to resolutions that are legislative in character. In *Richardson vs. Young*, 125 S. W. 664 (Tenn.), the legislature had passed a joint resolution, that is, one originating in one house and going to the other. The purpose of this resolution was to fix a day certain for a meeting of both houses to elect certain state officers. The resolution was vetoed by the governor and thereafter the General Assembly, sitting in joint session, ignored the veto and proceeded to elect the officers. The right of one of those elected to hold office was challenged, and, in the opinion, the court, of necessity, had to determine the validity of the governor's veto. The Tennessee Constitution authorizing the governor to veto resolutions is similar to that of the State of Missouri, and is as follows:

"Every joint resolution or order (except on questions of adjournment), shall likewise be presented to the Governor for his signature, and before it shall take effect shall receive his signature; and on being disapproved by him shall, in like manner, be returned with his objections; and the same, before it shall take effect, shall be repassed by a majority of all the members elected to both houses, in the manner and according to the rules prescribed in case of a bill."

The Court, in determining this question, said,
1. c. 678:

"But the joint resolution was not one which article 2, section 18, of the

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Constitution requires to be presented to the executive, and which cannot become effective without his approval, or adoption notwithstanding his veto. That provision only concerns resolutions, or orders, which are legislative in their character, and does not relate to those in regard to mere matters of formal procedure, of which the Senate and House have exclusive control. There seems to be no conflict of authorities as to this.

"The Constitution of the United States (article 1, section 7) provides that 'every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on the question of adjournment), shall be presented to the President of the United States, and before the same shall take effect shall be approved by him or, being disapproved by him, shall be passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill,' which, while very similar to section 18 of article 2 of the Constitution of this state, is broader, in that the requirement covers, not only every resolution and order, but every vote to which the concurrence of the Senate and House of Representatives are necessary.

"This provision has always been construed to include only resolutions which are legislative in their character, and it has never been the practice of the Congress of the United States to present to the President for his approval concurrent resolutions, orders, or votes in regard to matters not legislative.

"The question first arose in 1798, when the concurrent resolution submitted the Eleventh Amendment of the Constitution

of the United States to the several states for adoption was challenged, because not presented to the President, as supposed to have been required by article 1, section 7, of the Constitution, and it was held that the negative of the President was confined to ordinary cases of legislation, and that he had nothing to do with a resolution of that kind. *Hollingsworth v. Virginia*, 3 Dall. 381, 1 L. Ed. 644.

"The subject of joint and concurrent resolutions was considered in a report of the judiciary committee of the Senate of the United States, submitted and adopted January 27, 1897, in which it is said:

"We conclude this branch of the subject by deciding the general question submitted to us, to wit, "whether concurrent resolutions are required to be submitted to the President of the United States," must depend, not upon their form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do so, they must be presented for his approval; otherwise, they need not be. In other words, we hold that the clause in the Constitution which declares that every order, resolution, or vote must be presented to the President to "which the concurrence of the Senate and House of Representatives may be necessary," refers to the necessity occasioned by the requirement of the other provisions of the Constitution, whereby every exercise of "legislative powers" involves the concurrence of the two houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the President. In brief, the nature or substance of the resolution, and not its

form, controls the question of its disposition.' 4 Hinds' precedents of the House of Representatives, Section 3482-3483."

The above case is authority that the governor of Missouri does not have power to veto any resolution that is not legislative in character.

We proceed to analyze joint resolution No. 3 to determine whether it is legislative in character. Both branches of the General Assembly assembled in the House of Representatives to receive the returns of the general election held on November 5, 1940, in compliance with the provisions of Article V, Section 3, and in connection therewith resolution No. 3 was adopted. We believe that resolution No. 3 is nothing more than a motion reduced to writing, passed by the General Assembly as an expression of its wishes to investigate the results of the election in the race for governor.

We are of the opinion that the resolution is not legislative in character because it purports only to prescribe a course of action for the General Assembly as a single body, in nowise pertaining to a legislative matter - in other words, an internal function. In order for a resolution to be legislative in character, it must lay down a rule of action for some person or group other than the General Assembly. That this is true is to be seen from the holding in *Richardson vs. Young*, supra, wherein it was held a resolution prescribing a course of action for the General Assembly, that it would meet at a certain date to elect certain officers was not legislative in character.

We have considered this latter proposition that the governor does not have authority to approve or disapprove a resolution that is not legislative in character solely for the purpose of illustrating what may be the rule in this state. We do not place the conclusion reached in this opinion upon that basis since we do not think it is the function of the attorney general to determine such a grave question, that of reading into the constitution a new exception, that joint resolutions not legislative in character are not subject to approval by the governor when that question is not presented.

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We note that the resolution did not receive a constitutional majority of the Senate and House of Representatives voting separately as such. The validity of the resolution did not depend upon obtaining a constitutional majority of each house voting separately. It was necessary to obtain only a majority of votes of the members of both houses, that is, ninety-three or more of the one hundred and eighty-four votes.

In our analysis of Resolution No. 3, we have observed it indicates the legislature's intention to appropriate funds of the State Treasury to pay expenses of the investigation of the election for Governor.

Section 43 of Article IV of the Constitution of Missouri provides:

" * * * the General Assembly shall have no power * * * to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

One employing only plain and honest reasoning would know the Governor's veto of Resolution No. 3 was a nullity, and would know also that no money can be drawn from the state treasury and expended for any purpose whatsoever except by the passage of an appropriation bill by the Senate and House of Representatives, and approved by the Governor.

Yours respectfully,

ROY MCKITTRICK
Attorney General

RM:EMW

CORPORATION: Notice of reduction of employees' wages is mandatory and has reference to all classes of employees (Sections 4590 and 4591, R. S. Mo. 1929).

January 21, 1941



Mr. Earl H. Shackelford
Commissioner of Labor
Jefferson City, Missouri

Dear Mr. Shackelford:

We are in receipt of your letter of January 9, wherein you state as follows:

"A question has arisen with reference to the interpretation of Section 4590 and 4591, R. S. Missouri, 1929. The question is - Do the above sections make it mandatory upon a company or corporation doing business in this state, desiring to reduce the wages of its employees, or any of them, to give to all employees affected thereby a thirty days notice of such reduction? Also what is meant by the term 'wages' in the above provision? Does this term indicate day and piece workers or does it have reference to salaried workers only?"

Section 4590, R. S. Mo., 1929, provides that:

"Any railway, mining, express, telegraph, manufacturing or other company or corporation doing business in this state, and desiring to reduce the wages of its employees, or any of them, shall give to the employees to be affected thereby thirty days' notice thereof."

Section 4591, R. S. Mo., 1929, provides that:

"Such notice may be given by posting a written or printed handbill, specifying the class of employees whose wages are to be reduced and the amount of the reduction, in a conspicuous place in or about the shops, station, office, depot or other place where said employees may be at work, or by mailing each employee a copy of said notice or handbill, and such company or corporation violating any of the provisions of the preceding section shall forfeit and pay each party affected thereby the sum of fifty dollars, to be recovered by civil action in the name of the injured party, with costs, before any court of competent jurisdiction."

In the case of State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S. W. (2d) 941, 1. c. 944, the court said:

"It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."

And in the case of Ousley v. Powell, 12 S. W. (2d) 102, 1. c. 103, the court said:

"When a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. Horsefall v. School District, 143 Mo. App. 541, 545, 546, 128 S. W. 33."

The above sections provide not only that companies or corporations doing business in this state shall give notice

to their employees of the reduction of wages, but also prescribe the results to follow if said companies or corporations fail to give notice. This definitely establishes the mandatory character of the above two sections.

The term "wages" was construed by the court in the case of *Reddick v. Northern Accident Co.*, 180 Mo. App. 277, 165 S. W. 354, 1. c. 357, wherein the court said:

"'Wages' is the compensation given to a hired person for his or her services; it is that for which one labors; it is the stipulated payment for service performed. *Bovard v. Railway Co.*, 83 Mo. App. loc. cit. 501."

In the case of *Henry v. Fisher*, 2 Pa. Dist. Rep. 71, the court said:

"Wages are defined to be 'the compensation paid or to be paid for services by the day, week or month' (*Anderson's Law Dict.*, hoc. tit.), or 'a compensation given to a hired person for his or her services' (*Bouvier's Law Dict.*, Id.). They are only due as the result of a hiring or employment, and involve the relation of master and servant, or employer and employee."

And again in the case of *Seller v. State*, 160 Ind. 605, 65 N. E. 922, 1. c. 927, the court said:

"Wages are the compensation paid or to be paid for services by the day, week, etc., as of laborers, commissioners, etc."

It is clear that the term "wages" is not limited to salaried workers only, but includes all workers whether they be paid by the hour, day, week or month.

Mr. Earl H. Shackelford

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Jan. 21, 1941

From the foregoing, we are of the opinion that it is mandatory upon companies or corporations doing business in this State and desiring to reduce the wages of their employees, or any of them, to give to all said employees affected thereby thirty days' notice of such reduction in the manner provided for by Section 4591, R. S. Mo., 1929. It is our further opinion that Sections 4590 and 4591, R. S. Mo., 1929, include all classes of employees of said companies or corporations whether they be salaried workers or day and piece workers.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

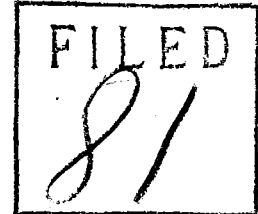
MW:EG

COUNTY OFFICERS: The sheriff and his deputies may not
legally receive from and be furnished
SHERIFF: DEPUTY: free transportation by a street railway
company.

March 22, 1941

Honorable Joseph A. Sherman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

ATTENTION: Hon. John W. Mitchell
Assistant Prosecuting Attorney



Dear Sir:

This is in reply to your request for an official
opinion in your recent letter, which is in the following
terms:

"The question has arisen in our county
as to whether or not the Street Railway
Company may legally furnish free trans-
portation on its passenger vehicles to
the sheriff and his deputies.

It would appear that under Paragraph No.
3 of Section 5155 R. S. 1929, such trans-
portation could not be furnished unless
the sheriff and his deputies may properly
be included within the term 'policemen'
as it is used in the following part of
that section: 'Nor shall anything in
this chapter be construed to prevent
the issuance of free or reduced trans-
portation by any street railroad corpora-
tion to mail carriers, policemen and
members of fire departments."

Article XII, Section 24 of the Constitution of
Missouri provides:

"No railroad or other transportation

company shall grant free passes or tickets, or passes or tickets at a discount, to members of the General Assembly, or members of the Board of Equalization, or any State, or county, or municipal officers; and the acceptance of such pass or ticket, by a member of the General Assembly, or any such officer, shall be a forfeiture of his office."

Section 4752 R. S. 1939 in part provides:

"No railroad or other transportation company shall grant or issue free passes or tickets, or passes or tickets at a discount, to ... any ... county ... officer."

Section 4753 R. S. 1939 in part provides:

"Any officer, agent or employee of any railroad or other transportation company who shall send or deliver any free passes or tickets, or passes or tickets at a discount, to any . . . county . . . officer, shall be deemed guilty of a misdemeanor . . ."

Section 4754 R. S. Mo. 1939 in part provides:

"Any . . . county . . . officer, who shall accept, use or travel on any free passes or tickets, or passes or tickets at a discount, mentioned in the preceding sections, shall be deemed guilty of a misdemeanor, and . . . upon conviction thereof, forfeit his office . . ."

To furnish or accept free transportation is plainly the same as to furnish or to accept a free pass.

As stated in State ex inf. McKittrick vs. Williams (Mo. Sup.) 144 S. W. (2nd) 98, 1.c. 103 (7,8), "A sheriff is indeed a 'public officer.' We hold he is a 'county officer' within the meaning of this section." The court was referring to Section 7 of Article XIV of our Constitution, applicable to county officers, and the case is authority here. Being a county officer, the sheriff may not legally receive from and be furnished free transportation by the street railway.

The deputy sheriff is not a state officer. It was so ruled in State ex rel vs. Bus 135 Mo. 325, 1.c. 337, 36 S. W. 636 where the court said:

"A deputy sheriff is not, in our opinion, a state officer within the intent and meaning of said section of the constitution. In this section the officers are clearly classified by territorial jurisdiction and a sheriff falls under the class of county officers."

Neither is he a municipal officer. But he is a public officer. In State vs. Bus, supra, at 1.c. 332, 333 of 135 Mo., it was ruled:

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualification they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' R. S.

1889, secs. 8181 and 8182.

The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers.

It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be 'a public charge or employment.' U. S. v. Maurice, 2 Brock, 96. Whether a public employment constitutes the employee a public officer depends upon the source of the powers and the character of the duties.

The constitution requires 'all officers both civil and military, under authority of this state' before entering on the duties of their office, to take and subscribe a prescribed oath.

The statute requires a deputy sheriff to take 'the oath of office' and his powers and duties are made equal to those of the sheriff himself. The deputy sheriff is certainly a public officer under the laws of this state, and his power and authority is coextensive with that of sheriff. State v. Dierberger, 90 Mo. 369."

It may be that for some purposes not here considered

March 22, 1941

the deputy sheriff is not in every sense a county officer. But there is authority for holding him subject to the same general limitations as are other public officers. In Scott vs. Endicott 38 S. W. (2nd) 67, 1.c. 68 (3), 225 Mo. App. 426, the Springfield Court of Appeals said:

"There can be no doubt that a deputy sheriff appointed by the sheriff, as provided by section 11513, R. S. Mo. 1929, is a public officer. State ex rel. Walker v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L.R.A. 616. That being true, he is subject to the same general limitations as any other public officer in the matter of salary and fees."

The deputy sheriff is a public officer with power and authority coextensive with the county. He has the same powers and duties as the sheriff has (Section 13134 R. S. 1939). Having those attributes, in our opinion, the deputy sheriff has somewhat the same limitations and obligations as the sheriff, and is within the purview of the above quoted constitutional and statutory prohibitions on the furnishing and acceptance of free transportation from a street railway company.

The above cited and quoted statutes are in Chapter 31, R. S. 1939. In view of all the foregoing, it is unnecessary to decide the question regarding another chapter of the statutes, Chapter 35 R. S. 1939 (Section 5155 R. S. 1929, now Section 5611 R. S. 1939), which is asked in your said letter.

CONCLUSION

The sheriff and his deputies may not legally receive

Hon. Joseph A. Sherman

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March 22, 1941

from and be furnished free transportation by a street railway company.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General

EH:RT

Recorder of deeds:

It is the duty of the recorder of deeds to record all instruments when properly proved or acknowledged according to law and authorized to be recorded in his office.

May 26, 1941

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Mr. John P. Sherrod
Recorder of Deeds
Jackson County
Kansas City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of May 23, 1941, which reads as follows:

"I am enclosing herewith photostat copy of a 'release deed' tendered by the Union Central Life Insurance Company, through their representatives Hamilton and Crawford Realty Company, of this city.

"After discussing the deed in question with several attorneys, I have declined to accept it for record pending your instructions. You will kindly note letter by L. Miller of the Union Central Life Insurance to the Hamilton-Crawford Realty Company, and their comments on this subject, also their request that in the event of my unwillingness to accept the same for record, I consult your office.

"The point in question is on page #2 of the deed, (Photostat Copy) and is that portion of the paragraph beginning, quote: 'Whereas, the Sedgely Investment Company, a Missouri Corporation,' etc., which reads, quote: 'note is cancelled, but not paid, a new note and deed of trust securing the same debt having been given.'

"I am, of course, not asking your office to pass upon the soundness

of the document in any sense, but I am merely asking that you instruct me as to its acceptance for record. I will appreciate your early advice and instructions."

Section 3465, Article 2, chapter 23, R. S. Missouri 1939, partially reads as follows:

"(If any mortgagee, cestui que trust or assignee, or administrator of the mortgage, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof) (or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record

and attested as above provided. * *

* * * * *

Under the above partial section it will be noticed there are two forms of procedure for the releasing and satisfaction of mortgages and deeds of trust. The first procedure is the presentation of the note secured by the mortgage or deed of trust and acknowledgment of the satisfaction of the mortgage or deed of trust on the margin of the record of the deed of trust. The other procedure for satisfaction and releasing of mortgages and deeds of trust is by way of a deed of release. This section provides that when a deed of release is given and not a satisfaction of the deed of trust on the margin of the recorded deed of trust the recorder of deeds should note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. It also provides that when a full deed of release is offered for record the note or notes secured shall be produced and canceled in the presence of the recorder who shall enter that fact on the margin of the record and attest the same with his official signature.

It will be noticed in case of a deed of release the word "canceled" is used and not "satisfaction" as used in the first procedure. This section further provides that no deed of release shall be admitted to record unless the note or notes are so produced and canceled and that fact entered on the margin of the record and attested as provided in said section. The wording of this section is unambiguous. It clearly states that under the first procedure, which is a release, by way of acknowledging satisfaction on the margin of the record containing the deed of trust the word "satisfaction" is used, where under the second procedure the release or satisfaction is made by way of a deed of release. All that is necessary is that the notes shall be presented, produced and canceled, the word "satisfaction" not appearing in that second class of procedure.

According to the photostatic copy of the deed of release in question, the deed of release specifically said: "canceled but not paid, a new note and deed of trust securing the same debt having been given." This deed of release follows exactly the wording of the second procedure of satisfaction and release under Section 3465, supra. Also, the

photostatic copy shows the cancellation of the note. I am presuming the cancellation of the note was in the presence of the recorder as provided under Section 3465, supra. The production and cancellation of the notes secured by the deed of trust for which the deed of release was given is a prerequisite to the recording of the deed of release, and unless the notes are produced and canceled in the presence of the recorder of deeds it is not mandatory upon the recorder of deeds to record the deed of release.

Section 13161, R. S. Missouri 1939, partially reads as follows:

"It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; * * "

It will be noticed under the above partial section that it is the duty of the recorder to record several described papers, "which shall be proved or acknowledged according to law and authorized to be recorded in their offices; * *" This partial section is mandatory, the word "shall" being used instead of the word "may" and does not leave the recording in the discretion of the recorder of deeds if the instrument is proved or acknowledged according to law. As to the meaning of the phrase "proved or acknowledged according to law" the acknowledgment must be made in accordance with Section 3408, R. S. Missouri 1939, which provides and reads as follows:

"The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following courts or officers: First, if acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, notary public,

or some justice of the peace of the county in which the real estate conveyed or affected is situated; second, if acknowledged or proved without this state, and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court, or any commissioner appointed by the governor of this state to take the acknowledgment of deeds; third, if acknowledged or proved without the United States, by any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or by any minister or consular officer of the United States, or notary public having a seal."

The recorder of deeds is largely a ministerial officer and does not pass upon the legality of instruments proved and acknowledged according to law. It is not for the recorder of deeds to say whether or not the instrument offered has been drawn up according to law but the recorder of deeds may require certain prerequisites required under our state law to be complied with and which are set out in Section 3465, supra, before it becomes mandatory that he record the instrument.

The State of Missouri has not passed directly on the question as to the recorder of deeds being merely a ministerial officer, but in the State of Iowa the Supreme Court of that state in *Weyrauch v. Johnson*, 208 N. W. 706, 708, pars. 5, 6, said:

"We may observe that the county recorder is largely a ministerial officer. It is a matter of common knowledge that many instruments that are technically defective are recorded, and the record of such instruments may be insufficient to impart constructive notice. There seems to be no provision in the statute which clothes the county recorder with the judicial

power to determine the legal validity and effect of every instrument tendered to him for record, or the effect of such recording. He cannot arbitrarily refuse to record instruments which are in proper form and eligible to record, under our recording acts, where a reasonable request for recording is made and the fee is duly tendered.

"We find no error in the record appealed from, and it must be, and is, affirmed."

Also, in the case of *People v. Fromme*, 54 N. Y. Supplement, 833, 834, the court said:

"* * * As has already been decided by the court of appeals of this state in regard to provisions of the previous revenue law, the congress of the United States cannot control the rules of evidence in courts of this state, nor the legality of contracts made, executed, and to be performed within its borders, except such contracts as relate to subjects over which the United States have jurisdiction. The responsibility of seeing that the proper stamp is affixed rests upon the parties to the instrument; and the register is no more required to determine the validity under the United States revenue law of an instrument offered for record than he would be to determine whether a deed offered for record contravened some statute of the state, or was offered for the purpose of defrauding creditors, or, for any other reason, was invalid and void. To hold that such a duty rested upon the register would be to constitute him a judicial instead of a ministerial officer. The

relator having complied with the provisions of the law of this state as to the statement which he desired to have filed, and having tendered the necessary fees for such filing, it was the duty of the register to accept the same for recording."

Since the Supreme Court of this state has not declared either way whether or not the recorder of deeds is a ministerial officer or a judicial discretionary officer, one must look to the statutes to determine that point. Under Section 13161, supra, it specifically states, "shall" and in accordance with the decisions of other courts there is no question but that the recorder of deeds is a ministerial officer. Corpus Juris states the theory of the law on this question as follows in Volume 18, par. 186, page 247:

"The question as to what instruments are entitled to record must as a general rule depend in each case upon the express provisions of law in respect thereto; and resort thereto must also be had in determining whether a deed is sufficient in its form and requisites to entitle it to record. Again, if certain conditions precedent are imposed by statute as a prerequisite to the registration of a deed, there should be a compliance therewith. A deed, though void on its face, may be entitled to record."

You do not state in your request the point involved as to your reason for not recording the deed of release, but I am presuming that you are objecting to the words, "Note is cancelled, but not paid, a new note and deed of trust securing the same debt having been given," and that you believe the note should be canceled as paid, but Section 3465, supra, does not provide that when a deed of release is given that the notes should be canceled as satisfied or paid but merely states canceled in the presence of the recorder of deeds.

Section 13162, R. S. Missouri 1939, reads as follows:

"The several classes of instruments of writing mentioned in the several subdivisions of the preceding section shall be recorded in separate

books, according to their classification therein."

Section 13163, R. S. Missouri 1939, reads as follows:

"Instruments in writing, conveying chattels or personal property alone, which by any law of this state are required to be recorded or admitted of record in any recorder's office in this state, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate."

By virtue of the above two sections the deed of release, which relates to land, should be recorded in the separate book regarding lands.

CONCLUSION

It is the opinion of this department that when a deed of release of a mortgage or deed of trust is offered for recording, which is properly proved and acknowledged according to law as set out in Section 3408, supra, it is mandatory that the recorder of deeds record the same providing all prerequisites have been complied with.

It is also compulsory under Section 3465, supra, when a full deed of release of mortgage or deed of trust is offered for recording the note or notes secured must be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature. Unless the note or notes are so produced and canceled and that fact entered on the margin of the record and attested by the recorder's official signature, the deed of release of the mortgage or deed of trust should not be admitted to record.

It is further the opinion of this department under the above authorities that when a release or satisfaction of a mortgage or deed of trust is made by a deed of release, it is not necessary that the note or notes be marked paid

Mr. John P. Sherrod

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May 26, 1941

or satisfied as it is sufficient to merely cancel the note or notes in the presence of the recorder of deeds. Therefore, it is the opinion of this department that the deed of release, from which the photostatic copy attached was made, should be recorded by the recorder of deeds providing the note or notes have been produced and canceled in the presence of the recorder of deeds, and for the further reason that the deed of release has been properly acknowledged by an officer qualified to take the acknowledgment under the laws of this state.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

CORONERS: When the act of violence occurs in one county and the victim dies in another, the coroner of the county in which the victim dies should have jurisdiction and the county court of that county is liable for the legal expense incurred in connection with such inquest.

August 25, 1941

Mr. N. Burton Short, Coroner
Cape Girardeau County
Jackson, Missouri



Dear Sir:

This is in reply to yours wherein you request an opinion on the following statement of facts:

"As you know the City of Cape Girardeau located within the boundaries of the County of Cape Girardeau has within it two Hospitals patronized by nearly all of the residents of Southeastern Missouri. Since I have been Coroner of this county several deaths have occurred in these hospitals from accident, homicide and other acts of violence. To illustrate-- On Sunday, March 9, 1941, a boy was brought to St. Francis Hospital, Cape Girardeau, Missouri, suffering from gunshot wound of which he died a few minutes after arrival. The hospital called me. I took the depositions of the boy's father and the attending medical doctor, and notified the coroner of New Madrid County where the alleged shooting transpired.

"I desire a ruling by your office on this question. To Wit -- Is it my duty to respond and investigate deaths of this nature where the alleged act of violence or accident is outside the legal boundaries of the County of Cape Girardeau and death occurs within the legal boundaries of the County of Cape Girardeau? Or should I refuse to answer such calls and inform the summoning parties to call the Coroner of the

county in which the act of violence occurred? On the call illustrated above, am I entitled to fee for viewing the body and taking depositions from the treasurer of Cape Girardeau County after the approval of the Cape Girardeau County Court?"

Section 13227, R. S. Missouri 1939, which pertains to this question, reads as follows:

"A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

The answer to your question will be determined upon the construction to be placed on the language of this statute reading, "* or where the body of any person coming to his death shall be discovered in his county, * "

If the coroner has jurisdiction to hold the inquest, then under the provisions of Section 13251, R. S. Missouri 1939, the county court of his county is required to audit and allow the claim. This section reads as follows:

"The coroner or other officer holding an inquest, as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables and others entitled to fees for which the county is liable; and the county court shall audit and allow the same, and shall make a certified copy of the same, without delay, and deliver such copy to the county treasurer, which copy shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees there-

in specified to each person entitled to such fees. The county treasurer shall pay to each person on demand, or to his legal representatives, the fees to which he is thus entitled, and shall take the proper receipt therefor, and produce the same in his settlements with the county court as vouchers for the money so paid out by him."

The exception to this section is in Section 13252, R. S. Missouri 1939, and Section 13253, R. S. Missouri 1939.

The fact that the coroner might be required to summons witnesses from a territory outside his jurisdiction would not affect the conclusion herein reached, because under Section 13261, R. S. Missouri 1939, the coroner can attach witnesses outside his jurisdiction. We do not find any Missouri cases on this particular question. However, the history of the coroners' act seems to be stated in Volume 4, American & English Annotated Cases at page 1161, 1162. We find the following statement:

"* * * Originally, in England, the office of coroner was one of great dignity and authority, and coroner's juries had the power, like grand juries, to present indictments for murder. The power and authority of the coroner from usage and statute have been much curtailed, * * * * *

"* * * Under the old system, where the coroner's jury performed the functions of a grand jury, this might require the removal of the body back to the jurisdiction where the crime was committed; but under the system in this state the inquest is to speedily inquire into the cause of death for the purpose of apprehending the guilty parties, and the testimony then taken to be an aid to the grand jury. * * *

"In England, under the common law,

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prior to the statute of 6 & 7 Victoria, chapter 12, the jurisdiction over an inquest, as regards place where the same might be held, was conferred upon the coroner only within whose jurisdiction the injury which caused the death had been received. * * * * *

This statement is borne out by the Missouri Statutes as they apply to coroners. It seems that under the earlier authorities where the coroner's jury was acting in the capacity of a grand jury that the body had to be moved back to the jurisdiction where the crime was committed, but it seems under the later statutes which authorized the inquest to be held in the county in which the body is found, the result is that the inquest is more speedily made and in some cases with less expense. It seems that the rule of construction of the statutes similar to the Missouri Statutes was announced in Volume 4, American & English Annotated Cases, page 1163, as follows:

"But the common-law rule was suspended by the statute of 6 and 7 Victoria, chapter 12, which provided 'that the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead, shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner.'

"In a case construing this statute, where the injury was inflicted and death occurred outside the city of London, but afterward the body was removed into the city, it was held that the inquisition was properly held by the coroner of London, although the cause of death arose without his jurisdiction. Reg. v. Ellis, 2 C. & K. 470, 61 E. C. L. 470. But it was held that the coroner of a county wherein a dead body was found could take an inquisition only in that county* * * * *

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"In the United States statutory provisions in most of the states determine the proper place for the holding of inquests, and decisions construing these statutes are not numerous.

"Where a person died in one county and was buried in another county, and after burial it became necessary to exhume the body in order to hold an inquest to determine the manner and cause of death, it was held that if there were conflicting claims between the coroner of the county wherein the person died and the coroner of the county wherein the body was buried, the former would have the better right; but in the absence of such conflicting claims, the coroner of the county wherein the body was buried had jurisdiction to hold a valid inquest. In its opinion the court said: 'An inquest must always be super visum corporis, and could not have been held in the other county without taking the body back there, thus involving useless expense and delays, and in some cases that may easily be imagined, such removal from the place of interment back to the place where the death occurred would be impracticable, and if the position taken by counsel for defendant is correct, defeating the ends of justice, or at least hindering them greatly by preventing the holding of any inquest at all. * * * On the whole, it would seem to be in accord with reason and convenience to say that under such circumstances as appear in the case now under consideration, the inquest could be lawfully held, as it was, in Erie county (the county wherein the body was buried).' Pickett v. Erie County, 19 W. N. C. (Pa.) 60, 3 Pa. Co. Ct. 23. See also Jameson v. Bartholomew County, 64 Ind. 524, 86 Ind. 154. But see Rentschler v. County, 1 Leg. Rec. (Pa.) 289, where the contrary was held.

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"Under a statute providing that the coroner shall take inquisition over dead bodies 'found within the county,' it has been held that a body is found within the county within the meaning of the statute whenever it is ascertained by any means that it is within the county. State v. Bellows, 62 Ohio St. 307."

In the case of Moore, Coroner, v. Box Butte County, 111 N. W. 469, the Supreme Court of Nebraska had under consideration a question similar to yours. In that state the statute read as follows:

"The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means. When he has notice of the dead body of a person, supposed to have died by unlawful means, found or being in his county, he is required to issue his warrant to a constable of his county, requiring him to summon forthwith six lawful men of the county to appear before the coroner, at a time and place named in the warrant."

The Missouri Statutes are somewhat similar to the Nebraska Statutes on the question of the body being found or being in his county. The Missouri statute provides that the body be discovered in the county, while the Nebraska statute provides that if the body be found or being in his county he may hold the inquest. At l. c. 470 the court, in speaking of the duties of the coroner with respect to holding inquests similar to those narrated in your request, said:

"* * * when a coroner finds in his county the body of a person who has evidently come to his death by violent means, although he may have reason to suspect, or even may know, that the violence was inflicted outside his own county, he has a very wide discretion in determining whether the circumstances are such as

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to require an official investigation at his hands, and that, at least so far as jurors and witnesses are concerned, his determination of that question is final. * * * * *

The duties of the coroner, with respect to holding inquests, are further provided for in Section 13231, R. S. Missouri 1939, which reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Under said Section 13227 the coroner shall hold the inquest where the body is discovered in his county, meaning the county where the coroner is elected and where the body is found.

Section 13231, R. S. Missouri 1939, provides that the coroner, when notified of a dead body supposed to have come to his death by violence or casualty, being found within his county, shall issue a warrant for a jury and proceed with the inquest and the warrant shall be directed to the constable of the township where the dead body is found.

Under the foregoing sections we think the coroner of the county where it is known death occurs and the body is found, that is to say, where the body is upon death occurring from violence or casualty should hold the inquest and where a body is found supposed to have come to his death by violence or casualty and there is no information as to where death actually occurred, the coroner of the county where the body

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is found should hold the inquest.

Under our criminal statutes the venue of a prosecution for a homicide is laid in the county where the assault was made or where the assaulted person died. So the place where the coroner's inquest is held would not affect a prosecution for a crime in connection with the case in which it was necessary to hold an inquest. It seems that the earlier cases would have required the inquest to have been held in the county in which the assault took place, but that was because of the fact that the coroner's jury acted in the capacity of a grand jury. Since the statutes have authorized the holding of the inquest in the county in which the body is discovered, the earlier decisions would not be controlling and the rule announced in Volume 4, American & English Annotated Cases, page 1163, would be controlling, that is, that the inquest is held in the county in which the dead body is found.

CONCLUSION

We are, therefore, of the opinion that in cases of assault committed on a person outside of your county and the person is later brought to your county and there dies, that under Section 13227, supra, it is your duty to hold an inquest over this body, and that under said Sections 13251 and 13252, your county court would be the body to which your fee bill should be presented for allowance and payment.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

TWB:DA

SALARIES: Circuit Judge Sam C. Blair cannot collect
CONTESTED ELECTION: a salary from the state unless he gives
CIRCUIT JUDGE: bond and complies with Section 11423, R.
S. Missouri 1929.

January 15, 1941

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of January 13, 1941, which reads as follows:

"I am enclosing a copy of notice
by the Attorney of Harry L. Buchanan
who is contesting the election of
Sam Blair for Circuit Judge, which
notice is served on me under Sec-
tion 11423, RS Mo. 1929 which pro-
vides that no money shall be paid
during the contest.

"I am enclosing a copy of a let-
ter which I received from Sam
Blair and which is self-explanatory.
May I have your opinion as to whether
I can legally pay money to Mr. Blair
pending this contest decision."

Section 11765, R. S. Missouri 1929, provides a
salary of Fifteen Hundred (\$1500.00) Dollars a year to
the circuit judge in a circuit of the same bracket as
the circuit of Judge Sam C. Blair for acting as juvenile
judge.

Section 11766, R. S. Missouri 1929, provides a
straight salary of Two Thousand (\$2,000.00) Dollars a
year to a circuit judge of the same bracket as Judge
Sam C. Blair.

Section 11771, R. S. Missouri 1929, provides a
payment of Twelve Hundred (\$1200.00) Dollars a year to
Sam C. Blair for expenses while trying cases in his cir-
cuit.

Hon. Forrest Smith

(2)

January 15, 1941

Section 11772, Laws of 1939, page 678, provides an additional salary of Thirteen Hundred (\$1300.00) Dollars a year to Judge Sam C. Blair as jury commissioner.

The total money which Judge Sam C. Blair is entitled to is Six Thousand (\$6,000.00) Dollars per year, payable monthly by the state.

Section 11423, R. S. Missouri 1929, reads as follows:

"Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of a quo warranto, then no warrant shall be drawn by the auditor, or paid by the treasurer, for the salary by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right: Provided, however, and it is hereby further enacted, that in all cases when the person to whom the commission for such office shall have issued shall deliver to the party contesting his right to such office a good and sufficient bond, in double the amount of the annual salary of such office, conditioned that if, upon final determination of the rights of the contestants, it shall be decided that the obligor is not, and that the obligee therein is, entitled to the office in controversy, he shall pay over to the obligee the amount of salary therefor drawn by him as such officer, together with ten per centum interest thereon from the date of the receipt of each in-

stallment received by him, then, and in such case, notwithstanding the provisions of this law, a warrant may be drawn by the auditor, and paid by the treasurer to the person holding the Commission aforesaid, for the amount of his salary, as the same shall become due. It shall be the duty of any person contesting the election of any such officer to give notice of such contest to the state auditor, and no such contest shall be heard or determined until he shall satisfy the tribunal trying such contest that such notice has been given."

The constitutionality of this section was upheld in the case of State ex rel. v. Gordon, 245 Mo. 12, 149 S. W. 638. In this case William P. Evans, Superintendent of Public Schools, brought an original proceeding by mandamus to compel John P. Gordon, State Auditor, to issue a warrant for his salary as superintendent of public schools for thirteen (13) months ending January 31, 1912, in the sum of Three Thousand Two Hundred Fifty (\$3,250.00) Dollars. In his petition he related that he was a person of small means and was financially unable to comply with the provisions of Section 11830, R. S. Missouri 1909, which is now Section 11423, R. S. Missouri 1929. He related that he could not give the contestant a bond in the sum of Twenty Four Hundred (\$2400.00) Dollars or any part thereof in compliance with this section. The court, in its opinion, held that the compensation of a public officer is a matter of statute and not of contract and cited from Mechem on Public Offices and Officers as follows:

"Sec. 855. As has been seen, the relation between the officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of con-

January 15, 1941

tract. It exists, if it exists at all, as the creation of the law, and when it so exists, it belongs to him "not by force of any contract, but because the law attaches it to the office." The most that can be said is that there is a contract to pay him such compensation as may from time to time be by law attached to the office."

The court, in its opinion, also held that this act in question did not violate the constitutional provision which forbids special or class legislation. The court also held that although the title to the act did not contain provisions as to the full subject matter of the act, yet it was not a violation of the state constitution. The court also held, in its opinion, that this act was not against public policy in that it deprived a man of just reward for his labor for the reason that the law set out the means of obtaining the salary and was a matter to be passed upon by the Legislature and was not a contract between the superintendent of schools and the state. This case is the only case in point upon this matter and has not been overruled in any respect. It was followed in the case of *Greene County v. Lydy*, 263 Mo. 92, 172 S. W. 382. The court, in its opinion, sustained the demurrer filed to the writ of mandamus. In its opinion the court also stated:

"We find one case only in our reports involving a consideration of this Act of 1873. In the case of *State ex rel. v. Clark*, 52 Mo. 508, the relator presented a petition to this court for a writ of mandamus to the State Auditor, alleging that he was commissioned as circuit judge on April 20, 1869, and was discharging the duties of that office, and that on April 1, 1873, he presented his account for the previous quarter's salary to the Auditor, who refused a warrant therefor. In his return the Auditor inter-

posed this same Act of 1873, and stated that a writ of quo warranto was pending to determine title to the office held by the relator. The answer to the return admitted the pendency of the writ, but said that it was issued at the relation of the Attorney-General, and did not involve a contest for the office. The answer further pleaded that the statute was unconstitutional. The court, without noticing the constitutional question, held that the act did not apply where there was no contest pending and where a quo warranto was filed by the Attorney-General at his own relation to determine only whether the respondent was a usurper in office. The validity of the Act of 1873 was apparently conceded by both court and counsel."

The above authorities have been set out for the purpose of showing the constitutionality of Section 11423, R. S. Missouri 1929, and also for the purpose of showing the procedure in case the Honorable Sam C. Blair, Judge, should desire to draw his full salary.

It will be noticed under Section 11423, supra, that it states, "Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, * * " It will also be noticed later in the section that it specifically states, "* * * in double the amount of the annual salary of such office, * * " In reading the whole section, it seems to be the intention of the Legislature that the state treasurer is only prohibited from paying out a salary warrant and not other expenses payable by the state to the circuit judge.

Section 11771, R. S. Missouri 1929, which provided a payment of Twelve Hundred (\$1200.00) Dollars a year for expenses while trying cases in his circuit is not part of his salary. It was so held in State v. Gass,

296 S. W. 431, par. 1, where the court said:

"The trial court, in determining how much compensation the circuit judges received, added to the \$2,000 paid by the state the \$1,200 allowed for expenses, making a total of \$3,200, which, deducted from the \$4,500 referred to in section 6640, fixed the compensation of the jury commissioner at \$1,300. The exception of the \$1,200 allowed for expenses in the amendment to section 10991, R. S. 1919 (Laws of 1921, p. 599), does not apply to the probate judge of Jasper county, for it is an allowance to the circuit judges for expenses when holding court in counties other than in the county in which the judge resides. The circuit judges of said county do not hold court in other counties. However, the \$1,200 allowed for expenses is not an allowance for services of any kind. * * * * *

Also, in the case of Macon County v. Williams, 224 S. W. 835, 1. c. 836, par. 1,2, the court said:

"This question, whether allowances to officers for expenses come within the meaning of the word 'compensation,' has arisen in several cases. In Wisconsin, under a constitutional provision somewhat analogous to ours, in so far as the question presented was concerned, it was held that a statute providing for a payment to each circuit judge of \$400 per annum 'as and for his necessary expenses while in discharge of his duties' did not

constitute additional 'compensation' in the constitutional sense. Milwaukee County v. Halsey, 149 Wis. loc. cit. 87, 136 N. W. 139. In McCoy v. Handlin, 35 S. D. loc. cit. 514, et seq., 153 N. W. 361, L. R. A. 1915E, 858, Ann. Cas. 1917A, 1046, under a more comprehensive constitutional provision than ours, the Supreme Court of South Dakota held that an allowance of \$600 per annum to the Supreme Judges 'in consideration of expenses' was not in violation of the prohibition against increasing the compensation of judges. The court held that the salary provided could not be increased, but that the allowance of expenses, as such, did not have that effect. * *"

Also, in this case the court, at page 837, said:

"From these authorities, the reasoning quoted, and the principle last mentioned it follows that the provision for the payment of expenses of circuit judges did not provide additional 'compensation' in the constitutional sense or in the sense of section 10695, R. S. 1909, and the trial court was right in holding that appellant could not lawfully retain, in addition to an amount equaling the circuit judge's salary, an additional sum equal to the amount allowed the circuit judge for expenses.

"The allowance is made to the circuit judges expressly for expenses which the circuit judge must incur in the performance of duties for which there is no counterpart imposed upon probate judges."

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There is no question but that the money allowed for expenses is not a salary.

The term "emolument" as used in Section 11423, R. S. Missouri 1929, does not include expenses such as allowed under Section 11771, R. S. Missouri 1929.

In the case of State v. Dishman, 68 S. W. (2d) 797, 1. c. 799, par. 4, 5, the court said:

"* * * But the undisputed evidence of the state was that the sum of \$25 of which the information made mention was a fine. Section 4093, R. S. 1929, as we construe it, relates alone to fees and emoluments and not to fines. Although the statute in one instance uses the word 'moneys,' that word, when viewed with its context, does not broaden the scope of the statute. The phrase is: 'Moneys, fees and emoluments so earned and received by him.' Only fees, but not fines, are earned. Therefore the trial court erred in overruling appellant's demurrers to the evidence."

The holding in the above case was to the effect that the word "emolument" did not include fines collected by the clerk of the Circuit Court of Christian County, Missouri, under a penal statute which assessed a punishment for the refusal to turn in certain specific moneys collected by him.

Expenses have been declared by the Federal Court of the United States in Federal Reporter 241, 747 as not being considered an emolument. In that case, at page 770, the court said:

"* * * Further light has since been thrown upon the construction given

to the provision of the federal Constitution above referred to by the act of June 23, 1906 (34 Stat. at L. 454, c. 3523 (Comp. Stat. 1913, section 225)), which provides: "That hereafter there may be expended for or on account of the traveling expenses of the President of the United States such sums as Congress may from time to time appropriate, not exceeding \$25,000 per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely." Under appropriations thereafter made by Congress, Presidents Roosevelt and Taft received, and to-day President Wilson is receiving, thousands of dollars each year. So far as we know, it has never been suggested that the money so allowed was an "emolument," and therefore unconstitutional. No one has ever seen fit to accuse these Presidents of being grafters. The judges of the federal courts, whose salaries are fixed by a law, declaring that such salaries shall be the "compensation for their official services," draw from the United States Treasury a sum not exceeding \$10 per day when absent from the places of their residence. Act March 3, 1911, c. 231, section 259, 36 Stat. at L. 1161 (Comp. Stat. 1913, Section 1236). This allowance is not given as an increase of salary but to cover the expenses incident to their being away from home in the discharge of their duties.'

"Paraphrasing, it may be said that the use of the house by Judge Jackson cannot be held to be an increase of salary, but was no more than the necessary inseparable incident to his compliance with

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his positive duty to reside within
the Canal Zone during the term of his
office. Section 8, supra, vol. 37,
pt. 1, U. S. Stat. at L. 62d Cong.
p. 565. * * * * *

CONCLUSION

In view of the above authorities it is the
opinion of this department that the state auditor can
not legally pay a monthly salary to Judge Sam C. Blair
unless he furnishes a bond to the contestant as set
out in Section 11423, R. S. Missouri 1929.

It is further the opinion of this department
that the state auditor should pay Judge Sam C. Blair
One Hundred (\$100.00) Dollars a month for his expenses
incident to the holding of the terms of court at places
in his circuit other than the place of his residence
as set out in Section 11771, R. S. Missouri 1929.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

SPECIAL ROAD DISTRICTS: Warrants to be paid in future years for
for payment of machinery where total costs
is in excess of the unspent year's income and that which can be
anticipated for the year that said machinery is bought are void
and non-enforcible within the meaning of Section 12, Article 10
of the Constitution of Missouri, and therefore, said warrants
would have no affect upon a reorganization of the said road districts.

January 20, 1941

Honorable Robert W. Smart
Prosecuting Attorney
Lawrence County
Mount Vernon, Missouri



Dear Mr. Smart:

We are in receipt of your request of January 7, 1941, for
an opinion on the following statement of facts:

"On August 29, 1940, at the request
of the County Court of Lawrence County,
Mr. Creech of your office submitted an
opinion regarding the dissolution of an
eight mile special road district created
under Article 9, Chapter 42, R.S. Mo.,
1929. In keeping with that opinion the
district was properly dissolved however
the district incurred an indebtedness of
approximately \$3500.00 for necessary road
machinery, which amount was more than three
times greater than the anticipated annual
revenue of the district. The purchase
contract for the machinery was based on a
deferred payment plan with annual payments
in an amount less than the anticipated
revenue for any fiscal year. There was no
bonded indebtedness in this district and
as a consequence it was not necessary to
invoke the provisions for liquidation for
bonded indebtedness. Since the road dis-
trict had been dissolved, they continued to
operate as a common road district under the

supervision of the County Court and an overseer appointed by the Court. The indebtedness which I have previously mentioned is still outstanding however a petition has been presented by sufficient property owners of the district to call an election for the creation of a benefit assignment district. In my search of the law I fail to find a statutory provision for the liquidation of indebtedness, other than bonded indebtedness following the dissolution of an eight mile district. I note that in the dissolution of other types of road districts that provision is made for the liquidation of assets and debts by a trustee and I deduce that the dissolution is not complete until the trustee has made his final settlement with the Court (8085-8086 Article 10, Chapter 42). The Court draws the inference that in as much as the law has contemplated and provided for the liquidation of such matters in other types of districts that it must have contemplated some such action on the part of the Court in the present instance. In the case of the district which is presenting this problem, the County Court has had the intention of setting aside sufficient funds from the anticipated annual revenue of the district to meet the annual payments in the machinery contract. Since Article 9 Chapter 42 R.S. Mo., 1929, seems to provide for the appointment of a trustee to handle such liquidation, none has been appointed. With this in mind, the situation suggests two questions, namely:

1. Does the County Court under such circumstances, have the authority to refuse to honor the petition of organization until the district in its present status has discharged its indebtedness?

2. If the Court does not have this authority, what disposition should be made of this indebtedness in order to protect the land owners of the district and the parties to the purchase contract for the machinery?

As is usual in rural road districts, there is a variance of opinion as to the types of district, which should be formed in this district and the county court has already been informed that other petitions will be filed pertaining to the same district. The Court is faced with the problem of incurring considerable expense in the publication of the present petition and any others which may be filed. While I am not certain as to the exact date on which the Court must take action, I am under the impression that there is only about one week remaining. In view of this circumstance, your opinion at your very earliest convenience, would be greatly appreciated."

Section 8032, R.S. Mo. 1929, provides for delivery of machinery by county court to district. Section 8033, R.S. Mo. 1929, provides as follows:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

It will be noted from reading these sections, particularly Section 8032, R. S. Mo. 1929,

that this section gives the county court authority to turn over to the board of the newly organized district all tools and machinery used for working roads belonging to the district formerly existing within the territory embraced in such special district. From reading Article 9 there does not appear any legislative enactment which gives a road district organized under this article any power to enter into the type of contract which is outlined in your request, that is, one which will obligate the district to pay over a period of years and one which in the aggregate amount calls for the purchasing of an article in excess of the anticipated revenue for the year in which it is purchased.

In the case of *Hawkins v. Cox*, 66 S. W. (2d) 539, 1. c. 543, the court had before it what appears to us to be an identical situation with the one outlined in your request, except that the district involved in that case was organized under Article 10, Chapter 42, R. S. Mo., 1929, but we think the ruling in that case is applicable to the statement of facts stated in your letter. It will be noted in the *Hawkins* case that this was a case where in the road district purchased from the Weber Implement Company a five-ton cleatrac caterpillar tractor at the contract price of \$2500.00, and paid down the sum of \$500.00, together with \$93.00 for freight, and were to pay the sum of \$500.00 and interest on the balance at the rate of 6% per year until the sum of \$2000.00 had been fully paid. This suit was based upon an injunction brought by a taxpayer to prohibit the three road commissioners and the county treasurer ex-officio treasurer of the special road district from paying these warrants, and the court in this case in declaring the contract void and non-enforceable and the warrants issued in payment thereof, had this to say:

"The question presented here is whether the road district in question exceeded its powers in this respect, under its then financial condition, in making the contract of purchase just referred to, and, if so, to what extent. We think the first question must be answered in the affirmative. Municipal corporations, such as are special road districts, are by our

Constitution placed on what has been termed a cash basis. This has been accomplished by the provisions of section 12, article 10, of the Constitution, which provides that 'no county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose.' The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year,' but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in *Book v. Earl*, 87 Mo. 246, where this court said: 'The contracting of a debt in the future, by the county in any manner or for any purpose, in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters' is prohibited. '* * * The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point.

Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it. '

"This provision of the Constitution is self-enforcing and limits the power of this road district 'to become indebted in any manner or for any purpose' beyond the revenues provided for the year. Under the facts here, 'the income and revenue provided for the year' 1928, in which the contract was attempted to be made, was whatever would be derived from the levy of 50 cents then made on the \$100 valuation of the property in the district, amounting to approximately \$600. The contract of purchase being made in February, 1928, the commissioners had a right to contract with reference to the funds then on hand as a cash payment and the anticipated tax collections of that year on the rates levied, as such was 'the income and revenue provided for that year,' but no further. The road district had no power by contract of purchase made in February, 1928, to anticipate, appropriate, or tie up the revenues of the district for 1929 or after years not yet levied and the amount of which would depend on levies to be made, if at all, in such years."

* * * * *

"The contract for the purchase of and payment for this road machinery made in February, 1928, is void at least to the extent it attempted to obligate the district for payments beyond the cash payment made at the time and the amount to be paid out of the revenues provided for 1928. Anderson v. Ripley County, 181 Mo. 46, 65, 80 S. W. 263."

January 20, 1941

On the authority of the case of Hawkins v. Cox, supra, it is our opinion, in answering your first question which reads: Does the county court under such circumstances have the authority to refuse to honor the petition of organization until the district in its present status has discharged its indebtedness? that the contract referred to in your letter with the Machinery Company is void and non-enforceable on the part of the Machinery Company and as far as the re-organization of the district is concerned, this purported indebtedness would not affect the re-organization one way or the other. Of course, in this opinion we are not passing upon the moral obligations, but are interpreting the law as we read it in the book.

In answer to your second question which reads: If the Court does not have this authority, what disposition should be made of this indebtedness in order to protect the land owners of the district and the parties to the purchase contract for the machinery?, it follows from what we have said heretofore in this opinion that the indebtedness is void and non-enforceable if against the road district, and therefore the county court could proceed in accordance with the statutes and assist in the perfection of a re-organization and would not legally be bound to take into consideration or give cognizance to the purported outstanding warrants referred to in your request. Of course, our opinion and ruling is based upon the assumption that when the indebtedness was incurred that the sum of \$3500.00 was greatly in excess of the anticipated annual revenue of the district, as your request states, more than three times.

In conclusion we are of the opinion that the purported contract to pay the sum of \$3500.00, or the remaining balance thereof, is void and non-enforceable and would not affect the re-organization of the special road district which was organized under Article 9, Chapter 42, R. S. Mo. 1929, and therefore, the county court should not refuse to honor the petition of re-organization of the district on that ground.

In answer to the second question, we are of the opinion that it is not necessary to make any disposition in regard to the indebtedness heretofore outlined.

Respectfully yours,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney-General

COVELL R. HEWITT
(Acting) Attorney General
WOJ/rv BRC/iv

W. O. JACKSON
Assistant Attorney General

BOARD OF FUND COMMISSIONERS: Comparison of paid bonds and coupons does not have to be done personally by Board of Fund Commissioners, but may be delegated.

April 11, 1941

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

4-14



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Does the Board of Fund Commissioners have authority to delegate to some other person, or persons, the duty of comparing paid bonds and coupons, abstract of bonds and coupons paid, and bank account between the Board of Fund Commissioners and the State Fiscal Agent, required by Section 13117, Article V, Chapter 87 of the Revised Statutes of Missouri for 1939?"

Section 13117, Article V, Chapter 87, R. S. Missouri, 1939, provides as follows:

"The board of fund commissioners shall require the bank selected as state's fiscal agent, as hereinbefore provided, to transmit to them, and to the governor, state auditor and state treasurer, within thirty days after payment of any installment of interest or bonds, an exact copy of the account between the bank and the fund commissioners, with an abstract of the coupons or bonds taken up by said bank, and to the fund commissioners the coupons or bonds; which abstract and coupons or bonds shall be carefully compared by the fund

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commissioners, and if found to be correct, they shall certify to the fiscal agent the correctness of the abstract, and thereupon direct the state auditor and state treasurer to credit said fiscal agent with the amount of bonds or coupons paid, as shown by said abstract, and turn the coupons or bonds over to the state auditor." (Underscoring ours)

The word "compare" is defined as follows in Webster's New International Dictionary, Second Edition:

"To examine the character or qualities of, two or more persons or things, for the purpose of discovering their similarity or differences; to bring into comparison."

While no cases have been found directly on the matter of comparison, it would seem that a comparison of this nature would be a ministerial duty.

In the case of State ex rel. v. Hudson, 226 Mo. 239, 1. c. 265, a ministerial duty is defined as follows:

"In State of Miss. v. Andrew Johnson, President of the United States, 4 Wall. 1. c. 498, a ministerial duty enforceable by a court through a writ of mandamus was thus defined: 'A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted, or proved to exist, and imposed by law.'"

And in the case of State ex rel. v. Meier, 143 Mo. 439, at 1. c. 447, the Court quoted and adopted the following

definition of a ministerial act.

" * * * 'A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.' Merrill on Mandamus, sec. 30; Marcum v. Com'rs., 42 W. Va. 263, and cases cited."

In the recent case of State ex rel. Donnell v. Osburn, 147 S. W. (2d) 1065, it was ruled by the Supreme Court that the adding of figures was purely ministerial. And the comparison of a bank account and paid bonds and coupons would be an act of a similar nature, purely ministerial and requiring the exercise of no discretion.

It is a well settled general rule that the discharge of a duty involving the exercise of discretion cannot be delegated and no authority is cited on the proposition.

And it is equally as well settled that the performance of purely ministerial functions can be delegated to others to be performed. This was a principle of the common law, and has been followed in the decisions in this and other states.

In the early case of Hunter v. Hemphill, 6 Mo. 106, the Court, at l. c. 21, said:

" * * * Before that question could be determined, it would be necessary to look into the nature of the act which was to be performed, if a mere clerical act, it might have been performed by deputy; if a judicial act, and the register does, for some purposes, and in some matters, act as a judicial officer (as in granting pre-emptions) the act could not have been performed by deputy. * * * "
(Underscoring ours)

And in the case of *Small v. Field*, 102 Mo. 104, in passing upon the right of a clerk of a court to appoint a deputy where no statutory authority was found, the following quotation is found at l. c. 119:

"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316, 317, -- Tit. Offices and Officers. And the rule is general that a deputy may do every act which his principal might do. Com. Dig. Officers, D. 3; Confiscation Cases, 20 Wall. 92."

And in Volume 46 of *Corpus Juris* at pages 1033 and 1063, it is stated that the performance of ministerial duties may be delegated to others.

In the case of *Blades v. Hawkins*, 240 Mo. 187, the Supreme Court upheld the right of a County Court to employ accountants to audit the accounts of county officers where no statutory authority was conferred, holding that the power was implied as the County Court was the general fiscal agent of a county holding supervisory powers over the collection and preservation of its powers.

The Board of Fund Commissioners has supervisory control over the treasury department of the state; it is composed of members who have a great many other duties to perform, and while upon some occasions this task of comparison might take very little time, upon others it might require a great deal of time and the members of the Board not be able to perform the duty personally because of their other duties.

In the case of *State ex rel. v. Reyburn*, 158 M. A. 172, a case in which mandamus was granted against a county clerk to compel him to permit the examination of the books and papers in his office by an accountant employed by one member of the County Court, the St. Louis Court of Appeals said, at l. c. 176-177:

"The matter of inspecting the books and papers of the clerk's office is purely ministerial and in no respect judicial in its character. It is therefore entirely clear that the law does not devolve it as a personal duty upon a judge of the county court which he may not delegate to another who is competent to perform such a task, especially when it appears the judge himself is from any cause unable or incapacitated to effectually discharge it. But that matter is unimportant, for the judge might cause the investigation to be made by expert accountants or others of his choosing though he were entirely competent himself. The principle announced in *State ex rel. Johnson v. Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126, is equally relevant here."

Again, in the case of *Menefee v. Taubman*, 159 M. A. 318, the Kansas City Court of Appeals upheld the act of a city engineer delegating to an assistant the duty of preparing plans and specifications of a public improvement and the following is taken from this case at l. c. 325:

"Finally defendants contend that the estimate, plans and specifications were not prepared by Duncan, the engineer, but by an assistant employed specially by him or by the city. The rule we applied in *Paving Co. v. O'Brien*, 128 Mo. App. 267, is invoked. We held that a city engineer had no authority to delegate such work to a private person but must bestow upon it his own care and skill, but we did not hold that he could not avail himself of the services and skill of his assistants. On the contrary, we expressed the opinion that 'such work might have been performed legally by assistants in his office under his supervision.' The evidence discloses that

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Duncan was not well qualified to perform the work in question and that he relied almost altogether on the skill and judgment of his assistant who was expert in such matters. But, further it appears that Duncan gave to the task the full measure of his skill, such as it was, and that to the best of his ability, he supervised the work of his assistant. This was all he could do and all the law as interpreted in the O'Brien case required of him."

CONCLUSION

From the nature of the duty, to compare the bank statement, the abstract of the coupons and bonds paid, and the bonds and coupons paid, placed upon the Board of Fund Commissioners, the composition of the Board and the numerous other duties of the members of this Board, it is the conclusion of the writer that the Board would have authority to delegate to some other person or persons this duty of making the comparison required by Section 13117, R. S. Mo. 1939.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ:VC

CRIMINAL LAW:
MOTOR VEHICLES:

Prosecution for theft of tires *of the* value of more than Thirty Dollars *must* be brought under the grand larceny section and not under the tampering section and upon acquittal the state must pay the costs.

April 25, 1941



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department under date of April 2, 1941, which reads as follows:

"We are enclosing herewith a letter from Mr. Jas. L. Paul, Prosecuting Attorney of McDonald County, in regard to liability for costs in case of State vs. Carl Mayfield No. 2482. We are also sending you the cost bill and information filed by the Prosecuting Attorney in this case.

"The cost bill in question was returned by us to the Circuit Clerk with the notation that the State was not liable for costs, reciting Sections 4475, 8404 and 4223 R. S. Mo. 1939 as authority.

"The property alleged by the information to have been bought and received by the defendant and to have been previously stolen, was five automobile tires. This department was relying on the assumption that the penalty for stealing property of this nature was not punishable solely by imprisonment in the penitentiary but could also be punished by jail sentence or fine, basing this on the provisions of Section 8404 R. S. Mo. 1939 and your opinion dated June 3, 1940, in regard to property of this nature. Also, (since the defendant was acquitted) we held that the costs were payable by the county under the provisions of Section 4223 R. S. Mo. 1939.

"You will note the exceptions taken by Mr. Paul. Please advise us in regard to this matter."

Section 4456, R. S. Missouri 1939 reads as follows:

"Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

Section 4457, R. S. Missouri 1939 reads as follows:

"Persons convicted of grand larceny shall be punished in the following cases as follows: First, for stealing an automobile or other motor vehicle, by imprisonment in the penitentiary not exceeding ten years; second, for stealing a horse, mare, gelding, colt, filly, mule or ass, by imprisonment in the penitentiary not exceeding seven years; third, in all other cases of grand larceny, by like imprisonment in the penitentiary not exceeding five years."

Section 4475, R. S. Missouri 1939 reads as follows:

"Every person who shall buy, or in any way receive, any goods, money, right in action, personal property, or any valuable security or effects whatsoever, that shall have been embezzled, converted, taken or secreted contrary to the provisions of the last four sections, or that

shall have been stolen from another, knowing the same to have been so embezzled, taken or secreted, or stolen, shall, upon conviction, be punished in the same manner and to the same extent as for the stealing of money, property or other thing so bought or received."

Section 8404, par. (a), R. S. Missouri 1939, reads as follows:

"Any person who shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, or any part, tire or equipment of a motor vehicle of a value of \$30.00 or more, or any person who shall be convicted of attempting to feloniously steal, take or carry away any such motor vehicle, part, tire or equipment, shall be guilty of a felony and shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment."

Under this paragraph it will be noticed that the penalty set out is a fine and a maximum of twenty-five years in the penitentiary. It will also be noticed that this penalty is included not only for the stealing, taking or carrying away of a motor vehicle, but also for the stealing, taking or carrying away of any part, tire or equipment of a motor vehicle of the value of thirty dollars or more.

The two penalties have been construed in the case of *State v. Mangiaracina*, 125 S. W. (2d) 58, pars. 1-4, where the court said:

"However, appellants are insisting that in the circumstances here involved they

may not be charged in the same count with the larceny of the automobile and the larceny of the fur coats, although both were consummated by the same act. Sec. 7786 is a later enactment than Secs. 4064 and 4065; and said Sec. 7786 deals with the subject matter of the larceny and attempted larceny of automobiles, whereas Secs. 4064 and 4065 deal with the common subject matter of grand larceny. We adopt a quotation from State v. Harris, 337 Mo. 1052, 1058, 87 S. W. 2d 1026, 1029 (6), citing additional authority, as applicable to the general effect of Sec. 7786 upon said Secs. 4064 and 4065: "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one * * *." Our General Assembly in the enactment of Sec. 7786 expressly provided that 'all laws or parts of laws contrary to, inconsistent or in conflict with any of the provisions of this act are hereby repealed * * *.' Laws 1st Ex. Sess. 1921, p. 106, Sec. 31. Thus a clear legislative intent to take the larceny or attempted larceny of the automobile here involved out from under the general provisions of Secs. 4064 and 4065 and to treat such larceny as an offense separate and apart from the offense denounced and punishable under the comprehensive terms of Secs. 4064 and 4065 is manifested. It follows

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that the instant information, charging in one count the larceny of the automobile and the larceny of the fur coats, charges offenses denounced by separate provisions of our statutes, calling for separate and distinct punishments, with Sec. 7786 permitting of a lighter punishment than that prescribed by Sec. 4065."

It will be noticed under Section 8404, supra, that it specifically states "any part, tire or equipment of a motor vehicle."

CONCLUSION.

In view of the above authorities it is the opinion of this department that when the parts, tires or equipment that are a part of a motor vehicle are stolen the prosecution must be based upon Section 8404, supra, but when the parts, tires or equipment are separate and apart from the car, and are stolen the prosecution must be based upon Section 4456, supra. It is further the opinion of this department that when a prosecution based upon Section 8404, supra, is dismissed by the State, or the defendant is acquitted, the county must pay the costs, but when the prosecution is based upon Section 4456, supra, and the State dismisses the charge or the defendant is acquitted, the State must pay the costs. The reason for the above distinction is that the State is not liable on the dismissal or the acquittal of a defendant charged under a graduated felony. In cases where the punishment is solely imprisonment in the penitentiary, as under Section 4456 the dismissal by the State or the acquittal by a jury results in the State paying the costs. If the tires are separate and not a part of the motor vehicle, as described in the letter received by you from James L. Paul, Prosecuting Attorney of McDonald County, the information should be brought under Section 4456, supra, which provides

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for a punishment of imprisonment solely in the penitentiary. Under Section 4475, supra, an information charging receiving stolen property, upon a conviction results in the same punishment as of larceny under Section 4456.

Since the information was brought under Section 4475, supra, and the punishment is the same as under Section 4456, supra, a dismissal by the State renders the State liable for the costs under Section 4223, R. S. Mo. 1939.

It is further the opinion of this department that the punishment for receiving stolen property, consisting of automobile tires not a part of a motor vehicle, if over Thirty Dollars, is imprisonment solely in the penitentiary and should not be charged under Section 8404, supra. It was our intention and still our contention, that under the opinion rendered your department on June 3rd, 1940, we then held and are still holding, that by the acquittal or dismissal of a case charging larceny of an automobile, tires or parts of an automobile, which are not separate and apart from an automobile, the costs must be paid by the county and not the State. It is further the opinion of this department that prosecuting attorneys filing informations charging the theft of automobile tires or parts and equipment of an automobile should specifically state whether the parts, tires or equipment are separate from an automobile or should state in the information that the parts, tires or equipment were taken from an automobile. In that way it would show specifically under which section the State is prosecuting and would be a great help to the Criminal Cost Clerk of the State of Missouri and the Clerk of the Circuit Court in the county where the costs should be paid.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:DA

CRIMINAL COSTS:
ON CHANGE OF VENUE:

Reporter's fee of Three Dollars should
be paid in the county where the information
or indictment is filed.

May 1, 1941

*See 34-1954 under
Lab. of January 21, 1954
Arthur W. Goodman Jr.
5-10*



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. Robert K. Nutter

Dear Sir:

Answering your request for an opinion dated April
2, 1941, in reference to four questions concerning criminal
costs, we submit the following:

Your first question reads as follows:

"1. In auditing cost fee bills pay-
able by the State, our criminal cost
department deducts the stenographer
fee if one is charged where a bill
shows that a plea of guilty was
entered. This deduction is made
upon the assumption that the case
is not contested. Are we correct
in making this deduction?"

Section 13346, R. S. Missouri 1939, partially reads
as follows:

"In every contested case, * * *
in any circuit court or division
thereof, when an official court
reporter is appointed, the clerk
of said court shall tax up the sum
of three dollars, to be collected
as other costs, and paid by said
clerk into the county or city
treasury, toward reimbursing the
county or city for the compensation
allowed such court reporter as herein-
before provided."

It will be noticed in the above section that it
specifically states a contested case. According to 13

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Corpus Juris, page 110, the word "contest" as a verb is defined as follows:

"To make a subject of dispute, contention, or litigation; to call in question; to challenge; to controvert; to oppose; to strive to win or to hold; to dispute; to defend, as a suit or other judicial proceeding; to dispute or resist, as a claim, by course of law; to litigate; to dispute the declared result of an election."

Under the above definition where the fee bill rendered to your office shows that a plea of guilty was entered it is not a contested case as set out under Section 13346, supra, and is a default case and, therefore, it is proper for your office to deduct the stenographer's fee, if one is charged, where the bill specifically shows that a plea of guilty was entered.

Your second question reads as follows:

"2. In some cases bills are presented to us to be audited, where a jury trial has been held and on account of a mistrial the cause is then set over to another term of court. In other words, two or more trials are had in the same case. Does this statute contemplate a charge for stenographer fee for each trial or should only one fee be taxed and allowed?"

Under Section 13346, supra, in plain and unambiguous language it specifically states "in every contested case." It does not say a trial. In the case of a mistrial the case is still pending and is the same case and only one cost of Three Dollars should be taxed up even if the case is tried more than one time.

In the case of Mechanics & Traders' Bank v. Glaser Bros., 40 Mo. App. 371, the court, in passing on the allow-

ance of the costs of Three Dollars to be taxed, said:

"The question for decision upon this record is, whether the fee of three dollars allowed by section 4 of the act of March 31, 1887 (Laws of 1887, page 146), can be taxed, in a proceeding by garnishment, as though it were a separate suit. The circuit court held that it could be so taxed, and the plaintiff has appealed from the decision. We are of opinion that it cannot be so taxed. Section 3 of the act provides for the payment of a salary to the court stenographers therein provided for, and also allows them compensation for writing long-hand transcripts of their notes. Section 4 is as follows: 'In every case (except in suits by the state for the collection of delinquent taxes), now or hereafter pending in any circuit court or division thereof, where an official stenographer is appointed, the clerk of said court shall tax up the sum of three dollars, to be collected as other costs, and thereupon to be paid by said clerk to the city treasurer to apply to the payment of salary of such stenographers as above.' This court is of opinion that a proceeding by garnishment in an attachment suit is not a 'case' within the meaning of the above statute. That it is a mere auxiliary proceeding, depending on the principal proceeding in which it is instituted, is abundantly shown by the statute creating and defining it. R. S. 1879, sec. 2531. It is not a suit or separable controversy within the meaning of the acts of congress allowing causes to be removed from the state courts to the federal courts. *Weeks v. Billings*, 55 N. H. 371; *Pratt v. Albright*, 9 Fed.

Rep. 634; Buford v. Strother, 10 Fed. Rep. 406; Poole v. Thatcherdeft, 19 Fed. Rep. 49. The right of costs is entirely conferred by statute. It is contrary to the policy of the law to enlarge such statutes by loose construction so as to build up constructive fees, since, as experience shows, the practice of taking these fees has a tendency to grow insensibly, even where the courts construe the statutes granting them strictly."

Under the holding in the above case it specifically sets out that other proceedings outside of the "case" was not a separate case but was merely auxiliary proceeding depending upon the principal proceeding in which it is instituted. It further held that a garnishment proceeding in an attachment suit was an auxiliary proceeding and was not a suit or separable controversy within the meaning of the statutes, acts of congress and proceedings for the removal from the state courts to the federal courts.

As set out in the second point of your request in case of a mistrial and the retrial of the same case, there was only one case and the second trial of the case was merely an auxiliary proceeding and a continuation of the filing of the first case.

Your third question reads as follows:

"3. Where a case is started in one county, and one or more trials are had and the cause is then taken on a change of venue to another county where the case is finally concluded by trial, should more than one \$3.00 stenographer fee be taxed and which county is entitled to same?"

Under Section 13346, supra, it specifically states, "In every contested case * * * the clerk of said court shall tax up the sum of three dollars, * * " There is no question but that the clerk referred to means the clerk of the court where the case is originally filed for the reason that this

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cost is a tax to be assessed by the clerk as a ministerial act and not by the court as a judicial act such as retaxing of costs.

In the case of Artophone Corporation v. Coale, 133 S. W. (2d) 343, pars. 2-4, the court said:

"* * * Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S. W. 2d 920, 925 (7-10). * * * * *"

The holding in the above case was to the effect that to construe a statute it is necessary to ascertain the lawmakers' intent and the purpose of the passing of the act.

In Section 13346, supra, it specifically states that the Three Dollars was to be collected as other costs and be paid by the said clerk into the county or city treasury for the purpose of reimbursing the county or city for the compensation allowed the court reporter as set out in Sections 13341, 13342 and 13343, R. S. Missouri 1939. Under Section 13341, R. S. Missouri 1939, it provides for the payment of certain amounts out of the county treasury the salary of the court reporter in certain amounts payable in equal monthly installments according to the population of the county. The courts have construed the word "county" under this section to mean also "circuit." State ex rel. v. Walker, 302 Mo. 116, 257 S. W. 470. Also, under Section 13341, R. S. Missouri 1939, it provided that where a judicial circuit is composed of more than one county, such salary shall be divided among the counties and be paid by them proportional as the population of such counties bear to the entire population of the circuit.

In view of the fact that the Three Dollars taxed up

by the clerk as costs for the purpose of reimbursing the county or city for the compensation allowed such court reporter by the county or city, then it seemed to be the intention of the Legislature and the purpose of the Legislature that the Three Dollars taxed up costs should be paid to the county where the contested case is first filed.

The courts of this state have distinguished as to the payment of costs which are definite and fixed by law and costs which require judicial action in determining the amount. In the case of *In Re Thomasson*, 119 S. W. (2d) 433, pars. 5, 6, the court said:

"In the matter of taxing costs, there is a distinction between the costs which are definite and fixed by law, and costs which require judicial action in determining the amount. *State ex rel. O'Briant v. Keokuk & W. R. Co.*, 176 Mo. 443, 75 S. W. 636. Costs which are definite and fixed by law are required by statute to be taxed in the first instance by the clerk of the court, a purely ministerial duty, and the retaxing of such costs may be had at any term of the court, the court in such instances itself exercising purely ministerial duties in correcting the errors, if any, made by the clerk in taxing the costs. This is not the case however in regard to the taxation of costs which require judicial investigation and determination, for there the court alone can order the costs taxed and retaxed, which 'must be done upon judicial investigation and determination, and must be done during the term of the court at which the final judgment in the cause is rendered, for it is elementary that with the lapse of the term at which the final judgment is rendered the jurisdiction of the court over the cause ceases.' *Burton v.*

Chicago & A. R. Co., 275 Mo. 185,
204 S. W. 501, 504."

It will be noticed in the above holding that the court specifically said that costs which are definite and fixed by law are required by statute to be taxes in the first instance by the clerk of the court and said that it was a purely ministerial duty. The courts have even held that where it is the duty of the clerk to tax fees, such as stenographer's fees allowed and required by law to be taxed and which he fails to do, he is liable on his official bond. In the case of State ex rel. Christian County v. Gideon, 158 Mo. 327, 1. c. 341, the court said:

"* * * * * Under the statute it was the duty of the clerk to tax these fees, 'to be collected as other costs, and thereupon to be paid by said clerk to the county treasurer.' (R. S. 1839, secs. 8249 and 8250.) If he failed to tax them they could not be collected and paid to the county treasurer, and if by reason of such failure the county lost fees which could have been collected, if they had been taxed, the county was damaged by the failure of the clerk to discharge his duty in this particular, and has a right of action on his bond for such damages. * * * * *

Your fourth question reads as follows:

"4. Where a case originates in one county and a trial which results in a mistrial is had and the cause is then taken on a change of venue to another county where the case is disposed of either by a plea of guilty by the defendant or dismissed by the State without a trial being had in the county to which the case venued, should one or more \$3.00 stenographer fees be taxed and which county should recieve the benefit of same?"

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In answer to your fourth question we have stated in our answer to your second question that only one stenographer's fee of Three Dollars can be allowed and that should be at the time of the trial of the first case even if it resulted in a mistrial. In your fourth question you inquire concerning a statement of fact where a mistrial is had and the cause is then taken on change of venue to another county. Section 4241, R. S. Missouri 1939, reads as follows:

"In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted; and in all cases where fines are imposed upon conviction under such indictments or prosecutions, or penalties or forfeitures of penal bonds in criminal cases, are collected, by civil action or otherwise, payable to the county, such fines, penalties and forfeitures shall be paid into the treasury of the county where such indictment was originally found or such prosecution originally instituted, for the benefit of the public school fund of the county."

This section specifically holds that the costs liable to be paid out of the county treasury shall be paid by the county in which the indictment was originally filed where a change of venue is taken from one county to another county.

Section 4242, R. S. Missouri 1939, provides that the bill of costs in any case which has been taken on a

change of venue from one county to another shall be presented to the county court in which the indictment was originally found or proceedings instituted and that the cost bill should be paid if the cause had been tried or otherwise disposed of in the first county.

In view of the above two sections commented upon, and in view of the fact that only one Three Dollar stenographer's fee can be taxed up, there is no question but the county where the case first originated is entitled to the Three Dollars taxed up by the clerk.

CONCLUSION

In answer to your first question, we hold that the state should not be compelled to pay the Three Dollars taxed up as reporters' fees, where the state is liable for the payment of the costs, unless it is a contested case, and under no circumstances should the state pay the Three Dollars taxed up as the reporter's costs where a plea of guilty was entered.

It is further the opinion of this department, in answer to your second question, that in case of a mistrial, and another trial is had which results in the state being liable for the criminal costs, only one cost of Three Dollars should be taxed up in the case as reimbursement to the county or city for the compensation allowed such court reporter by the county or city.

It is further the opinion of this department, in answer to your third question, that when a case is started in one county and one or more trials are had and the cause is then taken on a change of venue to another county where the case is finally concluded by trial, the Three Dollar stenographer's fee must be taxed up in the county of the origin of the case and should be paid to the county in which the indictment or information was originally filed.

It is further the opinion of this department, in answer to your fourth question, that where a case originates in one county and a trial results in a mistrial, and the cause is then taken on a change of venue to another county

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where the case is disposed of, either by plea of guilty by the defendant or dismissed by the state without a trial, the Three Dollar stenographer's fee should be taxed up in the county where the case originated and the county where it originated should receive the Three Dollar stenographer's fee when paid into the clerk's office.

The above conclusions, of course, are based upon the fact that in the above four questions the state only and not the county is liable for the payment of the costs in the criminal case in question.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

BOND ISSUES: Uncertified assessments can not be used in ascertaining value of property within political subdivisions.

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Attention: John L. Graves

Dear Mr. Smith:

Under date of April 25, 1941, your office, by John L. Graves, bond attorney, wrote this office asking for an opinion on the following question:

"An Injunction proceedings has been filed in the Circuit Court of Cole County, Missouri, against the State Board of Equalization and the State Tax Commission jointly, which injunction proceedings questions the assessment of the properties of the Western Union Telegraph Company, Postal Telegraph Company, Southwestern Bell Telephone Company and the American Telephone and Telegraph Company and enjoins the State Board of Equalization and Tax Commission from certifying to the various counties of the State, a certification of the assessment.

"Under Section 12 Article 10 of the Constitution of Missouri, relating to the limit of municipal indebtedness, it is provided that the basis of determining bonded indebtedness shall be extended on the value of taxable property to be ascertained by the assessment next

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before the last assessment for State and County purposes previous to the incurring of such indebtedness. In view of the pending injunction proceedings the simple legal question is whether or not the completed assessment as of June 1, 1937, which became a final assessment when the Board of Equalization adjourned sine die December 31, 1938, is the controlling assessment and whether or not the assessment as of June 1, 1938, which was a completed assessment on December 31, 1939. It is the assessment of June 1, 1939, which is questioned by the injunctive proceedings."

and enclosing copy of a letter written by the Honorable Robert B. Fizzell of the law firm of Bowersock, Fizzell and Rhodes, to your office pertaining to the same question.

The legal proposition, as we understand it from the letter of Mr. Graves, upon which you wish an opinion is this: 'Can the assessment for the year 1939 be treated as a completed assessment for the purpose of ascertaining the value of property within political subdivisions of the state when considering the legality of a bond issue, during the pendency of this suit, enjoining the State Tax Commission and the State Board of Equalization from certifying to the various counties the result of the assessment and equalization of values of the property of Telephone and Telegraph Companies for the year 1939.'

In writing this opinion, for the purpose of clarity, and the further reason that it may be read by persons not familiar with the constitutional and statutory provisions, we will set out herein certain portions of the Constitution and the Statutes with which your office is thoroughly familiar.

The portion of Section 12, Article X of the Constitution, pertinent to the question, is as follows:

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"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; * * * * *

The words 'last assessment' used in the above quoted portion of Section 12 of Article X of the Constitution have been held by our Supreme Court to mean 'last completed assessment', that is, an assessment which has passed through all the state agencies which have to do with property assessments. State ex rel. Dexter v. Gordon, 251 Mo. 303, Steinbrenner v. City of St. Joseph, 285 Mo. 318, State ex rel. Carthage v. Hackman, 287 Mo. 184, State ex rel. Jamison v. St. L.S.F. Railway Co., 318 Mo. 285, State ex rel. Lane v. St. L.S.F. Railway Co., 338 Mo. 852.

The assessment and equalization of the value of property of the telephone and telegraph corporations is provided for in Section 11295, Article 16, Chapter 74, Revised Statutes of Missouri, 1939, which section is herein set out, as follows:

"All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, interstate bus and truck lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission

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lines, oil pipe lines, gas pipe lines, gasoline pipe lines, interstate bus and truck lines, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, interstate bus and truck lines, or express companies in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

It will be noted that this section requires the filing, by the President or Chief Officer of telephone and telegraph companies, of a statement of the property owned by the companies in the same manner that property statements are filed on behalf of the railroad Companies and that the manner of assessing, adjusting and equalizing the value of such property is the same as applied to the value of the railroad companies.

The law in regard to the assessment and equalization of the value of property of railroad companies is set out in Article 14, Chapter 71, Revised Statutes of Missouri, 1939. The sections of the statutes in this article and chapter, which we consider pertinent to your question, are Section 11243, which requires the president or chief officer of each company to file property statement; Section 11247, prescribing certain duties of the State Auditor in connection with such property statements; Section 11248, which directs the action of the State Board of Equalization in connection with such property statements; Section 11254, requiring the State Board of Equalization to keep a record of its action and directing the Board in connection with the record, and Section 11255, directing the certification and publication of the completed record by the State Auditor. All of these sections are herein set out, as follows:

Section 11243:

"On or before the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof."

Section 11247:

"On the third Monday of April in each year, the state auditor shall lay before the state board of assessment and equalization all returns made to him by every railroad company and county clerk."

Section 11248:

"The state board for the assessment and equalization of railroad property shall be composed of the governor, secretary of state, state auditor, state treasurer and attorney-general, and shall meet annually at the capitol in the City of Jefferson, on the third Monday of April of each year, for the purpose of assessing, adjusting and equalizing the valuation of such railroad property. The said board shall proceed to assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 11243. The board shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other property belonging to said railroad companies, or property belonging to any railroad companies in this state of the kind specified in section 11243, upon which no returns have been made, which may be otherwise known to them, as they may deem just and right. In assessing, adjusting and equalizing any railroad property for any year or years, the state board may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusion and judgment by the testimony which may be adduced, further

than to give it such weight as the board may think it is entitled to: Provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said board shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Section 11254:

"The said board shall cause to be kept a fair and full record of all its proceedings and decisions, and shall cause the same to be signed officially by the president and the secretary, and file said record in the office of the state auditor on its adjournment. As soon as said record is filed with the state auditor, he shall furnish a copy of the same, duly certified, under seal of his office, to the state printer for publication; and said state printer shall publish five hundred copies of the same, in the usual style and at the same rates now provided by law for the publication of the journals of the general assembly; and said published copy of the record of the proceedings and decisions of said board shall be received in all courts of this state as evidence of the action of said board. Said printed copies shall be disposed of as follows: Two hundred copies shall be delivered to the secretary of state, for the use of the members and officers of said board, and the remaining three hundred

copies shall be for general distribution, in the same manner as is now or may hereafter be provided by law for the distribution of the laws and journals of the general assembly. The cost of printing and distributing the same shall be paid for out of the appropriation for the contingent expenses of said board."

Section 11255:

"On the receipt of the proceedings of said board, the state auditor shall certify to the secretaries of the respective railroad companies, and also to the county courts of the proper counties, the action of said board, which certificate shall set forth the entire length of such railroad, including sidetracks, in the state, and the valuation thereof per mile; the total value of the rolling stock of said railroad; the total length of the roadbed, including sidetracks, in each county, city, town, village, and municipal township; also, the total value of roadbed and sidetracks and rolling stock as adjusted, equalized, assessed and apportioned to such county, city, town, village and municipal township therein by said board; and such certificates, respectively, shall be held and received in all courts and places where the action of said board shall be called in question, as prima facie evidence of the facts set forth in said certificates, and that each and every act and thing required to be done by said board, under the provisions of this article, had been fully complied with, and the party using or offering such certificate in evidence shall not be required to produce the record of the proceedings or decisions of said board, or a copy thereof, nor any other matter or thing as evidence to sustain such certificate."

In the case of State ex rel. School District of Webster Groves v. Hackmann, 294 Mo. 190, the Supreme Court had before it the question of what constituted the assessment next before the last for the purpose of ascertaining the value of the property in a political subdivision in relation to the amount of indebtedness that the school district could incur. The Court held that it must be an assessment which had been taken as of a certain time, regardless of whether or not the parts of the assessment were all equalized and completed at the same time. We quote at length from this case where the Court, at 1, c. 193-195, used the following language:

"The contention is that under Articles XVI and XVIII of Chapter 119, Revised Statutes 1919, the assessment of merchants' and manufacturers' stocks for 1920 was completed in September, 1920, and the taxes thereon collected November 1st of that year, and that the assessment of like stocks for 1921 was completed in September of 1921 and collected November 1, 1921; that, therefore, the assessment of such stocks for 1921, was, in April, 1922, the 'last' completed assessment, and that that completed in 1920 was, therefore, the 'next before the last' completed assessment, and, consequently, that of 1920 is the valuation of merchants' and manufacturers' stocks which goes into the valuation upon which the constitutional five per cent must be computed.

"(1) The language of Section 12 of Article X of the Constitution, so far as pertinent, is: 'No . . . school district . . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be in-

curred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness.' The words 'on the value of the taxable property therein' are significant. They make it clear that the purpose was to limit the indebtedness, which might be incurred, to five per cent of the value of the property in the subdivision which proposed to issue bonds. This implies the ascertainment of the value in some way and as of sometime. The Constitution does not leave this to implication. In the same sentence it fixes the method by which the value shall be ascertained and thereby fixes the time as of which the value is to be taken for the purpose in hand. So far as concerns all property other than stocks of merchants and manufacturers, the value fixed as of June 1, 1919, goes into the constitutional basis for the computation of the five per cent limitation in its application to this case. This was the value of such property 'therein,' i. e. in relator district, for the purposes of this proceeding. Subsequent changes in that valuation all relate to the original date. The valuation is fixed as of that date. (1 Cooley on Taxation (3 Ed.), pp. 604, 605, 606.) Upon the same date merchants and manufacturers were required to make their return. (Sec. 13071, R. S. 1919.) These returns disclosed the value of such property 'therein.' The total in fact disclosed, for present purposes, the actual value of all the property in the district on June 1, 1919. It was the value of all the property which was required to be taken in computing the five per cent. The Constitution uses the assessment merely as a method by which the value of the property in

a subdivision may be ascertained. This cannot be accomplished by taking the value of the real, personal and railroad, telegraph and telephone property as of June 1, 1919, and the value of merchants' and manufacturers' stocks as of June 1, 1920, and adding them together. In this case this would result in adding to the value of the property in relator district as of June 1, 1919, \$135,000, which was not in the district on that date, and thereby using as a basis for the five per cent computation the value of part of the property in the district in 1919 and the value of other property which was not in the district in 1919. The result is a value which in no event could represent the property in the district at any time, unless the assessments, by mere chance, were the same.

"(2) It is a completed assessment which must be taken. For the purpose of fixing the value of the taxable property therein with respect to any subdivision, this means an assessment completed in every respect. The merchants' and manufacturers' assessments made in 1920 as completed, so far as they are concerned, were completed in September, but the remainder of the 1920 assessment was not completed until 1921. The same thing is true of the assessment of 1921. The fact that the merchants' and manufacturers' taxes were collected more promptly than the rest does not affect the question. It remains true that, whether these taxes are collected or not, the assessments on which they are based do not become a part of a completed assessment until the whole assessment is completed. * * * * *

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In the cases of State ex rel. Jamison v. St. Louis-San Francisco Railway Co., 318 Mo. 285, and State ex rel. Lane v. St. Louis-San Francisco Railway Co., 338 Mo. 852, mentioned in the copy of letter from Mr. Fizzell enclosed with your opinion request, the Supreme Court had under consideration the words "last assessment" as used in Section 11 of Article X of the Constitution in connection with the levying of the tax rate by county courts. From an examination of facts set in these two cases, it might appear that the court in these cases approved the use of what might be termed a split assessment, that is, a portion of an assessment taken in one year and a portion of an assessment taken in another year, to be used as the last completed assessment for the purpose of ascertaining the rate which could be levied by the county court. If this is true, then it might be considered as furnishing at least the basis of a strong argument that such split assessment might be used in ascertaining the valuation of a political subdivision for the purpose of issuing bonds. However, we do not believe that any such split assessment could be used in that manner, for the purpose of ascertaining valuation to be used in connection with the issuance of bonds, and in this connection we call your attention to; First, these two cases were cases involving the tax levy and not the validity of bonds, Second, that in the case of State ex rel. Jamison v. Railway Co., the Supreme Court upheld the levy made by the county court, which was being questioned, without directly passing upon the question of the matter of using a split assessment, and in discussing the question, at l. c. 291, used the following language:

"The last assessment for state and county purposes, that is, the completed assessment for 1922, does not appear in the stipulation, further than the final valuation of merchants' stocks, which was nearly \$30,000 less than the 1923 valuation on the same item. But it is not necessary that the proof of the total of the 1922 assessment appear in the record in order that the judgment of the trial court should be entitled to affirmance."

The above quoted language would seem to be giving recognition to the principle that the last assessment must be as of some given time and not taken piecemeal. In the case of Lane v. St. Louis-San Francisco Railway Co., it seems that the question was solely upon which real estate and personal property assessment should have been used in determining the 1931 tax rate for the county; Third, neither of these cases in any manner takes up, cites or even mentions the case of State ex rel. Webster Groves School District v. Hackmann, supra, and while they may be authority for using a split assessment to fix the rate of levy for purposes of taxation, inasmuch as the Webster Groves case is not specifically overruled, we prefer to follow it as the law as to what is meant by last completed assessment for the purpose of ascertaining valuation upon which to base a bond issue.

In the case of State ex rel. Carthage v. Hackmann, 287 Mo. 184, a mandamus proceeding in which relator sought to compel the state auditor to register certain bonds in discussing the above quoted portion of Section 12 of Article X of the Constitution, used the following language at l. c. 188:

"The assessments mentioned in this section mean completed assessments. (State ex rel. City of Dexter v. Gordon, 251 Mo. 303; State ex rel. v. Wabash, 251 Mo. 134; Steinbrenner v. St. Joseph, 226 S. W. 890.) The clause 'previous to the incurring of such indebtedness' means previous to the authorization of the indebtedness in the election held by the voters of the municipality. (State ex rel. City of Dexter v. Gordon, supra; Steinbrenner v. St. Joseph, supra.) The State Board of Equalization had not completed the equalization of the 1918 assessment and certified its action thereon previous to September 16, 1919, the date of the election, and hence the assessment of 1916 was the 'next before the last assessment,' and must be used as the measuring rod." (Underscoring ours)

And again, in the case of State ex rel. Jamison v. St. Louis-San Francisco Railway Co., 318 Mo. page 285, a case which involved the validity of a tax rate levied and in which the words "last assessment" as used in Section 11 of Article X of the Constitution were being considered, the Supreme Court, in its discussion, at l. c. 290, said:

"* * * * When the valuation fixed by the State Board of Equalization for railroad and telegraph property is not certified until after the May term of the county court, such valuation cannot be used at that time as any part of the 'last assessment.'
* * * * *"

From the above cases it is our belief that before an assessment can be used for ascertaining the validity of bonds issued under authority of Section 12, Article X of the Constitution, the values, as shown by such assessment, must not only have been equalized but the result of the action of the State Board of Equalization must have been certified to the county in which the political subdivision is located, seeking to use the assessment as a measuring rod to ascertain whether or not its bond issue is within the Constitutional limitation.

Further, in the case of State ex rel. Jamison v. St. Louis-San Francisco Railway Co., supra, some illuminating discussion is found at l. c. 289, as follows:

"The term 'last assessment' is merely an arbitrary measuring rod which is not necessarily accurate at the time it is applied. In fixing the limit of indebtedness under Article X, Section 12, the 'assessment next before the last assessment' is used as the measuring rod, notwithstanding the actual assessed value in the taxing district may have markedly increased or decreased between the date of such 'assessment next before the last assessment' and the time when the particular bonds are voted."

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* * * * *

"* * * * If the assessment for the current year is completed at the time the levy is made, well and good. That assessment can be used as the measuring rod to ascertain the rate which can legally be levied. If the assessment for the current year is not complete at that time, then the completed assessment for the previous year must be used."

Under your statement of the question the State Board of Equalization has apparently completed its work of valuing and equalizing but has been prevented from certifying the result by the injunction. While the State Board of Equalization could not at this time change its valuation, the valuation is yet subject to be changed by decree of the court, further it has not yet reached any county, due to the injunction. An attempt to use the valuation for the year 1939, if it were obtained unofficially, would be an attempt to use an elastic measuring rod, and we do not believe this would be permissible.

CONCLUSION

It is our opinion that the assessment for the year 1939 can not be treated as a completed assessment in ascertaining the valuation of the property in a political subdivision as shown by the next before the last assessment for the purpose of issuing bonds until certified to the various counties.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

WOJ/rv

SCHOOLS: Contract for more than one year with teacher is legal and binds new board, if contract is made in good faith without fraud or collusion, and is for reasonable time.

(Overruling opinion of Mr. Buffington and reaffirming opinion of General Crow of May 1, 1933, to Board of Education, Columbia, Missouri)

May 9, 1941

Mr. Robert W. Smart
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri



Dear Sir:

You recently submitted by telephone the following request for an opinion:

"The school board of Miller, Missouri, (a town with a six director board) shortly before the annual school election in April 1940, and probably in March 1940, hired a superintendent of schools for two years, namely, for the school year of 1940-41 and the school year of 1941-42, and entered into a written contract with such superintendent for that period of time. The personnel of the board of directors changed as a result of the annual school election held in April 1941. The present school board desires to rescind the contract, if possible, and the opinion of this department is requested as to whether or not it may cancel the contract. There is no evidence that the contract was executed or induced by fraudulent practices or as a result of nepotism."

There has been considerable discussion both pro and con concerning the question which you present. We are enclosing an opinion rendered by this department on May 1, 1933, to the Board of Education, Columbia, Missouri, in which this question is exhaustively discussed. The statutes

do not bear directly on the question. It has long been a custom for the period of time for hiring teachers and superintendents to be for but one year, but in the absence of any statute prohibiting a contract for longer than one year, we think such a contract is not illegal. A change in the personnel of the board of directors, as a result of the annual school election, will not invalidate such a contract, but in fact will bind the new board provided that such contract is made in good faith without fraud or collusion and is for a reasonable period of time.

A most exhaustive review of this question is contained in the decision of Tate vs. School District No. 11, 23 S. W. (2nd) 1013, 1.c. 1021. The decisions of many foreign states are contained therein, but we will not burden this opinion with quotations from them all. We will cite the general rules as set forth in 35 Cyc. 1079 and 24 R.C.L. 579:

"The prevailing weight of judicial authority on the subject is thus stated in 35 Cyc. 1079, 1080: 'In the absence of a statutory provision limiting, either expressly or by implication, the time for which a contract for employment of a school-teacher may be made to a period within the contracting school board's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for the term of school succeeding their term of office, provided such contract is made in good faith, without fraud or collusion, and for a reasonable period of time; and the succeeding board or officers cannot ignore such contract because of mere formal and technical defects, or abrogate it without a valid reason therefor.'

The prevailing rule is thus stated in 24 R.C.L. 579: 'In the absence of an express or implied statutory limitation, a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract, if made in good faith and without fraudulent collusion, binds the succeeding board. It has even been held that, under proper circumstances, a board may contract for the services of an employee to commence at a time subsequent to the end of the term of one or more of their number and subsequent to the reorganization of the board as a whole, or even subsequent to the terms of the board as a whole. The fact that the purpose of the contract is to forestall the action of the succeeding board may not of itself render the contract void. But a hiring for an unusual time is strong evidence of fraud and collusion, which, if present, would invalidate the contract. Of course, any statutory implication that the powers of the board are limited to the current term would invalidate contracts for a term extending beyond that of the board.'

You will note that the decision of Gates School District 53 Ark. 468 is based on a statute similar in purport to that of the Missouri statute. Likewise, in the decision of Reubelt vs. Noblesville 106 Ind. 478 numerous other cases supporting the rules above quoted are cited. The only sound reason for permitting a contract in excess of one year seems to be to the effect that desirable teachers and superintendents may be lost to the school if the board is not authorized to employ them for more than one year.

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In the decision of *Aslin vs. Stoddard County* 106 S. W. (2nd) 472, the question arose as to whether or not the county court of Stoddard County was liable under a contract made to a janitor, and whether the members of the county court were bound by their predecessors. The Tate decision is cited and approved. The decision in the State of Minnesota, 108 Minn. 142 is as follows: "While there is some apparent conflict in the authorities it is reasonably clear that the weight of authority is to the effect that the board has such power." Another applicable and pertinent citation mentioned in the opinion is *Commissioners of Pulaski County vs. Shields* 136 Ind. 6, as follows:

"It (the board) is a continuous body while the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason."

We think that a school board speaks by and through its members but the board continues even though the membership be constantly changing and in the last analysis it is the board and not the individual members that makes a contract. In the *Stoddard County* decision, l.c. 477, the court further said:

"In our opinion a county court has power to make a contract such that here in question for a reasonable time, the performance of which will extend beyond the term of office of some member or members

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of the court. We so hold."

The question might arise as to the effect of an enactment by the legislature in 1931, Laws of 1931, page 331, wherein counties of 200,000 and less than 350,000 inhabitants, the board of education may contract under certain conditions with the superintendent of schools for a school district for a period not to exceed three years. The act further provides that the board may enter into contracts with teachers not to exceed two years. Some lawyers might interpret this section as a recognition by the legislature that contracts for teachers may not be extended beyond one year, and by the act attempt to enable the contract to extend beyond a year only in a certain county (St. Louis County).

It is reasonable to place the opposite interpretation, that is to the effect that the only intention of the legislature was to limit the term as it relates to time of such a contract, thereby recognizing that such power already existed, but the legislature merely wanted to limit the length of the term of the contract.

This department rendered an opinion to Honorable Lloyd W. King, State Superintendent, Department of Public Schools, on June 1, 1939, on an entirely different set of facts to which you present. However, the learned writer of the opinion appears to have branched out into the question herein involved, we think needlessly. But the result was the apparent conflict in the opinions of this department relating to your question.

In so far as our opinion of June 1, 1939, conflicts with our opinion of May 1, 1933, we overrule the opinion of June 1, 1939.

Mr. Robert W. Smart

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You state in your letter that the superintendent in question was hired for two years. This does not appear to be an unreasonable period of time and we are of the opinion that the contract, in the absence of the elements mentioned above, is legal and binding on the new board of directors.

Respectfully submitted

OLLIVER W. NOLAN
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General

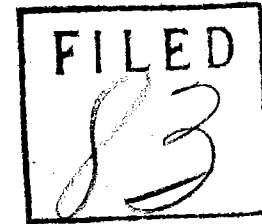
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MOTOR VEHICLES:) Motor vehicles carrying agricultural
) products exclusively in intrastate
PUBLIC SERVICE COMMISSION:) traffic exempt from Public Service
Commission Act.

July 2, 1941

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Honorable Buford Skaggs
Representative
State Capitol
Jefferson City, Missouri



Dear Mr. Skaggs:

This is to acknowledge your oral request for
an opinion on the following question:

"Do trucks which haul agricultural
products only to and from market
have to have an extra driver and
sleeper?"

Rule No. 51 of the Public Service Commission
relating to motor carriers and contract haulers prescribes
the following working hours:

"No motor carrier controlling, oper-
ating or managing any motor vehicle
used in the transportation of passen-
gers or property shall cause or allow
any driver or operator of such motor
vehicle to work as a driver or oper-
ator for a longer period than ten
hours and whenever any such driver or
operator shall have been continuously
on duty driving or operating for ten
hours, he shall be relieved and not
required or permitted again to go on
duty driving or operating until he has
had at least 10 consecutive hours off
duty, also that in cases of unforeseen
emergency a driver may remain on duty
not in excess of twelve hours.

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"(b) The ten-hour period provided for rest in sub-section (a) shall be taken while off the vehicle, unless such vehicle is equipped with reasonable sleeping quarters, consisting in part, of some form of bed."

The above rule, however, does not apply to motor vehicles used exclusively in the transportation of agricultural products in intrastate traffic for the reason that Section 5721, R. S. Mo. 1939, specifically exempts same; said section providing in part as follows:

"The provision of this article shall not apply to any * * * * * motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm * * * * *"

From the foregoing we are of the opinion that motor vehicles used exclusively in the transportation of agricultural products in intra state traffic are exempt from the Public Service Commission Act and therefore are not required to have an extra driver or sleeper and otherwise comply with the rules established by the Public Service Commission relating to the working hours of drivers or operators of motor vehicles.

It is to be understood that our opinion does not take into consideration the operation of trucks in interstate traffic. Such trucks are within the jurisdiction of the Interstate Commerce Commission. We do not have available the rules of the Interstate Commerce Commission and hence are unable to advise you with reference to same. Such information relating to the rules of the Interstate Commerce Commission may be obtained by writing Mr. J. F. Miller, District Director Interstate Commerce Commission, Bureau of Motor Carriers, 912 Baltimore Avenue, Kansas City, Missouri. If you desire

Hon. Buford Skaggs

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that we write the above party please communicate with the writer and we will be glad to do so.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG

CRIMINAL COSTS: Court reporter not entitled to costs of transcript of bill of exceptions on a pauper appeal until the case is finally decided and determined without right of further appeal.

July 8, 1941

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of June 19, 1941, which reads as follows:

"This is a request for an official opinion in regard to the payment of a court reporter fee in a criminal case where the defendant is allowed to appeal as a poor person.

"There was certified to this department for payment what purported to be a supplemental cost bill. The fee bill in question could not be classed as a 'subsequent bill' under the provisions of Section 4244 R. S. Mo. 1939. The bill had listed no fee except that of Mr. Fred W. Cramer, Official Reporter, Jackson County, Missouri, for preparing the bill of exceptions, which claim amounts to \$489.15.

"The defendant in this case was charged with murder and sentenced to ten years in the penitentiary. The defendant was allowed to appeal as a poor person. The court reporter's claim for preparing bill of exceptions was made up, approved by the judge of the court and certified to us on a fee bill marked 'supplemental'. Our Criminal Cost Department returned the cost bill to the circuit clerk citing that the costs in question

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were not payable until the completion of the case and cited in support thereof, Section 4236 R. S. Mo. 1939, which among other things cites ' * * * in which any criminal cause shall have been determined * * *.' In other words, our Criminal Cost Department has interpreted the word 'determined,' as used in Section 4236 to mean final adjudication by the courts without right of further appeal of the cause. Mr. Cramer, the official reporter who has the claim does not agree with this interpretation and insists that he is entitled to his fee at this time. We have not questioned the validity of the claim submitted but we have questioned the right to pay this fee before the completion of the case and in advance of other costs payable by the state.

"We request your official opinion in regard to the proper time for certification and payment of cost bills. Do the existing statutes or construction placed upon said statutes permit a cost bill for the fee of a court reporter for preparing the Bill of Exceptions where a defendant is allowed to appeal as a poor person, to be made up and certified before the final completion of the case and in advance of the certificate and payment of other costs payable by the state. If certified, should they be paid by the state in advance of other costs?"

The fee bill described in your request is marked "supplemental." Supplemental fee bills are governed by Section 4244, R. S. Missouri 1939. This section is only applicable in this case whereby an oversight or mistake the clerk failed to include any costs properly chargeable against the state or county in any fee bill he had before presented. It is very noticeable under this section that it specifically states "costs properly chargeable against the state or county."

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The only reference made to the payment of court reporters for transcripts furnished to defendants when they are unable to pay the costs of such transcript is partially set out in Section 13354, R. S. Missouri 1939, and reads as follows:

"* * * and provided, that in cases of appeal and on motions for new trial, the transcript of the evidence shall be furnished to the defendant upon the order of the court without cost to said defendant when it shall appear to the satisfaction of the court that the defendant is unable to pay the cost of such transcript for the purpose of making such appeal; and provided further, that the stenographer shall be allowed for making such transcript the sum of fifteen cents per folio of one hundred words for each transcript so furnished; and when the court shall be satisfied that the defendant is unable to pay for making such transcript, the same shall be taxed as costs in the case against the state or county, as may be proper."

Under the above section it specifically states "* * the same shall be taxed as costs in the case against the state or county, as may be proper." In other words, the payment must be taxed as costs by the state or county for the furnishing of a transcript of the trial of the case when ordered by the trial court. The partial section does not say that it must be paid but merely says taxed.

The above Section 13354, supra, was passed upon in the case of State v. Pieski, 248 Mo. 715, 1. c. 720, where the court said:

"There is no express statutory authority in this State for prosecuting an appeal in a criminal case in forma pauperis. In the courts

nisi it is but stating a ridiculous truism to say that one being prosecuted for a felony, has no occasion to invoke the privilege. By the vaguest statutory inference alone can it be said that this court has the right, even in a proper case properly presented, to permit the prosecution of an appeal without the payment of costs. These inferences arise only from the provisions of our laws providing for the duties of official stenographers in the circuit courts of the State. (Secs 11257, 11263, and 11246, R. S. 1909.) By virtue of these sections the trial court in case of an appeal or suing out of a writ of error in a criminal case, if 'it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of making the appeal, the court shall order the same to be furnished, and the stenographer's fee for making the same shall be taxed against the State or county, as may be proper.' But since orders permitting actions to be prosecuted in forma pauperis are not binding except in the court wherein such order is made (Collett v. Frazier, 3 Jones's Eq. (N.C.) 398; Oakes v. High, 32 N. Y. Supp. 289; 11 Cyc. 204), an order thus made by the trial court would not of itself bind this court on appeal and relieve the appellant of the duty of paying the costs of this court. It might be persuasive, upon a timely application made here for permission to prosecute an appeal in a criminal case as a poor person, but not binding. But application to prosecute as a poor person on appeal here ought to be made before the lapse of the one-year period limited by section 5313, supra."

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In that case the court specifically held that the Supreme Court was not bound by the actions of the trial court in permitting a person to appeal as a poor person.

In construing different sections of the statutes all sections in reference to the same subject matter must be considered together. It was held in the case of Whalen v. Buchanan County, 111 S. W. (2d) 177, 1. c. 180, where the court said:

"* * * Statutes relating to the same subject are to be construed together and, if possible, harmonized and effect given to all provisions. * * "

Section 4221, R. S. Missouri 1939, partially reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * * * *

The question as to whether the judgment was final was determined in the case of State of Missouri, ex rel., v. Carpenter, et al., 51 Mo. 555, 1. c. 556, where the court said:

"Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary,

yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review."

Section 4222, R. S. Missouri 1939, reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Under the above section the county, and not the state, is liable for the costs when a defendant is sentenced to the county jail or assessed a fine or both. This section is only applicable where the costs cannot be collected from the defendant.

Section 4223, R. S. Missouri 1939, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the

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prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Under the above section, upon an acquittal of a defendant on a charge which is punishable solely in the penitentiary, the state is required to pay the costs when the defendant is unable to pay them and in cases where the punishment is not solely in the penitentiary upon an acquittal, the costs shall be paid by the county.

All of the above sections reading together and read with Section 13354, supra, specifically hold that under certain circumstances the state must pay the costs and other circumstances the county must pay the costs, governed, of course, by the fact whether or not the costs can be collected from the defendant. Reading the above sections in reference to the clause under Section 13354, supra, which reads as follows: "* * the same shall be taxed as costs in the case against the state or county, as may be proper," the costs in any case may be taxed against the state or the county.

In the case of a graded felony, as carrying concealed weapons, upon a sentence to the penitentiary, where the defendant is unable to pay the costs, and the case is appealed and affirmed in the Supreme Court, the state would be liable for the costs. If the case is not affirmed by the Supreme Court but reversed and remanded for trial and the defendant, upon a retrial, is either sentenced to the county jail or assessed a fine, or both, the county, and not the state, would be liable for the costs providing the costs could not be collected from the defendant.

In the case covered by the supplemental fee bill attached to your request, which only sets out the costs allowed by the court to the court reporter for preparing a bill of exceptions for appeal to the Supreme Court, in which the death sentence was assessed, it is possible but not probable that the case may be reversed and remanded and the defendant convicted on the second trial on a charge of manslaughter and assessed a punishment or sentence to the county jail. In such a case the county would be liable for the costs in the case, including the bill of exceptions, provided the costs could not be collected from the defendant. This assessment of costs is governed by Sections 4221 and 4222, R. S. Missouri

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1939, supra.

Section 4236, R. S. Missouri 1939, reads as follows:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Under the above section it specifically states that the clerk, after a case has been determined or continued generally, shall tax all costs which have accrued in the case and specifically states, "and if the state or county shall be liable under the provisions of this article * * *."

Under the above section the question to be determined, first, is whether or not the state or county is liable for the costs under Sections 4221 and 4222, supra. Section 4237, R. S. Missouri 1939, merely refers to Section 4236, supra.

In this state both the appellate and Supreme Courts have passed upon the word "determined." In the case of The State v. Police Commissioners, 14 Mo. App. 297, l. c. 303, the court, in defining the word "determine", said:

"An idea that the statutory powers given to the commissioners are equivalent to a direct authority to terminate an official service at pleasure, seems to grow out of a misconception of the language employed. If it were the

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actual service which the board is empowered to 'determine,' there might be some propriety in attaching to the word used a signification of closing, concluding, or ending, instead of that one more commonly understood, which implies a fixing, settling, or deciding upon. But the time, which 'the board shall determine,' is coupled with the appointment, and not with the service. To determine this 'time' as directed, is to fix, settle, or decide what it shall be, as an addendum qualifying the effect of the appointment. * * * * *

Also, in the case of State v. Wright, 194 S. W. 35, par. 2, l. c. 37, the court said:

"While the above language is all that the act contains as to the initial manner of 'determining' the boundaries, the context we think, shows that the word 'determine' is not used in its strict sense of 'ascertaining to a mathematical certainty,' but it means that the county superintendent shall 'settle upon and decide' where such boundaries shall be; * * * * *

Also, in the case of State v. Manring, 58 S. W. (2d) 269, par. 6, l. c. 274, the court said:

"* * * * This court ruled the objection against the relators. It held that the word 'determine' as used in section 11259, R. S. Mo. 1919, with reference to the duty of the school superintendent to fix the boundaries of a proposed consolidated district, is not to be used in its strict sense of 'ascertaining to a mathematical certainty,' but it means that the superintendent 'shall settle upon and decide' where such boundaries

July 8, 1941

shall be. * * * * *

Also, in the case of State v. Bode, 113 S. W. (2d) 805, pars. 3-6, the court said:

"Relator does not contend that the paragraph presents an ambiguity, and it is admitted that the word 'determine,' as commonly used, means to conclude, settle, decide, and fix. If so, the paragraph, standing alone, authorizes the commission to settle the necessary qualifications of a director. We do not understand the relator to otherwise contend. He argues only that the paragraph should be harmonized with section 10, art. 8 (which requires a residence of one year), by interpolating after the word 'determine' in said paragraph the words 'subject to the provisions of section 10, art. VIII.' We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with section 10, 'the amendment must prevail because it is the latest expression of the will of the people.' * * * * *

CONCLUSION

In view of the above authorities it is the opinion of this department that a court reporter is not entitled to have made up and certified the costs for preparing a bill of exceptions where a defendant is allowed to appeal as a poor person before the case is finally completed.

It is further the opinion of this department that the court reporter is not entitled to a supplemental bill for costs in advance of the certificate and payment of other costs payable either by the state or county until

Hon. Forrest Smith

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July 8, 1941

the case is finally determined by the courts without
right for further appeal in the case.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

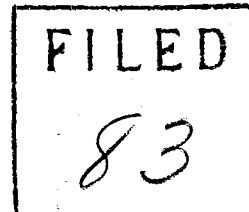
WJB:DA

STATE AUDITOR:
ESCHEAT FUND:

Auditor precluded ~~from~~ drawing warrants upon Escheat Fund absent an appropriation by the Legislature creating funds out of which the State Treasurer may pay such warrants.

7/25
July 24, 1941

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an official opinion as of July 21, 1941, which request reads as follows:

"The Legislature adjourned without making an appropriation authorizing us to pay out money from the Escheat Fund to claimants after their bills have been properly presented to our office.

"We would like an opinion from your office as to whether I can legally pay any money from the Escheat Fund in the absence of an appropriation duly passed by the Legislature and signed by the Governor.

"Section 19, Article 10, I believe covers this question."

In reply, we call attention to Section 621, R. S. Missouri, 1939, which section reads as follows:

"Within one year after the final settlement of any executor or administrator, assignee, sheriff or receiver, all moneys in his hands unpaid or unclaimed, as provided

in section 620, shall, upon the order of the court in which such settlement is made, be paid into the state treasury. And the state treasurer shall issue to him a duplicate receipt therefor, one of which shall be filed with the state auditor, who shall credit him with the amount thereof and charge the state treasurer therewith. All such moneys so received into the state treasury shall be credited into a fund, to be known and designated as 'escheats'."

We presume that it was under the force of this section that the moneys referred to in your request were lodged in the office of the state treasurer. We call attention to Section 43, Article 4, Constitution of Missouri, which provides in part as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:***"

It might be contended that the aforesaid section of the Constitution has only application to the money procured through revenue. However, it will be noted that in the aforesaid section the words, "moneys received by the State from any source whatsoever," and in reading Section 621, supra, we see that the legislature has set up a plan whereby escheat moneys may be paid into the state treasury and if it were authoritatively ruled by the courts that Section

621 has no application whatsoever to Section 43, Article 4 of the Constitution, then we call attention to Section 19, Article 10 of the Constitution which reads as follows:

"No moneys shall ever be paid out of the treasury of this State or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

It will be noted that the aforesaid section provides in part as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law;*****"

We are of the opinion that the above quoted language would be sufficient to preclude the state auditor from issuing any warrants unless there had first been an appropriation by the legislature for payment of such warrant. See State ex rel. v. Holladay, 64 Mo., p. 526, l.c. 527 where the court had this to say:

"For although the sections of the constitution just cited, do not in express and direct terms inhibit the auditor from drawing his warrant in favor of a claimant who relies

on an appropriation more than two years old, yet those sections, by necessary and inevitable implication, accomplish the same result; for it cannot, with any show of reason, be claimed that a warrant can be drawn without an appropriation; but as just seen, no appropriation possesses any validity, force, or even existence, after the lapse of two years."

It will be further noted that this section contains the words, "--or any of the funds under its management," which wording is broad enough to embody funds received through the force of Section 621, supra.

However, the legislature saw fit to enact Section 13043, R. S. Missouri, 1939, in pursuance to Article 10, Section 19 of the Constitution of Missouri, supra, which reads as follows:

"No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

It will be noted that Section 13043, supra, absolutely prohibits the auditor of the State of Missouri from drawing any warrants and precludes the state treasurer from paying any warrant unless money has been previously appropriated by law.

In the case of State ex rel. v. Gordon, 236 Missouri 142, l.c. 157, the court had this to say after setting out in the opinion in verbatim, Section 19, Article 10 and Section 43, Article 4 of the Constitution of Missouri, supra:

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment

July 24, 1941

of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury*****."

Even though the facts in the Gordon case, supra, were somewhat different from the facts set forth in your request, we think that the language above quoted in the Gordon case is controlling in the situation that you present to us. It will be noted that the court emphasized that moneys coming into the hands of the state treasurer from any source whatever, or any funds under his management should not be paid unless there had first been an appropriation made by the General Assembly for that purpose.

From the reading of Section 19, Article 10 and Section 43, Article 4 of the Constitution of Missouri, and also Section 13043 R. S. Missouri, 1939, we are of the opinion that one could not escape the conclusion that both the statute and the Constitution preclude the state auditor from drawing warrants, on the "Escheat Fund" in the hands of the state treasurer, until the legislature had appropriated a fund of money for the biennium in which said warrant was sought to be drawn, thereby creating a fund out of which the the state treasurer could pay said warrant.

As stated in the request for an opinion, the (Sixty-first) General Assembly failed to make an appropriation providing funds which would enable the state treasurer to pay warrants drawn by the state auditor on the "Escheat Fund".

CONCLUSION

We are of the opinion that due to the fact that the (Sixty-first) General Assembly failed to appropriate funds which would enable the state treasurer to pay warrants drawn by the state auditor upon the "Escheat Fund" to lawful claimants, the state auditor is precluded under the Constitution of Missouri and through the force of Section 13043 R. S. Missouri, 1939, from issuing warrants drawn on the "Escheat Fund" in the hands of the state treasurer until a subsequent legislature appropriates necessary funds for the payment of such warrants.

Respectfully submitted

B. RICHARDS CRNECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:EAW

SCHOOLS: School board is not authorized to buy caps and gowns and invitation cards for students at graduation time. There is no statute authorizing the same.

July 25, 1941

Hon. J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

FILED

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Dear Sir:

This department is in receipt of your letter of June 21st, wherein you make the following inquiry:

"Please give me an opinion on the following question,

"A rural school district operating on a 20¢ levy only, issued warrants for graduation expenses of high school pupils, who reside in the district. Is this expenditure of funds legal? The expense was for graduation cards and rent of gowns."

The question which you present has been a controversial one throughout the State. We do not think the question of whether the amount of taxes levied is 20¢ or any amount within the Constitutional limit would have any bearing on the matter. The power and authority of a school board to expend funds for any purpose must be found within the purview of some statute. School boards are creatures of the statute whose duties are purely statutory. The funds, management and control of a school district are solely within the hands of the board and all its powers must be gleaned from the statutes. *Corley v. Montgomery*, 46 S. W. (2d) 283.

Hon. J. P. Smith

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July 25, 1941

We have searched diligently through the statutes in an effort to find one broad enough in its terms to give the board of education such power as outlined in your letter. We confess that we have failed. We do not believe that the board has authority to provide for caps and gowns and graduation cards as, in one sense, it might constitute the use of public school funds for a donation, gift or private purpose.

In the decision of Hammond & Stephens v. Christian County, 62 S. W. (2d) 844, the Supreme Court holds that charts, stars, attendance certificates and awards, composing a system designed to stimulate school attendance and purchased by the county superintendent of schools, are not authorized by statute and that the county is not liable for the same.

We are not unmindful of the fact that caps and gowns, graduation invitations and cards are closely related and perhaps a part of a student's education, yet due to the fact that there is no statute authorizing the board to expend funds for such articles we are of the opinion that the board cannot do so.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:CP

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

CRIMINAL LAW: Setting out officers subject to prosecution for the purchase of fees and warrants at less than par under Section 4349, R. S. Missouri 1939.

October 2, 1941

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We have your request for an opinion from this department under date of September 23, 1941, which reads as follows:

"In our auditing of criminal cost cases we find in some of the counties of the state, that all of the county officials are engaged in the business of buying witness fees. Sections 4349 and 4486 Revised Statutes of Missouri 1939, seem to prohibit county officials from purchasing witness fees or other claims against the county at less than par.

"We would like an opinion from your office as to whether this prohibits the speculation by county officials in the buying of witness fees where the cost is paid by the State, and if so, what officials are prohibited from buying witness fees where the cost is paid by the State. If certain county officials are prohibited from buying witness fees, who is charged with the responsibility of filing charges against the guilty county officers."

In your request you mention Sections 4349 and 4486, R. S. Missouri 1939. Section 4349, R. S. Missouri 1939, provides as follows:

"It shall be unlawful for the clerk of any court, or his deputy, or any person in his employ, or any person

for him, or any other officer of any court, to buy or purchase, or trade for, directly or indirectly, any fee taxed or to be taxed as costs in the court of which he is clerk or officer, or of any other court in this state, or any county warrant, at less than par value, which may be by law due or become due to any person by or through any such court; and it shall be unlawful for any county clerk, circuit clerk, recorder, or any other officer of any court, or his deputy, or any person in his employ, to charge, collect or receive less fee for his services than is provided by law."

Under this section the crime described refers to fees and county warrants becoming due to any person by or through some court. The crime described in this section is a misdemeanor.

Section 4350, R. S. Missouri 1939, provides as follows:

"Any such clerk or officer violating the preceding section shall, upon conviction, be punished by fine of not less than one hundred dollars, and in addition shall forfeit his office, and it shall be the duty of the judge having criminal jurisdiction to give this and the preceding section in special charge to the grand jury."

Section 4486, R. S. Missouri 1939, provides as follows:

"Every clerk of a court of record, sheriff, marshal, constable, collector of public revenue, or deputy of any such officer, or a judge of a county court, prosecuting attorney or county treasurer, who shall traffic for or purchase at less than the par value or speculate in any county war-

October 2, 1941

rant issued by order of the county court of his county, or in any claim or demand held against such county, shall be adjudged guilty of a misdemeanor, and shall, upon conviction, be punished by fine not less than twenty nor more than fifty dollars."

Under this section the crime described refers to the traffic in county warrants on claims and demands held against the county. This section is not applicable in any way to your request for the reason you are interested in the disbursement of criminal costs paid by the state.

Under Section 4248, R. S. Missouri 1939, the state auditor pays to the county treasurer in a lump sum cost bills due and payable by the state. The county treasurer, in turn, disburses the money to the individual claimant of fees and it is not a claim or a warrant against the county as described in Section 4486, supra.

In your request you also ask what officials are prohibited from buying witness fees at less than par where the cost is paid by the state. Section 4349, supra, specifically sets out and prohibits the buying of a fee taxed or a county warrant at less than par value which becomes due through any court. The officers specifically named are the clerk of any court, or his deputy, or any person in or not in his employ who should purchase for him fees or warrants at less than par, or any other officer of any court. Since it specifically states the clerk of the court, there is no question but that he would be liable to prosecution under Section 4349, supra. Since it mentions "any other officer of any court," we are compelled to give our opinion as to who should be construed as "any other officer of any court." It goes without saying that the judge of a court is an officer of his own court. Under Section 13138, R. S. Missouri 1939, the duties of the sheriff are specifically set out, one of them being "and he shall attend upon all courts of record at every term." Under this section there is no question but that the sheriff is the officer of any court of record. State v. Yager, 250 Mo. 388.

Section 13339, R. S. Missouri 1939, specifically states, "such court reporter shall be a sworn officer of the court, * * "

It is, therefore, our opinion that a court reporter is an officer of the court although some states hold that a court reporter is not an officer of the court. It was so held in *State ex rel. v. Hitchcock*, 171 Mo. App. 109.

Under Section 12951, R. S. Missouri 1939, it is the duty of the prosecuting attorney to attend any term of the court having criminal jurisdiction in his county, and by reason of this section it is our opinion that a prosecuting attorney is an officer of the court.

The county treasurer, the recorder of deeds, the assessor and the coroner are not officers of any court. The coroner, under certain circumstances, may be considered an officer of the court when he is acting as sheriff where the sheriff has been disqualified or a vacancy has been declared in the office of sheriff.

In your request you ask who is charged with the responsibility of filing charges against the guilty officer who can be prosecuted under Section 4349, *supra*. Under Section 12948, *supra*, if the prosecuting attorney and assistant prosecuting attorneys be interested in any certain case, the court having criminal jurisdiction may appoint some other attorney to prosecute the case. In such a case where the prosecuting attorney is guilty of the crime charged under Section 4349, *supra*, then the court having criminal jurisdiction may appoint some other attorney to prosecute the prosecuting attorney.

Under Section 3891, R. S. Missouri 1939, the circuit court, and under Section 3804, R. S. Missouri 1939, a justice court has concurrent jurisdiction to try misdemeanors such as set out under Section 4349, *supra*.

Section 3895, R. S. Missouri 1939, provides as follows:

"When any person has knowledge of the commission of a crime, he may make his affidavit before any person authorized to administer oaths, setting forth the offense and the person or persons charged therewith, and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney, or

October 2, 1941

deposit it with the prosecuting attorney, furnishing also the names of the witnesses for the prosecution; and it shall be the duty of the prosecuting attorney to file an information, as soon as practicable, upon said affidavit, as directed in the next preceding section."

Under the above section any person may make the affidavit and file the same with the clerk of the court having jurisdiction of the crime and it shall be the duty of the prosecuting attorney to file an information as soon as practicable upon said affidavits.

Section 3805, R. S. Missouri 1939, provides the prosecuting attorney may file an information upon a misdemeanor in a justice court upon his own information and belief, and any individual may file a complaint before a justice of the peace upon a felony or upon a misdemeanor, and in a misdemeanor when the complaint is filed the prosecuting attorney shall file an information founded upon the complaint.

Under Section 3837, R. S. Missouri 1939, it is the duty of the prosecuting attorney to appear and prosecute all misdemeanors tried before any justice of the peace of his county.

An attorney has been commonly known as an officer of the court by the appeal courts of this state. In the case of *In Re Fenn*, 128 S. W. (2d) 657, the court said:

"* * 'while a lawyer is not a public officer in the constitutional sense of the term, he is an officer of the court, * * * * *

It was so held in the case of *In Re Sizer*, 134 S. W. (2d) 1085.

CONCLUSION

In view of the above authorities it is the opinion of this department that under Section 4349, *supra*, the judge of any court, the clerk of any court, any deputy clerk of

October 2, 1941

any court, the prosecuting attorney, the court reporter, the sheriff, and in some cases the coroner, are prohibited from directly or indirectly buying, purchasing or trading for any fee taxed or to be taxed as costs in the court of which he is an officer or of any other court in this state, or any county warrant, at less than par value, which may be by law due or become due to any person by or through any such court.

It is further the opinion of this department that any individual having knowledge of such an offense may file a complaint in the proper justice court and it then becomes the duty of the prosecuting attorney to file an information under this section which is a misdemeanor.

It is further the opinion of this department that the prosecuting attorney may file an information on his own knowledge and belief under Section 4349, supra, either directly in the criminal court or in a justice court.

It is further the opinion of this department that if the prosecuting attorney is guilty of a charge set out in Section 4349, supra, and a complaint is filed by an individual before a justice of the peace, then the judge of the criminal court may appoint another lawyer to prosecute the prosecuting attorney.

It is further the opinion of this department that the county treasurer, recorder of deeds, county collector, assessor, and in most instances the coroner and an attorney at law are not officers of the court and would not be subject to prosecution as officers of any court under Section 4349, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

APPROPRIATIONS: Appropriation from Private Grain Inspection fund for six months period is not affected by Section 73 of House Bill 581.

October 10, 1941

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Mr. Smith:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the following statement of facts:

"Section 73, House Bill 581, provides, 'All appropriations made under the provisions of House Bill 581 are subject to all prior appropriations made for State departments contained in this bill made by the 61st General Assembly, and in no event will the total appropriations of such departments exceed the amount set out in House Bill 581.'"

"Section 35, House Bill 66, makes an appropriation for the Grain and Warehouse Department, payable out of Private Inspection Fund. Also, Section 34 makes an appropriation for the same department payable out of Grain Inspection and Weighing Fund."

"House Bill 581 does not make an appropriation out of Private Inspection Fund for this department, but does provide for an appropriation out of the funds collected for weighing and inspection of grain, Section 46."

"As provided in Section 73, should the payments made under House Bill 66, Section 35, from Private Inspection Fund be charged under Section 46, House Bill 581?"

House Bill 66 found on page 73, Laws of Missouri, by Section 35 thereof, l.c. 94, makes an appropriation as follows:

"Grain and Warehouse Department Private Inspection Fund. -- There is hereby appropriated out of the State Treasury, chargeable

to the fund collected and received by the Warehouse Commissioner or his agents and employees on account of inspection and weighing grain in private warehouses, the sum of Nineteen Thousand Seven Hundred Ninety-seven Dollars (\$19,797.00) to pay the salaries, wages and per diem of the officers and employees and other expenses of the warehouse commissioner inspecting grain in private warehouses for the period beginning January 1, 1941, to June 30, 1941, as follows: * * * ."

House Bill 581, Laws of Missouri 194, page 181, by Section 46, l. c. 202, makes an appropriation as follows:

"Grain and Warehouse Department. -- There is hereby appropriated out of the State Treasury, chargeable to the fund into which the fees for the Weighing and Inspection of Grain are deposited, the sum of Four Hundred Fifty-one Thousand Five Hundred (\$451,500.00) Dollars to pay the salaries, wages and per diem of the officers and employees and other expense of the grain and warehouse commissioner, for the years 1941 and 1942, as follows: * * * ."

Section 73 of said House Bill 581, l. c. 219, reads as follows:

"Limitation of total expenditures. -- All appropriations made under the provisions of House Bill 581, are subject to all prior appropriations made for State Departments contained in this bill made by the 61st General Assembly and in no event will the total appropriation of such departments exceed the amount set out in House Bill 581."

The 61st General Assembly by House Bill 191, Laws of Missouri, 1941, page 343, amended the laws pertaining to grain and warehouses. Section 8 of this new act, pages 376 - 377, provides as follows:

"* * * All fees shall be turned into the State Treasury and set up as a special fund to the credit of the Grain Warehouse Fund, and all fees so turned into the State Treasury from services performed in accordance with the provisions of this act are hereby re-appropriated to the Department for the purpose of paying all salaries and expenses necessary for complying with the provisions of this act, and paying all other expenses incurred in the administration of the department. * *

* * * * *"

Prior to the 1941 act, supra, provision was made for the inspection of private warehouses by Sections 14684 and 14685, R. S. Mo., 1939. These sections authorized the charge of an inspection fee. The fees which accrued from private inspections under these sections were kept in a separate account and the appropriation for private inspections heretofore has been made as was made in said Section 35 of House Bill 66, supra. Under the foregoing quoted provisions of Section 8 of said House Bill 191, all fees for inspection are to be placed in one account. This new act was approved August 7, 1941, and since it did not have an emergency clause does not go into effect until ninety days after the adjournment of the General Assembly. With the foregoing provisions of the act pertaining to the deposit of all inspection fees in this fund, it was not necessary for the General Assembly to make an appropriation out of private inspection funds for the balance of the biennium because the law pertaining to private inspection funds was replaced by the foregoing provisions of said House Bill 191.

Under Section 19 of Article 10 of the Constitution of Missouri, the appropriations under Section 35 of House Bill 66 would be in effect for a period of two years unless repealed by the General Assembly or unless the General Assembly provided for it to be in effect for a shorter period of time. In so far as this appropriation depends upon private inspection funds being deposited into its account, from which payments are to be made, we would say that since said House Bill 191 stops the deposit of private inspection funds into that account, the appropriation would be repealed when no further funds were available in the account. However, it will be noted that the appropriation under said House Bill 66 by Section 35 thereof, was only to cover the period beginning January 1, 1941 and ending June 30, 1941, so regardless of the provisions of House Bill 191, or of the provisions of Section 19 of Article 10 of

the Constitution of Missouri, this appropriation lapses on June 30, 1941. It is our understanding that funds from private inspections were placed in this account during the above period and warrants were drawn by virtue of the above appropriation.

As stated above, said House Bill 581, Laws of Missouri, 1941, page 181, does not contain a section similar to Section 35 of House Bill 66, supra, whereby funds are appropriated out of private inspection funds, but it does contain a section appropriating moneys out of funds into which the fees for the weighing and inspection of grain are deposited. Section 46, supra.

Section 34, Laws of Missouri, 1941, page 94, makes the following appropriation:

"Grain and Warehouse Department. -- There is hereby appropriated out of the State Treasury chargeable to the Grain Inspection and Weighing Fund, the sum of One Hundred Seven Thousand Six Hundred Twenty-five Dollars (\$107,625.00) to pay the salaries, wages and per diem of the officers and employees and other expense of the grain and warehouse commissioner, for the period beginning January 1, 1941 to June 30, 1941, as follows:
* * * * "

By this section funds are appropriated out of grain inspection and weighing funds for the six months period beginning January 1, 1941 and ending June 30, 1941. The language, excepting the amount, of subsection A for personal service, and Subsection D for operation, in said section 34, supra, reads the same as does the same subsection in Section 46, supra, intending to appropriate money from the grain and warehouse department for the remainder of the biennium. In other words, the appropriations under these two sections were for the same purpose, and of course there could be no question but that the provisions of said Section 73, supra, would apply to the appropriations under both sections.

Since there is no real appropriation from the private inspection funds in House Bill 581, then it would be seen that said Section 73, was not intended by the lawmakers to include the appropriation made from private inspection funds as set out in said Section 35 of House Bill 66, supra.

This is a rather peculiar situation and we do not find any case in this state which is authority upon which to base our view. However, we may use some rules of construction

which might be of aid in arriving at a conclusion here. One of these rules of construction is stated in State ex rel. McAllister v. Dunn, 277 Mo. 38, l. c. 45:

"* * * That the Legislature intended to accomplish something is not an unreasonable conclusion. That the statute should be construed to effect this, if on its face it is open to two reasonable constructions, is settled law. * * *"

Applying this rule here we must assume that the General Assembly, when they made the appropriation out of private inspection funds did not intend to do a useless thing, but if we were to construe the two appropriation acts so that by the provisions of said Section 73, no appropriation would be made under said Section 35, then we would be giving this statute a construction which would be that the Legislature did a useless thing. Another rule of construction which might be applicable here would be that repeals by implication are not favored and in order to effect such a repeal, it would have to be quite apparent that it was so intended. This rule is enacted in State ex inf. Major v. Amick, 247 Mo. 271, l. c. 289, where the Court said:

"If these two statutes are consistent and can stand together, then it is the duty of the court to harmonize rather than to hunt for conflict of statutory provisions in pari materia."

"In discussing this canon of statutory construction, the Supreme Court of the United States, in the case of Frost v. Wenie, 157 U. S. 58, used this language: 'It is well settled that repeals by implication are not favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court -- no purpose to repeal being clearly expressed or indicated -- is, if possible, to give effect to both. In other words, it must not be supposed that the Legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute.'"

October 10, 1941

Applying this rule here under the provisions of Sections 73 and 46 of House Bill 581, we would hold that the payments made under Section 35 of House Bill 66 should be charged under Section 46 of House Bill 581, but we think such a holding would by implication repeal the appropriation made by the General Assembly under said Section 35, and be contrary to the rule enacted above.

CONCLUSION

From the foregoing it is the opinion of this department that the appropriation from the Private Grain Inspection fund made by Sec. 35 of House Bill 66 is not affected by House Bill 581 and especially Sec. 73 thereof, and that all claims chargeable to the Private Inspection fund should be paid out of and charged to the appropriation authorized by Sec. 35 of House Bill 66.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

STATE AUDITOR: State auditor has power, under Section 13100, R. S. Mo. 1939, to compel Recorder of Deeds to show actual amount paid deputies or assistants. If he refuses to do so the matter should be referred to the Prosecuting Attorney.

October 22, 1941

Honorable Robert W. Smart
Prosecuting Attorney
Lawrence County
Mount Vernon, Missouri



Dear Sir:

This Department is in receipt of your letter of October 1, 1941, wherein you make the following inquiry:

"On January 23, 1940, Mr. Roberts, Lawrence County Recorder of Deeds, submitted his annual report to the County Court, making an accounting for all fees collected and received for the year 1939. These fees totaled \$5,756.15. Mr. Roberts then made a deduction of \$1800.00 for 'deputy hire and office help' leaving a balance of \$3,956.15. Since there is a statutory maximum of \$4,000.00 on the Recorder's salary there was no balance remaining to be paid back to the County. Mr. Williams desires to inquire into the correctness of the sum of \$1800.00 which Mr. Roberts deducted from his total fees received and has requested Mr. Roberts to produce either an affadavit, cancelled checks, or receipts, all of which requests have been refused by Mr. Roberts. Mr. Roberts takes the position that since he has submitted his report to the County Court setting up in full all fees received and further setting up the amount which he has deducted for deputy hire and office help, which report was approved by the County Court, that he is under no compunction under the law to produce any further evidence that he has

October 22, 1941

paid the amount set up for deputy hire and office help. In order that you may have a complete understanding of the facts, I am inclosing a copy of Mr. Roberts' report to which I have referred so that you may see the exact form in which the items are set up.

"The sole question to be determined is whether or not the State Auditor or his representative, under the circumstances which I have above outlined, has the authority to force the production of evidence on the part of the Recorder to prove that he has paid for deputy hire and office help in the amount which he deducts in his statement for same."

Article III, Chapter 87, Section 13094 to 13104, inclusive, R. S. Missouri, 1939, refers to the duties of the state auditor in connection with auditing the state institutions as well as all county officers. Section 13094, R. S. Missouri, 1939, specifically refers to the recorder of deeds including every county in the state.

Section 13098, R. S. Missouri, 1939, makes it a misdemeanor for any county officer to refuse to comply with the provisions of Article III. We herewith set forth the terms of Section 13100, R. S. Missouri, 1939, as we believe it is the pertinent section in answering your question:

"If any such officer or officers shall refuse to submit their books, papers and concerns to the inspection of the auditor of the state, or any of his examiners, or if anyone connected with the official duties of the state, county or institution shall refuse to submit to be examined upon oath, touching the officers of such county, the auditor of state shall report the fact to the prosecuting attorney, who shall

Hon. Robert W. Smart

(3)

October 22, 1941

institute such action or proceedings
against such officer or officers as
he may deem proper."

Under the Constitution, especially Article IX, Section 13 provides, in part, that every officer shall make a return quarterly to the County Court of all fees received by him and of the salaries actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit. The statement signed by the recorder of deeds is not verified and hence is open to attack as to its verity or correctness. By the terms of Section 13100, supra, it appears to be a matter which should be handled by you, as prosecuting attorney, after proper facts and report is submitted to you by the examining officer, and prosecution can be bottomed on Section 13098.

We call your attention to the fact that, by the terms of Section 13100, the examining officer may call for examination or testimony of any one connected with the official duties of the county. Therefore, by way of suggestion, it is possible that the state auditor or his deputies could examine the deputies and assistants who have served under the recorder of deeds and determine from such deputies and assistants the actual amount that was paid to them.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN/rv

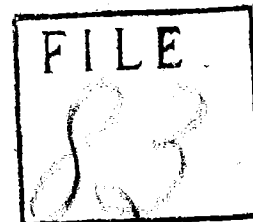
BOARD OF HEALTH: No limit on inspectors in Food & Drug and cosmetology departments or their salaries.

State Board through president may sign all payroll vouchers, except water and sewage division which Commissioner of Health may sign, but such duty may be delegated.

October 25, 1941

10-28

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of September 30, 1941, presenting for our opinion the following questions:

- "1. How many inspectors may the State Board of Health employ in its Food and Drug Department?
- "2. What compensation may they receive?
- "3. How many employees may the State Board of Health employ in its Cosmetology Department?
- "4. What compensation may they receive?
- "5. Who is authorized to sign pay-roll vouchers in the Board of Health, the President of the State Board of Health or the Secretary of the State Board of Health?"

In Laws of 1909, p. 559, the office of Hotel Inspector was created and certain duties were imposed upon said officer. In Laws of 1923, p. 227, said office was abolished and the duties thereof imposed upon the Food

October 25, 1941

and Drug Commissioner.

In Laws of 1919, p. 379, the office of Beverage Inspector was created and certain duties were imposed upon said officer. In Laws of 1923, p. 228, said office was abolished and the duties thereof were imposed upon the Food and Drug Commissioner.

In 1923 the Food and Drug Commissioner was a separate office existing under the provisions of Chapter 38, Article VI, R. S. Missouri, 1919, with the duty to make certain inspections relative to the manufacture and sale of food products and drugs.

It therefore appears that in 1923, after the enactment of the laws above mentioned, relative to hotel and beverage inspections, the Food and Drug Commissioner became vested with duties relative to three subjects -- hotel inspections, beverage inspections and inspections of food and drugs.

In Laws of 1933, p. 255, the office of Food and Drug Commissioner was abolished and the duties thereof were conferred upon the Commissioner of Health.

In Laws of 1939, p. 416, the act of the General Assembly in 1933, abolishing the office of Food and Drug Commissioner and imposing the duties thereof on the Commissioner of Health, was repealed and a new act passed which conferred the duties of said Food and Drug Commissioner on the State Board of Health of Missouri.

Since the Act in 1939, no further changes have been made, and it thus appears that the administration of the laws relating to hotel inspections, beverage inspections and inspections of food and drugs is now vested in the State Board of Health.

Under Section 9737, R. S. Missouri, 1939, the State Board of Health is directed to establish certain divisions in said agency, and we assume that under such authority there has been established the Division of Food and Drugs. This division includes the duties pertaining to hotel inspections, beverage inspections and inspections of food and drugs.

Chapter 58, Article VI, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to hotel inspections. As the article now stands, there is no provision made therein for employees or inspectors or for a salary for such employees or inspectors. The only reference is found in Section 9925 thereof, wherein it is made the duty of the "commissioner and his deputies to see that all the provisions of this article are complied with," and Section 9954, referring to method of payment of deputies. Prior to 1923, when the office of Hotel Inspector was abolished, the statute (Sec. 5889, R. S. Missouri, 1919) provided for not to exceed three deputies with a salary of not to exceed \$100.00 per month. This statute was expressly repealed by the 1923 Act (Laws 1923, p. 227).

Chapter 58, Article VII, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to beverage inspections. As the article now stands, there is no provision made therein for employees or inspectors or for their salaries. The only reference found is in Sections 9969, 9976 thereof, providing that "the expense of said office, including the salaries of the commissioner and his deputies, shall be paid monthly out of the amount appropriated by law, * * *." Prior to 1923, when the office of Beverage Inspector was abolished, the statutes (Secs. 5959, 5960, R. S. Mo. 1919) provided for four deputies with an annual salary of \$1800.00, and such chemical and clerical help as was necessary, with no fixed salary or any provision made for a salary for such employees, except for provision for payment of all salaries out of such sums as may be appropriated for such purpose. These statutes were expressly repealed by the 1923 Act (Laws 1923, p. 228).

Chapter 58, Articles I to V, inclusive, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to inspection of food and drugs. As the articles now stand, Section 9856 thereof authorizes the appointment of one deputy with a salary of \$1200.00 annually; not to exceed six inspectors with a salary of \$1000.00, annually and allows the commissioner not to exceed \$50.00 per month for clerk hire. Prior to 1933, when the office of Food and Drug Commissioner was abolished, this section was the same (Sec. 13006, R. S. Mo. 1929).

A summary of the foregoing results in the following: In only one (the article pertaining to food and drugs) of these articles is any express provision made of inspectors and their salaries, but all contain reference to deputies by either referring to the duties or the method of paying the salary of such deputies.

Chapter 57, Article V, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to Cosmetology, Hairdressers and Manicurists. Examination of that Article discloses that it makes no provision for any employees or inspectors and does not even make a reference thereto, such as was found in the articles heretofore examined.

We have further examined all other articles of Chapter 57 and 58, R. S. Missouri, 1939, which the Board of Health is charged with administering, and except as heretofore noted, find only one provision made for employees. That is found in Section 9761, Chapter 57, Article II, R. S. Missouri, 1939, relating to vital statistics.

However, we do not think that the failure of the law to expressly authorize the appointment of employees and inspectors in the Food and Drug division (treating section 2856 as inoperative, later to be explained), and in the Cosmetology division, prevents the appointment of such employees and inspectors.

In 59 Corpus Juris, p. 128, Section 188, appears the following rule:

"State officers or boards have power to hire or appoint agents or other employees whenever such power is expressly conferred by law or implied from the nature of the duties to be performed, * * * * *" (Underscoring ours)

In *Wines v. Garrison*, 214 P. 56, 26 A. L. R. 1302, 1309 (Cal.) the following statement appears:

"* * * By section 59 of the County Government Act (1897) above quoted, and the corresponding section of the Political Code (Sec. 4024), the officer has the authority to appoint as many deputies and assistants as may be necessary to enable him to perform the duties of his office. This would be the rule without any statutory authority. * * * * *"
(Underscoring ours)

In John Taylor v. Brown, 4 Cal. 188, it appears that no statute existed authorizing the appointment of a deputy constable. When this right was called into question, the court said:

"A constable, like any other ministerial officer, has the right to appoint as many deputies as he pleases, * * * * *"

In Jobson v. Fennell, 35 Cal. 711, the point was involved that was ruled in the preceding case. The court said, l. c. 712:

"The general rule of the common law is, that officers who exercise judicial functions cannot act by deputy, but those who exercise merely ministerial functions may, without express authority to that effect, * * * * *"

"The statute of this State in relation to Constables is silent as to the appointment of deputies. (Stats. 1850, p. 263.) Such being the case, the rule of the common law applies, and it has accordingly been held that Constables may act by deputy in the exercise of their ministerial functions."

In Franklin v. Hammond, et al., 45 Pa. 507, it appears that the State Treasurer was authorized by statute to settle certain debts due the state from corporations. The treasurer, to carry out this power, appointed Thomas E. Franklin, Attorney-General of Pennsylvania, to be his agent. The Attorney-General in turn appointed J. W. Hammonds to act for him. The authority of Franklin to make this appointment was drawn into question. The court said, l. c. 512:

"Although not necessary to a determination of this case, we will look for a moment at the controverted point of authority. The authority to Franklin was 'to discover and bring to settlement corporations' in default to the Commonwealth, 'on account of non-payment of their dues, and to adopt such measures in the premises as to him may seem best calculated to carry out the authority hereby conferred.' If assistance were necessary in the performance of the duty assigned and accepted, surely here was authority to employ it. He was only limited in the measures to be employed by his own discretion, and the legal requirement that they should be lawful. If personal intercourse with the corporations was deemed better than a correspondence, he might employ the former in preference to the latter; he might attend in person or employ an agent. The proceedings were not restricted to process, so as to come within the prohibitions of the Act of 1806. It was an agency outside of that, effectuating what doubtless it was thought could not be as successfully accomplished by a resort to formal proceedings. Viewed in this light, we see the reason of the appointment of an agent, and at the same time the general authority conferred. * * * * *

In Opinion of the Justices, 54 Atl. 951 (N.H.), the point involved was the right of the Governor to appoint an attorney to collect certain claims against the United States. The court said, l. c. 951:

"By section 3, c. 2479, p. 2435, Laws 1861, the Governor, with the advice and consent of the council, was 'authorized and empowered to negotiate, adjust and settle all questions, accounts, matters and things, between this state and the United States, in any way * * * growing out of * * * any contracts or expenditures which may be made for the public defense or the payment of troops.' The Governor and Council at the date of the appointment in question (this act being still in force) were therefore expressly authorized to negotiate, adjust, and settle any accounts or claims of this character then existing in favor of the state against the general government. That there were such claims appears to have been then contended, and is now established. The power so conferred, by necessary implication, included authority to do whatever was reasonably necessary for its proper and efficient execution. It is not to be supposed the Legislature understood the Governor and Council would or could personally perform all the services incident to the proper investigation, proof, and prosecution of such claims by the state. Such matters are commonly conducted by persons having special training, experience, and skill. The appointment of suitable persons to represent the state in the prosecution of its claim before the appropriate tribunals must therefore have been understood to have been embraced

within the general terms by which power in the matter was conferred upon the executive. Evidence in support of this conclusion is furnished by section 1, c. 4076, p. 3120, Laws 1865, in which the Governor and Council were empowered 'to pay the authorized agent or agents employed by the state in prosecuting the claims of said state against the United States.' No other statutory provision in the matter being found, this act appears to be a legislative recognition of the legal employment of 'agents' for the purpose named, under the act first cited. * * * * *

The foregoing authorities, while some are perhaps silent as to the rule invoked, invoke the rule that an officer or board has by implication all powers necessary to effectuate the express power granted. This rule has long been recognized and applied by the courts in this State. In *Hudgins v. Mooresville Consolidated School District, et al.*, 312 Mo. 1, 278 S. W. 769, 771, it is stated:

"* * * The rule of interpretation being that a power granted carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the one expressed; * * * * *"

Applying the foregoing rules to our precise question, it appears that the State Board of Health is composed of seven (7) persons (Section 9733, R. S. Missouri, 1939), and the statutes fixing their compensation at Ten Dollars (\$10.00) for each day engaged in carrying out their duties (Section 9740, R. S. Missouri, 1939), certainly contemplates only part time service. As was pointed out in the case of *Opinions of the Justices* (54 Atl. 951), it cannot be sup-

posed that the Legislature intended for these seven (7) men to personally make the necessary inspections of hotel, beverages and food and drugs, and as we have heretofore pointed out, the statutes pertaining to such function by referring to the duties of or method of payment of deputies and employees expressly recognizes that there will be persons employed to actually perform the duties imposed on the Board of Health. If it were not the rule that the State Board of Health could employ all persons necessary to carry out their powers, then those powers granted are empty and amount to nothing because of the impossibility of seven (7) men, with other duties besides, to carry them into effect.

The expressed power given the Board of Health is to inspect hotel, beverages, food and drugs, and license those desiring to become cosmetologists. In order to make this power effective, by implication said board has authority to employ all personnel necessary.

However, even this conclusion leaves one thing yet undeciphered. What effect is to be given Section 9856, R. S. Missouri, 1939, providing for certain employees and their salary to inspect food and drugs? It has been suggested that said section has been repealed by implication on the theory that it is inconsistent with the act abolishing the office of food and drug commissioner and conferring the duties on the Board of Health (Laws 1939, p. 416). We do not believe this to be so. "Courts will not hold that a later statute repeals an earlier one by implication, nor by an express provision to the effect that it repeals former acts inconsistent with it, unless the inconsistency clearly appears. If the two statutes may be read together without repugnancy or unreasonableness, they will be read together and given effect." (Nichol v. Hobbs, 197 S. W. 258, 259, Mo. Sup.) As we see it, the Act in Laws of 1939, p. 416 and Section 9856, R. S. Missouri, 1939, are in no way repugnant to each other. One abolishes an office and transfers the powers and duties. The other contains one of the powers attached to the office abolished and of course, was carried on over as one power which the Board of Health could exercise. We think a reasonable view could, if said statute had a subject on which to operate, produce the result that now the Board of Health has the authority to

make the appointments mentioned in Section 9856, subject of course, to the limitations contained therein as to numbers and salary. However, this view in no way detracts from the power of said board to appoint as many persons as may be necessary to enforce the hotel and beverage inspections laws. The limitation is only on those appointments respecting food and drugs, and even so, we do not think it operates as a barrier to the appointment of more than one deputy and six inspectors on that phase of the work.

Our reason is that Section 9737, R. S. Missouri, 1939, provides as follows:

"In addition to the divisions of vital statistics and laboratories already established, the board shall establish the following divisions: Preventable diseases, including tuberculosis, child hygiene, venereal diseases; and other divisions as it may deem necessary from time to time. * * * * *

As we understand it, the Board has, under this broad authority, established the Division of Food and Drugs, which administers, under the supervision of the board, the laws pertaining to hotel, beverage and food and drug inspections. That being so, these subject matters have lost their identity so far as it may be said that one inspector was hired to do this duty and another to do that duty. And this is true, irrespective of the terms of Section 9737. When the offices of hotel and beverage inspector were abolished and the duties conferred on the Food and Drug Commissioner, the effect of such action was to weld the three into one single department -- The Food and Drug Department. Thus, when the duties of the food and drug commissioner were placed on the Board of Health, that officer's department went into the board of health as a single unit. Therefore, it appears to make little difference whether it has been constituted a division by the board or has been merely left as it was, the result either way is the same. It is a single unit with

no line being drawn between the three types of work it performs, so far as the employees of said unit or division are concerned.

We think the Legislature has recognized this view. In Laws of 1937, p. 113, we find an appropriation to the Food and Drug Department and it makes no break down as to what part of the funds are allocated to hotel, beverage and food and drug inspections. The same appears in the appropriation in Laws of 1939, p. 128. The same is also true of the appropriations in Laws of 1941, p. 98, 218.

We, therefore, fail to see how it can be said that an inspector employed in the "Food and Drug Department" with the duty of enforcing the law pertaining to said department, can be said to be limited as to salary by the terms of Section 9856, which clearly applies to only a portion of his duties. By the same reasoning, we do not see how the Board of Health is in any way limited by said section as to the number of inspectors it may employ to enforce said laws, which are articles 1 to 7, inclusive, of Chapter 58, R. S. Missouri, 1939. We are further fortified in this view by the terms of Section 9856, R. S. Missouri, 1939, which specifically restricts the duties of the employees provided for under Section 9856, to enforcing "all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products * * * or drug." The present inspectors do not have these duties alone, they have those and the further duty to inspect hotels and beverages. Section 9856 stands unrepealed, but inoperative because there is nothing in existence to which it applies. There are no inspectors of food and drugs. The present inspectors are inspectors of the Food and Drug Division of the Board of Health.

It is, therefore, our opinion that the board of health may employ as many inspectors as necessity demands in the division of Food and Drugs and division of Cosmetology, subject only to the limitation of the available appropriation.

Your question as to the salary that may be paid said inspectors seems to be completely answered by the case of State ex rel. Hueller v. Thompson, 289 S. W. 338 (Mo. Sup.)

That case involved the right of the Board of Permanent Seat of Government to appoint an assistant commissioner and the fixing of his salary. The statutes involved authorized the appointment of a commissioner at a salary of Two Thousand Five Hundred Dollars (\$2,500.00), and authorized the appointment of as many watchmen as was necessary but did not fix their salary. No provision was made for the appointment of an assistant commissioner or fixing a salary for the same. The court disposed of the question as follows, l. c. 340:

"Since the Legislature has not, by any general law, fixed the compensation of any employees or appointees of the board of the permanent seat of government, except that of the commissioner thereof, and has not named or limited the number of such employees or appointees, save and except certain temporary employees (section 9267, R. S. Mo. 1919), it is to be presumed that it intended to give the board a discretion as to the kind and number of assistants and helpers necessary to carry on the duties enjoined upon the board by said chapter 84, as well as the compensation of such employees, helpers, and assistants. Indeed, the number of persons necessary to take care of and protect the property of the state, as contemplated and required by law, is a matter which the Legislature could not foresee. Therefore the placing of no inhibition upon the employment of such help, but to leave the same to the wisdom and discretion of the board of the permanent seat of government, reflects a wholesome legislative policy. We hold, therefore, that the board, in its discretion, had the power to appoint an assistant commissioner and to fix his compensation. * * * * *." (Underscoring ours)

Just previous to this ruling the court said, l. c. 340:

"* * * As to the compensation of these watchmen, the statute makes no provision, thereby leaving it within the authority of the board to fix such compensation as the board may deem fair and reasonable."

It is clear that, under the rule laid down by this case, the Board of Health has authority to fix the salaries of the inspectors in the Division of Food and Drugs and Division of Cosmetology in such sums as the board may deem fair and reasonable.

The remaining question is: Who is authorized to sign payroll vouchers in the Board of Health? We take you to mean by this question all branches of said board and not just the two with which we have been dealing in the foregoing.

As we see it, this question is partially answered by the statutes and where the statute makes no express provision, it will depend upon who or what body is charged with administering the various provisions of Chapters 57 and 58, R. S. Missouri, 1939.

Under Section 9740, R. S. Missouri, 1939, it is expressly provided that the members of the board are to receive a per diem allowance, plus necessary expenses and that "The president of the board shall certify the amount to the Commissioner of Health and the per diem, traveling and other expenses of members and on presentation of this certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

Our view of the meaning of this statute is that the board members are authorized to be paid their per diem and expenses on the certificate of the president which certify the Commissioner of Health is to present to the auditor.

Under section 9752, R. S. Missouri, 1939, the division of Water and Sewage is maintained out of the fees collected for the service performed under section 9751, R. S. Missouri, 1939. Said section provides "the state auditor shall draw his warrant for claims against this fund (created out of the fees collected) after such claims have been approved by the secretary of the state board of health."

The Commissioner of Health, under Section 9744, R. S. Missouri, 1939, is constituted the secretary of the board. Therefore, the salaries attendant to administration of the Water and Sewage Division should be paid upon the voucher of the Commissioner of Health.

Article II of Chapter 57, R. S. Missouri, 1939, relates to the bureau of vital statistics. Section 9761 thereof makes the secretary of the board of health, (now the Commissioner of Health) the titular head of said department. The statute then provides, "The state board of health shall provide for such clerical and other assistance as may be necessary for the purposes of this article, who shall serve during the pleasure of the board, and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature." No provision is made in said article relative to who shall be authorized to submit payroll vouchers of these employees. However, since the Board of Health has the power to appoint and dismiss these persons, we are of the opinion said board, through its president, is the proper party to sign such vouchers.

Article IV, Chapter 57, R. S. Missouri, 1939, relates to chiropodists. The administration of this law is vested in the Board of Health (Sections 9795, 9808) and by section 9807, thereof the board members are allowed Ten Dollars (\$10.00), and expenses for each day spent in performance of his duties thereunder. The statute provides, "The said compensation and traveling expenses, and any incidental expense necessarily incurred by the board or any member thereof, shall, if approved by the board, be paid from the treasury of the state" out of the fees received under the provision of article IV.

It is, therefore, clear that this expense and compensation is to be paid, if approved by the board, and we think said board must act through its executive head, the president, in submitting the vouchers. Any other salary vouchers would be submitted in the same manner as indicated for the vital statistics bureau.

Article V of Chapter 57, R. S. Missouri, 1939, relates to Cosmetologists, etc. No provision is made in this article as to the method to be followed in seeking payment of salaries. The act is to be administered by the Board of Health, who has power to appoint and dismiss the employees. Therefore, the salaries should be paid as indicated for the vital statistics bureau.

Article VI, Chapter 57, R. S. Missouri, 1939, is the Narcotic Drug Act. The Board of Health has the duty of administering the same. No provision is made relative to the method in which salaries are to be paid. Therefore, the salaries should be paid upon vouchers signed by the president of the board.

Chapter 58, R. S. Missouri, 1939, contains seven (7) articles. The duties pertaining to each are vested in the Board of Health. Articles I to VI, inclusive, pertain to the food and drugs and by Section 9864 of Article I the duty of signing payroll vouchers is expressly placed upon the board which must act in that respect through its president. Article VI on hotel inspections in Section 9954 makes the same provision. Article VII on Beverage inspections in Sections 9969 and 9976, makes the same provision.

We have stated that the statutes referred to in Chapter 58, R. S. Missouri, 1939, expressly place this duty on the board. The term used in said statutes is the "commissioner," meaning the commissioner of food and drugs whose duties, under Section 9855, R. S. Missouri, 1939, are now vested in the Board of Health.

From the foregoing, it appears that all the persons that may be employed to administer the provisions of Chapters 57 and 58, R. S. Missouri, 1939, (except the Commissioner of Health, Section 9744), are appointed by and

Hon. Forrest Smith

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October 25, 1941

subject to dismissal by the State Board of Health. All the payroll vouchers for such persons should be signed by the board acting through its president, except those in the Water and Sewage divisions, which are to be signed by the Commissioner of Health (Section 9752, R. S. Missouri, 1939).

However, we believe that after the board has selected its employees and fixed their salaries, the mere signing of monthly payroll vouchers is a ministerial function which may be delegated by the board, by appropriate action, to some person to act in its stead.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

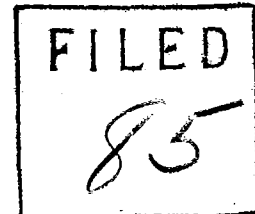
VANE C. THURLO
(Acting) Attorney General

LLB/rv

BOARD OF HEALTH: Commissioner of Health has a right to investigate the health conditions of a county jail, and should report his findings to the County Court and the Circuit Judge of the particular county, and may furnish his report to the City Council of the city in which the jail is situated.

July 19, 1941

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri



Dear Sir:

We are in receipt of your letter of July 16, 1941, enclosing a copy of a letter written to your department by B. T. Shukers, Justice of the Peace, Waynesville, Missouri, and requesting an opinion from this department, which request reads as follows:

"I am enclosing herewith a copy of a letter from Mr. B. T. Shukers, Justice of the Peace, Cullen Township, Pulaski County, Waynesville, Missouri. As you will note, this official is complaining of the insanitary condition of the County Jail of Pulaski County located at Waynesville, Missouri. If this jail, as set forth in the attached letter, does constitute a filthy insanitary condition and menace to the health of inmates, I am in doubt concerning my authority with regard to such a county institution.

"I would appreciate being advised as to my authority as State Health Commissioner to abate a health menace maintained by a county and further if so empowered, how, in your opinion, I should proceed as State Health Commissioner to secure a remedy, granting that an insanitary and unhealthful condition exists."

In reply, we quote the sections of the statute which we think are pertinent to the situation outlined in the request above, and later we shall refer to the several sections by number.

Section 9193, R. S. Mo. 1939:

"There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

Section 9205, R. S. Mo. 1939:

"It shall be the duty of the grand jury, at each term, or a committee, to consist of at least three members thereof, to visit the jail of their county, and examine the condition thereof, and inquire into the treatment of the prisoners, and make report thereof to the court."

Section 9206, R. S. Mo. 1939:

"It is hereby made the special duty of the court having criminal jurisdiction, at each term, to inquire and see that all prisoners are humanely treated."

Section 13730, R. S. Mo. 1939:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

In the case of Kansas City Disinfecting & Mfg. Co. v. Bates County, 273 Mo. 300, 1. c. 305, the court had this to say in passing upon what is now Section 9193:

"It is not doubted that the statutes (Secs. 1571 and 1573, R. S. 1909) and the construction thereof by this court in a case to an extent analogous (Harkreader v. Vernon County, 216 Mo. 696) furnish authority to a sheriff of a county to purchase such articles and supplies as are requisite and necessary to keep and maintain the county jail 'in good and sufficient condition and repair.'"

From the above authority, and by the terms of Section 9193, supra, the sheriff of the county apparently has the right to make necessary and emergency repairs of a minor nature in the upkeep and management of a county jail, so long as such repairs are reasonable.

It will be noted from a reading of Section 9205, supra, that the grand jury, when in session, shall visit the county jail and examine its condition and inquire into the treatment of the prisoners. Thus, the Legislature has provided a second means looking to the care and maintenance of county jails.

It will also be noted in reading Section 9206, supra, that the court having criminal jurisdiction shall inquire into and see that all persons are humanely treated. Thus, under this section, we think the judge of the circuit court of the county would also have a right to make investigation and to make such orders as he saw fit to the end that the jail was properly maintained in the county. We think further that wherein the section says that the prisoners shall be humanely treated would mean not only that the prisoners could not be physically tormented, but that the term is sufficiently broad to mean that a prisoner should not be subjected to a jail in which the conditions were such that it would be similar to the dungeons of old.

It will be noted from reading Section 13730, supra, that this section casts the duty upon the county court to keep the jail in good repair, in accordance with the financial ability of the particular county.

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In the case of State ex rel. v. Bollinger, 219 Mo. 204, 1. c. 223, 117 S. W. 1132, the court had this to say:

"Clearly that section of the statute (referring to Sec. 13730, supra) gives the county court of Stoddard county jurisdiction over the subject-matters complained of in the petition; and the pleadings, evidence and report of the referee filed herein disclose the fact that the county has sufficient money on hand with which to pay for the proposed improvements. That being true, then the county court of that county was acting within its jurisdiction, and prohibition will not lie. (State ex rel. v. Reynolds, 209 Mo. 161; State ex rel. v. Riley, 203 Mo. 175.)"

It will be noted, therefore, from a reading of the aforesaid sections of our statute that the Legislature has carefully provided the machinery for the upkeep of a county jail, and has cast upon the sheriff, the county court, the grand jury, when they are in session, and the circuit judge the duty to see that the county jail is kept in good repair, and that the persons who are incarcerated in said jail shall be treated humanely.

Now, turning to the portion of your request wherein you ask to be advised as to the authority of the State Health Commissioner when a situation exists wherein a jail is kept in an unsanitary and unhealthy condition, Section 9735, R. S. Mo. 1939, reads as follows:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such repre-

sentatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

It will be noted in reading the above section that it shall be the duty of the State Board of Health to safeguard the health of the people in the state, counties, cities, villages and towns. We are of the opinion that this language clearly contemplates that the Commissioner of Public Health shall have the right to investigate each and every jail throughout the state, for the reason that in all instances the county jail is located within the city limits of some particular municipality, and by its nature it is a place where people are incarcerated from time to time, and certainly a jail could get into such a condition that infectious, contagious, communicable or dangerous diseases could emanate therefrom.

However, when we view the cases which have arisen in the courts wherein this section has been construed, we find that in the case of State ex rel. v. Goodier, 195 Mo. 551, l. c. 559, the court had this to say:

"The gravamen of the complaint in the petition is that the board is going to try him without exercising compulsory process to bring before it the witnesses he needs for his defense. The State Board of Health is not a court, is not a judicial tribunal; it can issue no writ, it can try no case, render no judgment; it is merely a governmental agency, exercising ministerial functions; it may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the form or character of a judicial trial."

It will be noted in reading the foregoing excerpt from the Goodier case that the State Board of Health is not a judicial tribunal, but is merely a governmental agency exercising ministerial functions, and may investigate.

From reading the Goodier case, and due to the fact that the several sections of the statute exist as set forth in the first part of this opinion, we are of the opinion that the Commissioner of Public Health would unquestionably have the right to investigate the jail referred to in the opinion request, and to make his report as to the condition and whatever suggested changes that may be needed to the end that the jail may be reasonably repaired and maintained, but we think the duty would be upon the Commissioner of Public Health to report his findings to the county court of the particular county and to the circuit judge of the county, or, if a grand jury were in session, to appear before the grand jury. We are further of the opinion that the legal duty is cast upon the county court or the circuit judge, or both, to carry out and provide the necessary repairs, and to take such steps as are necessary to see that the jail is maintained in a reasonably healthful manner.

In reading from Joyce on Injunctions, Vol. 2, pp. 1520-1521, we find that there have arisen cases in the United States wherein the courts have upheld the right of a municipal corporation to maintain an injunction against a county wherein the county erected in the town an obnoxious cesspool. See Llano City v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008. In that case the court reasoned that a city corporation is a governmental agency, and has been given authority and power to abate nuisances, and has the right to resort to a court of equity to aid it by injunction.

It will also be noted in this work, at page 1521, that a board of health has been allowed to maintain an action for an injunction where the state and city ordinances so provide and the nuisance endangers the public health. However, in the State of Missouri we do not find any specific statute which gives the Commissioner of Public Health this right, and we are inclined to the view that the power and duty is in the hands of the county court and the circuit judge.

It will be noted in reading the cases cited in Joyce on Injunctions, supra - Board of Health of Yonkers v. Capcutt, 140 N. Y. 12, 23 L. R. A. 485, and Village of White Plains v. Tarrytown, W. P. & M. R. Co., 117 App. Div. (N.Y.) 841, that the board of health must bring the action in the name of the city, and the nuisance complained of must be set out in detail

Dr. James Stewart

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in the petition, and the board of health cannot declare a nuisance and order it abated. These decisions, we think, are in conformity with the principles set forth in the Goodier case, supra.

CONCLUSION

We are of the opinion that the Commissioner of Health has the right to investigate the health conditions of a county jail and to make his report, and that such report should be presented to the County Court and the Circuit Judge of the particular county, or the City Council of the city wherein the jail is situated, in the discretion of the Commissioner of Health.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

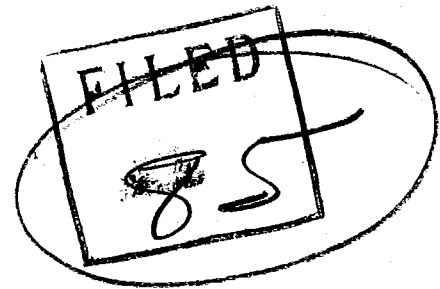
APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:HR

STATE BOARD OF HEALTH: Has no legal duty to make laboratory tests for individuals or officials in matters not affecting the public health.

September 11, 1941



Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an official opinion under date of August 25, 1941 upon the question submitted by your office, in substance as follows:

"As to whether the State Laboratory of the Board of Health could be used for an analysis of a medico-legal nature for the testing of blood specimen of man killed in accident for the presence of alcohol, upon the request of a prosecuting attorney."

Most public health laws are a constitutional and proper exercise of the police power of the State, and the powers conferred on the Board of Health and State Health Commissioner in order to enable them to perform their important functions in safe-guarding the public health should receive a liberal construction as held by the Supreme Court in State ex rel. Horton vs. Clark, et al 9 SW (2d) 635. Nevertheless, the State Board of Health and State Health Commissioner are creatures of statute and their powers and duties are generally limited by the legislative enactments. See Ruling Case Law, Vol. 12 Page 1268.

Among the statutes setting forth the powers and duties of the State Board of Health and State Health Commissioner are:

Section 9735 R. S. Missouri 1939 which provides for the creation of the State Board of Health and provides for its powers and duties and which states that the State Board of Health is: " * * * "

to safeguard the health of the people of the state, counties, cities, villages, and towns," and "to study causes and prevention of diseases and prevention of contagion, etc. * * *"

Section 9288 R. S. Missouri 1939 provides that it shall be the duty of the State Board of Health or its Secretary (Commissioner) " * * * to make bacteriological tests and other scientific analyses and investigation when requested by the health supervisor or the superintendents of the state eleemosynary institutions in caring for the health of the patients in any of said institutions."

Section 9751 R. S. Missouri 1939 provides that the State Board of Health shall in making and enforcing rules and regulations for the maintenance of a safe quality of drinking water dispensed to the public: " * * * to collect samples of and analyze drinking water dispensed to the public when requested by municipalities, corporations or individuals * * *" upon payment of fee for said analyses.

We find no statutory provision making it the duty of the State Board of Health or the State Health Commissioner or the State Board of Health Laboratory to make tests or analyses of a medico-legal nature for individuals or officials. Unless the laboratory tests or analyses requested are for the safe-guarding of the public health or the promotion thereof or required in the necessary administration of the office of the State Health Commissioner in performing his duties and functions for the State Board of Health authorized by statute or in caring for the health of patients in state eleemosynary institutions, then any such laboratory tests made by the State Board of Health Laboratory would be purely voluntary on the part of the State Health Commissioner.

CONCLUSION

It is, therefore, the opinion of this department that there is no legal duty imposed on the State Board of Health, the State Health Commissioner or State Board of Health Laboratory to make laboratory tests of a medico-legal nature unless they be required for the safe-guarding of the public health of the citizens of the State or in connection with necessary duties and functions required by statute of the State Board of Health or State Health Com-

Dr. James Stewart

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missioner. So it would necessarily follow that the State Board of Health Laboratory has no legal duty under the law to make laboratory tests of a blood specimen of a man killed in accident for the presence of alcohol.

Respectfully submitted,

Assistant Attorney-General

APPROVED:

VANE O. THURLO
(Acting) Attorney-General

STATE BOARD OF HEALTH: Although a hotel is exempt from property tax it is not exempt from hotel license fees. Deputy of State Board of Health must follow the statutes in condemnation and forfeiture of food and drugs.

October 9, 1941

James Stewart, M. D.
State Health Commissioner
The State Board of Health
of Missouri
Jefferson City, Missouri



Attention: Mr. W. D. Cruce, Supervisor
Division of Food and Drugs

Dear Sir:

Your request of October 7, 1941, in reference to two questions upon the powers and duties of the State Board of Health, is answered by the following opinion.

I.

Your first question is as follows:

"The matter has been brought to my attention under the hotel act Article 6, R. S. 1939, by the Young Men's Christian Association at Springfield, Missouri, that they should be exempt from paying the hotel license fee. I should like your opinion on this matter.

"Also, we have numerous apartment hotels which claim they should not pay. Can I have your opinion on this matter?"

Section 9931, R. S. Missouri 1939, provides as follows:

"That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms

are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner."

The above section states, "approved by the food and drug commissioner," and under Section 9855, R. S. Missouri 1939, the duties of the food and drug commissioner were transferred to the Commissioner of Health and interpreting the statutes, the Commissioner of Health is substituted in Section 9931, supra.

Section 9932, R. S. Missouri 1939, specifically states that anyone conducting a hotel, as defined under Section 9931, supra, must procure a license for each hotel.

Section 9933, R. S. Missouri 1939, specifically provides the fee to be charged for the license which amount depends upon the number of rooms contained in the hotel.

Section 9934, R. S. Missouri 1939, specifically provides that in estimating the number of rooms so as to arrive at the amount of the license fee to be charged for operating a hotel, the parlor, dining room, kitchen and office shall be construed to mean guest rooms. The exemption from the paying of taxes has been set out in Section 6, Article X of the Constitution of Missouri and provides as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such

cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Under the above section of the Constitution the latest case decided by our Supreme Court is *Young Women's Christian Association et al. v. Baumann, Collector of the City of St. Louis*, 130 S. W. (2d) 499. In this case the court, in passing upon the taxation of property owned by the Young Women's Christian Association, specifically held that they were exempt from taxation if the building was used exclusively for the benefit of the association. In that case they also cited several cases which involved the Young Women's Christian Association and Young Men's Christian Association where it was held that the associations are liable for property tax when the building and property was not used exclusively by the associations. They approved those cases for the reason that in the cases the associations had leased part of the property to other persons for business not connected with the educational or charitable purposes of the association. The above only applies to property tax.

It has been held in this state that excise taxes and licenses do not come within the prohibition set out in Section 6, Article X of the Constitution of Missouri. In the case of *State v. Distilling Co.*, 236 Mo. 29, the court, in holding that a license issued under the police power was for the purpose of regulation and was not a taxation for revenue, at page 291, said:

"The authorities reviewed, among other things, established the three following propositions: First, That the burdens imposed by section five of the act in question are not taxes upon occupations, persons or property within the meaning of the Constitution. Second, That the class of cases which hold that a statute which imposes a

tax, under the taxing power of the State, upon persons, property or any lawful business, is unconstitutional, if it is not uniform in its operation; and third, That where a person has no natural, absolute or lawful right to engage in a business, and can only do so under a license from the State, the State may grant or withhold such license as the Legislature may deem wise and proper, and if granted it may do so upon such terms and conditions as the lawmaking power may impose (not inconsistent with the State or Federal Constitution) including a requirement that the applicant therefor shall pay or agree to pay the license fees, in consideration of the license, or right, to conduct said business; and that said fees are in no sense a tax upon the business licensed, nor upon the person or property engaged therein."

Also, the court, at pages 268-270, cited as follows:

"Black on Intoxicating Liquors says in section 117: 'It will be apparent that three leading ideas are involved in the definition of a license under the liquor laws. First, it confers a special privilege or franchise, upon selected persons, to pursue a calling not open to all. Second, it legalizes acts which, if done without its protection, would be offenses against the statute. Third, it is a privilege granted as a part of a system of police regulation, and herein is distinguishable from taxation?.... A license fee is exacted primarily as a means of restricting or regulating a trade, and it continues to be such although, incidentally, it may produce an addition to the public revenue.'

"If we read this act in the light of the foregoing definitions of the word 'license,'

it seems clear to us that it does not purport to impose a tax upon any occupation, person or property, but is simply an act requiring all persons who wish to engage in the business therein mentioned, to first procure a license from the proper authorities granting them the permission to do so, and at the same time imposes a license fee which must be paid by each and all licensees, in consideration of the right and privilege so granted. Such licenses must be actually paid for, or agreed to be paid for (according to the provisions of the act under which they are issued), by the applicant therefor, before the same can lawfully issue. That agreement may be in express terms, or it may be implied from the acceptance of the license, which in contemplation of law, has the act under which it is issued written therein, and constitutes a part thereof. That being indisputably true it seems clear to us, that it would be a physical impossibility, as it were, to hold that such consideration so required to be paid for said privilege, which evidenced by the license, is a tax upon the occupation, person or property mentioned therein, for the obvious reason that there could be no such lawful occupation, as shown by the authorities previously cited, until the license had been issued and paid for before its issuance; and if there could be no such business in existence until after the issuance of the license, then it is self-evident that no one could engage therein until after its issuance; and likewise no property could be employed in a business before the business itself is established."

Also, in the case of State ex rel. Cement Co. v. Smith, 338 Mo. 409, 1. c. 413, the court said:

"* * * 'Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word however has come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.' (26 R. C. L., sec. 18, p. 34.) The same text, in pointing out the distinction to be drawn between property taxes and excise taxes, says 'If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise.' (26 R. C. L., sec. 19, p. 35.) 1 Cooley on Taxation (4 Ed.), section 42, page 127, defines excises as 'taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Under these general definitions of the term, as well as upon the authority of the many adjudicated cases, we think it so clear as not to be open to question that the tax in controversy is an excise, and not a property tax. (See Independent School District v. Pfoest, 51 Idaho, 240, 4 Pac. (2d) 893, 84 A. L. R. 820; Crockett v. Salt Lake County, 270 Pac. 142, 60 A. L. R. 867; Portland v. Kozer, 108 Ore. 375, 217 Pac. 833; Standard Oil Co. v. Brodie, 153 Ark. 114, 239

S. W. 753; Wiseman v. Phillips (Ark.), 84 S. W. (2d) 91; Pierce Oil Co. v. Hopkins, 282 Fed. 253; Monometer Oil Co. v. Johnson, 292 U. S. 86.) It will be observed that the exemptions granted by the Constitution and the statute, supra, are limited by express terms to the real and personal property of the several bodies mentioned. Accordingly, Article X, Section 6 of the Constitution has been held to have no application to collateral inheritance taxes (State ex rel. v. Henderson, 160 Mo. 190, 60 S. W. 1093), nor to license fees (State v. Distilling Co., 236 Mo. 219, 139 S. W. 453). And we think in this instance the statute does not impinge upon the constitutional provision pointed out, nor violate the statute relied on, and is valid.

"We pass now to the question of the intent of the Legislature with respect to imposing a tax on sales or transactions wherein a subordinate branch of the executive department (which the highway department was held to be in State ex rel. v. Hackmann, 314 Mo. 33, 282 S. W. 1007) becomes the purchaser. Respondent invokes the rule that exemption from property taxes does not extend to excise taxes, and asserts the language of the act itself, together with the record of the General Assembly in considering this particular legislation, evinces a legislative intent to impose the tax upon such agencies. The weight of authority seems to be that, as applied to counties, municipalities and other subdivisions, exemption from property taxes does not ordinarily extend to excise taxes. (See Independent School District v. Pfost, and other cases cited, supra.) But the rule is not absolute, and is dependent upon the circumstances of each case."

CONCLUSION

In view of the above authorities we hold that even if the Young Men's Christian Association at Springfield, Missouri, has not rented any part of its building to any private individual for other commercial purposes, and comes within the definition of a hotel as set out in Section 9931, supra, it is still subject to the payment of a license fee as set out under Section 9933, R. S. Missouri 1939.

II.

Your second question is as follows:

"Also, I should like your opinion as to the authority of this department in regard to seizure and destruction of articles of food, which might be unfit for human consumption, such as bulged canned goods, filthy or wormy confections, rat-and-insect-infested flour, etc. The Federal Food and Drug Department has specified seizure laws, which they cannot enforce in case of intrastate laws.

"Every day matters of this kind are turned to me, and I do not know under our statutes how much authority this department has. Will you please clarify this situation for me?"

The sections of the statutes applicable to this question are very lengthy and we will be compelled to refer you to the numbers of the sections applicable to your question. I believe your department has most of this law in pamphlet form.

Section 9855, R. S. Missouri 1939, specifically states that the duties heretofore vested by law in the Food and Drug Commission are now transferred to and vested in the State Board of Health and that wherever the words "commissioner" and "food and drug commissioner" are used in Chapter 58, they shall be construed to mean the State Board of Health of Missouri, or its deputies.

Section 9857, R. S. Missouri 1939, authorizes the State Board of Health to enforce all the laws that now exist, or that may hereafter be enacted, regarding the manufacture and sale of certain food and drug products. It authorizes the State Board of Health, or its deputies, under certain conditions, to arrest and prosecute, or cause the arrest of certain individuals violating the laws of the Food and Drug Act.

Section 9858, R. S. Missouri, authorizes the State Board of Health, or any of its deputies, to enter certain places of business under certain conditions and obtain samples which should be analyzed by the chemists of the state experiment station, and it further authorizes the deputies to open any cask, tub, or other vessel therein described to obtain articles of food or drugs and to take samples thereof in the presence of a witness and then tender at the time of taking to the person having custody of the same, the value of the samples. It further provides that the samples may be purchased in the open market and that the collector, that is, the man who purchases the samples, shall keep a memorandum of all names and other matters so that it can be used as evidence in court. It further provides that when samples are taken they shall be divided into three parts, each labeled with identifying marks. One of the parts shall be delivered to the person from whom the purchase was made, one of the parts so labeled shall be sent to the chemist of the state experiment station and one part shall be held under seal by the State Board of Health.

Section 9860, R. S. Missouri 1939, provides the procedure for the prosecution of the case after the samples so analyzed show that it was in possession with intention of sale by the defendant and was either misbranded, was unwholesome and was a violation as set out in Chapter 58 as being a violation of the law therein. Under this section the State Board of Health must notify the parties from whom the sample was obtained that they should appear at a certain date, hour and place of hearing upon the question involved by the taking of the samples. This hearing should be private and take place at the office of the State Board of Health or some other place designated by the State Board of Health. It further provides that after such a hearing the State Board of Health, if it finds that the laws of Chapter 58 have been violated, may file a complaint before any justice of the peace

having jurisdiction, providing the value of the samples shall not be greater than the amount within the jurisdiction of the said justice. The justice of the peace shall thereupon issue his summons to the person in possession of the goods directing him to appear not less than five nor more than ten days from the date of issuing said summons, and show cause why said goods shall not be condemned and disposed of. It also further provides, where no one can be found in possession of the goods, for service by the same procedure as is set out in other civil matters. It further provides that if upon trial the goods shall be found to be in violation of any of the provisions of Article 1, Chapter 58, it shall be the duty of the said justice of the peace to render judgment that the property be forfeited to the State of Missouri, and that said goods be destroyed or sold for any purpose other than to be used as food. It also provides for an appeal from the judgment of the justice of the peace.

There is a provision in this section that if the owner or party claiming the property declared forfeited by the justice of the peace can produce and prove a written guarantee of purity, signed by the wholesaler, jobber, manufacturer or other person residing in this state from whom said articles were purchased, then the proceeds of the sale of such articles, over and above the cost of forfeiture and sale, including witnesses fees, shall be paid over to such owner or claimant. It also provides that where the goods from which the samples are taken exceeds the jurisdiction of the justice of the peace, complaint shall be filed in the circuit court and not in the justice court. This section is to the effect that first, samples must be taken, and after an examination by the state experiment station if it can be proven that the samples violated some law in Article 1, Chapter 58, then the justice of the peace or the circuit court, upon a hearing, find that the samples are a violation of some law in article 1, Chapter 58, the justice of the peace or the circuit court may order the food or drugs, from which the samples were taken to be condemned and forfeited by the state as set out in this section.

26 Corpus Juris, page 751, Section 2, in stating the rule in reference to unwholesome foods, said:

"The selling of unwholesome provisions

was an offense at common law. But the common law was inadequate to the complete protection of the public against abuses in connection with the production and sale of food, and it has accordingly been reenforced and supplemented by federal statutes, and by numerous state statutes and municipal ordinances, regulating the manufacture and sale of articles of food with a view to the preservation of health and the prevention of fraud. Similar regulations also exist in England and in Canada."

Also, in 26 Corpus Juris, page 752, Section 3, in stating the rule setting out power to make regulations by the state, it is said:

"Under the police power inherent in the states and reserved to them in the federal constitution, statutes or municipal ordinances may be enacted, making reasonable rules as to the production and sale of articles of food."

Also, the same authority, on page 755, Section 5, states the rule as to condemnation as follows:

"In the exercise of its police power to condemn and destroy articles of food endangering the health of the community, the state may authorize the condemnation and destruction of food products deleterious to health."

Very few of the sections set out in this opinion have been passed upon by the Supreme Court, especially as to unwholesome foods. Most of the cases which have reached the Supreme Court are on misbranding and adulteration.

CONCLUSION

In conclusion we can only say that the statutes must be specifically followed in the condemnation and forfeiture

James Stewart, M. D.

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October 9, 1941

of food and drugs and if not followed, the deputy of the State Board of Health may be liable to civil damages.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

HEALTH, BOARD OF:) Board of Health and cities of the first
MUNICIPAL CORPORATIONS:) class both have authority to inspect
food and drugs.

October 30, 1941



Dr. James Stewart
State Board of Health
Jefferson City, Missouri

Attention: Mr. W. D. Gruce

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"The question has been raised with this office from time to time pertaining to our authority in enforcing the food and drug laws of this State in the cities of the first class, the question being whether this department has authority to act or whether we must leave the enforcement of the health and pure food and drug laws up to the city health departments. I should like your opinion in regard to this matter."

Chapter 58 of the Revised Statutes of Missouri, 1939, provides for the inspection of food and drugs by the State Board of Health. Section 6293, R. S. Mo. 1939, sets forth the powers of a city of the first class and includes the right to regulate the inspection of various foods. The question presented is whether the State Board of Health has the authority to enforce the state food and drug laws in cities of the first class.

We believe this question is answered in the case of City of St. Louis v. Klausmeier, 112 S. W. 516, 213 Mo. 119,

in which our Supreme Court had before it the question of whether the City of St. Louis had the right to enact an ordinance controlling the sale of milk in that city. At that time there was a statute dealing with this subject. The court, through Judge Woodson, said (l. c. 125, 127, 128):

"It is not disputed, but it is conceded by plaintiff, that the acts of 1905 and 1907 are general laws of the State, and that they by their terms apply to the entire State and to all the cities thereof. And it is well settled that the ordinances of the city of St. Louis in order to be of any validity must be consistent with the general laws of the State, and must be in harmony with the 'legislative policy of the State manifested by its general enactments,' and as provided for in express terms by the Constitution. This proposition is fully supported by the following authorities: Dillon on Mun. Corps. (4 Ed.), sec. 329; St. Louis v. Meyer, 185 Mo. 593-4; State ex rel. v. Railroad, 117 Mo. 1, 13; State v. Kessels, 120 Mo. App. 239; Ewing v. Hoblitzelle; 85 Mo. 64, 78.

"But there is nothing in the Constitution or laws of the State which prohibits the city council from enacting ordinances supplemental of and in addition to the State laws in the establishment of standards of purity and providing for the inspection of dairy products. In fact, section 26 of article 3 of the charter of the city of St. Louis expressly authorizes the enactment of just such an ordinance as the one here in question, and the validity of this particular ordinance has been repeatedly sustained and upheld by this court. (St. Louis v. Liessing, 190 Mo. 464; St. Louis v. Grafeman Dairy Co., 190 Mo. 492; St. Louis v. Bippen, 201 Mo. 528."

* * * * *

"And it is equally well established that where a city has concurrent powers with the State it may prescribe a penalty for the violation of its ordinances different from that prescribed by the State for the violation of a statute regarding the same subject-matter: (Hill v. St. Louis, 159 Mo. 1. c. 167, and cases cited.)

* * * * *

"The city might wisely rely upon the State law for protection against such illegal sales unless the products so sold fell below a certain standard of purity fixed by ordinance, and at the same time prescribe a penalty for selling such products which fall below the standard fixed by ordinance."

Under the authority of the above decision it will be seen that the State Board of Health and cities of the first class both have authority to regulate the inspection of food and drugs.

Conclusion

It is, therefore, the opinion of this Department that the State Board of Health has authority under Chapter 58, R. S. Mo. 1939, to regulate and inspect food and drugs in this State and that a city of the first class may pass ordinances dealing with the same subject, but that said ordinances must be supplemental to and not in conflict with the state law.

Respectfully submitted,

AO'K:EG

APPROVED:

ARTHUR O'KENNE
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

STATE BOARD OF HEALTH: It is the duty to inspect homes for incurable people even though no special appropriation was made for the purpose.

December 1, 1941

Hon. James Stewart, M. D.
The State Board of Health
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of November 28th, 1941, which is as follows:

"Senate Bill #142 provides for the licensing of convalescent nursing and boarding homes for the aged, etc., places the duty on the State Board of Health to carry out the intent of this act, through its personnel.

"It provides for license to operate and the fee shall be collected, said fee to be deposited in the Treasury to the credit of the General Revenue Fund. Apparently there has been no budgetary provisions for the carrying out of this act.

Will you please give us an opinion upon the proper procedure for the State Board of Health to carry out the duties as prescribed in this act. May we have this opinion within the next few days."

Senate Bill No. 142 appears at page 368 in Laws of Missouri 1941. Section 5 of that act reads as follows:

"The State Board of Health is empowered and it is hereby made its duty: (1) to inspect, at least annually and as often as shall be necessary, all convalescent, nursing, shelter, lodging and boarding homes for aged, chronically ill or incurable persons; (2) to grant licenses, for a period not to exceed one year, after inspection, to persons to conduct the occupation defined in this Act and may renew the same when expired and to revoke the license of such persons as fail to obey the provisions of this Act or the rules and regulations made by said Board; (3) to promulgate such rules and regulations as it deems necessary for the proper cleanliness and sanitation of said convalescent, nursing, shelter, lodging and boarding homes and for the care, maintenance and safety of the persons residing therein."

Under the above wording it is mandatory that the State Board of Health carry out the act. It even goes so far as to state the time in which this duty shall be performed. Under the laws of this State it has been held that where the provisions regarding time of doing an act are set out it is mandatory. It was so held in *Dawson v. Hetzler*, 74 S. W. (2d) 488, 230 Mo. App. 737. Also in construing whether an act is directory or mandatory one must consider the intention of the Legislature. In Section 5 the fact that it made it the duty of the State Board of Health to carry out the provisions of the act, there is no question but that it is mandatory.

In your request you stated that no budgetary provisions had been enacted for the carrying out of this act and I pre-

Hon. James Stewart

(3)

December 1, 1941

sume that you mean that no special appropriation had been made.

In the case of officers upon whom a duty is placed in the performance of their official duties, and no consideration or fee has been allowed for the performance of that duty, the courts have construed that the duty must be performed gratuitously. It was so held in *State ex rel. Troll v. Brown et al.*, 146 Mo. 401, 1. c. 406. Also in the case of *State ex rel. Wm. P. Evans, et al. v. Gordon*, 245 Mo. 12, 1. c. 37. Also it was so held in *King v. Riverland Levee Dist.*, 270 S.W. 196, 1. c. 196.

Also in your request you call attention to the fact that the fees under Section 6 shall be paid by the State Board of Health into the general revenue fund. This money cannot be used for the purpose of carrying out the act on account of the limitations as are set out in Article X, Section 19 and Article IV, Section 43 of the Constitution of Missouri, which prohibits the diversion of money from the State Treasury except by appropriation made by law. The above Constitutional sections were passed upon in the case of *State ex rel. Toler Tao, State Game and Fish Commissioner, v. John P. Gordon, State Auditor*, 236 Mo. 142, 1. c. 157, Para. 1. It was also passed upon in the case of *State ex rel. St. Joe Water Co. v. Jacob Geiger, et al.*, constituting Board of Managers of State Hospital No. 2, 246 Mo. 74, 1. c. 92. These facts were also passed upon in the case of *State ex rel. Russell, et al. v. State Highway Commission*, 42 S. W. (2d) 196, 1. c. 203.

As stated in your request, after a careful research, we find no appropriation for the carrying out of the act as set out in Senate Bill No. 142, but it is still the duty for the State Board of Health to carry out the act even though no appropriation has been made.

CONCLUSION

It is the opinion of this department that it is mandatory that the State Board of Health perform its duties as set out in Section 5 of the act as it appears on page 369 of the Laws of Missouri 1941 even though no appropriation has been made for that particular service.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

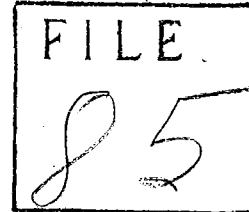
VANE C. THURLO
(Acting) Attorney General
WJB:DA

ADMINISTRATION: Upon refusal to grant letters of administrations under Section 2, Laws of Mo. 1941, page 289, widower widow or minor children under the age of 18, through their guardian, as the case may be, may assign title to automobile in the estate.
A creditor under Clause 2 of said section, supra, has the right to transfer the title to an automobile in the estate, if there be one.

December 2, 1941.

Mr. V. H. Stewart
Commissioner of Motor Vehicles
Jefferson City, Missouri

Dear Mr. Stewart:



We are in receipt of your request of November 19th, for an official opinion, upon the following statement of facts:

"This department kindly requests an opinion from your office in regard to the following:

"In the matter of an estate where Letters of Refusal of Administration are granted by the Probate Court, does the surviving wife or husband have authority to assign or transfer the certificate of title to the purchaser or should such survivor first obtain title in his or her name in order to make proper transfer.

"In other words if an assigned title is presented to this department together with a certified copy of Order of Refusal of Letters and the title shows assignment or transfer by the surviving husband or wife unto the purchaser of the car, should this department consider this a legal and proper transfer?"

Section 2, Laws of Missouri 1941, at page 289, reads as follows:

"Letters Not Granted - When - The probate court, or judge thereof in vacation, in its or his discretion, may refuse to grant letters of administration in the following cases: first, when the estate of the deceased is not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children under the age of eighteen years; second, when the estate of the deceased does not exceed one hundred (\$100.00) dollars and there is no widower, widow or children under the age of eighteen years, any creditor of the estate may apply for refusal of letters by giving bond in the sum of one hundred (\$100.00) dollars, said bond to be approved by the probate court or judge thereof in vacation, conditioned upon such creditor obligating himself to pay, so far as the assets of the estate will permit, the debts of the deceased in the order of their preference. Proof may be allowed by or on behalf of such widower, widow, minor children or creditor before the probate court or judge thereof of the value and nature of such estate, and if such court or judge shall be satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, or that the estate does not exceed one hundred (\$100.00) dollars when application is made by a creditor, the court or judge may order that no letters of administration shall be issued on such estate, unless, upon the application of other creditors or parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow, minor children or creditor shall be authorized to collect and sue for all the property belonging to such estate; if a widower, widow or creditor, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of eighteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suit; provided also, that the widower, widow or minor children under the age of eighteen

years may retain the property belonging to such estate and the creditor shall apply the proceeds thereof to debts of the estate in the order in which demands against the estate of deceased persons are now classified and preferred by law. Provided further, that any person who has paid the funeral expenses or other debts of deceased shall be deemed a creditor for the purpose of making application for the refusal of letters of administration under this section and be subrogated to the rights of such original creditor."

In the case of Perkins v. Goddin, 111 Mo. App. 429, 1. c. 438, the Court said:

"Under the well-settled law of this state, on the death of a party, the personal property passes to the administrator, not to the heir, unless it be where the probate court, by order dispenses with an administrator under Section 2 of the Administration Statute. R. S. 1899. There was nothing of that kind in this case as shown by the fact that the Boone County Probate Court took up the administration and granted letters to appellant thereon."

In the case of Estate of Ulrich v. Johnston, 177 Mo. App. 584, the question was whether the costs of administration should first be paid and then the residue turned over to the widow as her absolute allowance when such residue would thereby be depleted to an amount less than the amount allowed as the absolute allowance to the widow. The Court held that the \$400 absolute allowance went direct to the widow and was her property stripped of the payment of the costs of litigation, and said (1. c. 589):

"It is not essential to consider the matter of good faith of the administrator here, as these allowances are given by the statute to the widow first of all other claims, and this includes the expense of administration, for they are not of the estate. Indeed, if there is not sufficient to pay them and the expense of administration besides, then no administration should be had."

and at page 590, the following:

" * * * but the Supreme Court has declared in plain terms, time and again, that the property enumerated in the statute and the allowance provided for are the absolute property of the widow and not parcel of the decedent's estate."

And at page 592, speaking of the Administration Law, the Court says:

" * * * it provides that if the estate is no greater in amount than is allowed by law as the absolute property of the widow, administration shall be dispensed with entirely. It is certain that, under the established rule of decision in this state, the widow's allowances are regarded as her absolute property and not to be considered as assets of the estate. The cases are multiplied which declare such to be true. In those states where the courts so construe these statutes, the rule obtains as well that the allowances go free to the widow first of the expenses of administration of the estate."

In the case of Jacobs v. Maloney, 64 Mo. App. 270, l. c. 272, the Court says:

"Neither the plaintiff nor anyone else, at the time of the transaction just stated, had been appointed or qualified as administrator of the estate of said deceased, nor does it appear that the probate court had made an order as provided in Section 2, Revised Statutes, authorizing plaintiff to collect, sue for, and retain all the property belonging to the estate of his father, * * *"

In the case of McMillan v. Wacker, 57 Mo. App. 220, l. c. 222, the Court says:

December 2, 1941.

"On the death of a party the personal property passes to the administrator, and he alone has a right to the possession thereof, unless indeed the probate court shall, by order, dispense with any administration, as provided for by section 2 of the administration statute. It is only 'after making such order such widow or minor children shall be authorized to collect, sue for and retain the property belonging to such estate.' R. S. 1889, Sec. 2. The probate court is the only tribunal having original jurisdiction to determine the question as to whether or not an administration is necessary."

From a review of the authorities heretofore set forth, supra, we must conclude that "first, that a widower, widow or minor children under the age of eighteen years, through their guardian, would have the right to transfer the title to an automobile as referred to in your opinion request for the reason that said automobile would become the absolute property as provided by law and without the necessity of granting letters of administration."

Turning to the second provision which provides: "second, it is our opinion that if a creditor applies for the refusal of letters under Clause 2, supra, and gives bond in the sum of \$100.00 properly approved by the probate court or judge thereof in vacation, that such creditor would also have the right to transfer the title of the automobile for the reason that we believe that the Legislature, through this section, has placed such a creditor in the same position as an administrator with all the powers and duties of a duly appointed and acting administrator."

Of course if other creditors or parties interested make application on the theory that other or further property will be shown and letters of administration are granted, then the duly qualified acting administrator would have the right to assign the title.

CONCLUSION

It is our opinion that upon the death of a person, and it is brought to the attention of the probate court having jurisdiction thereof, and the probate court or judge thereof in vacation refuses to grant letters of administration under Clause 1, Section 2, Laws of

December 2, 1941.

Missouri 1941, page 289, that the widower, widow or minor children under the age of eighteen years (through their guardian) as the case may be, is authorized and empowered to collect, sue for and retain said property as his or her absolute property as provided by law, and upon the order that letters of administration on said estate be refused, that he or she becomes invested with the authority to transfer the title to an automobile, if one be such estate.

Secondly, if letters of administration be refused by the probate court or judge thereof in vacation, under Clause 2 of Section 2, Laws of Missouri 1941, page 289, the creditor, applying and giving bond in the sum of \$100.00 which said bond being approved by the probate court or judge thereof in vacation, becomes invested with the authority to transfer the title to an automobile in the estate, if there be one.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:LB

COUNTY COURTS: PUBLIC BUILDINGS: County courts may convey a site for construction of a public health center provided such location is not needed for county public buildings.

December 10, 1941

Dr. James E. Stewart
State Health Commissioner
The State Board of Health
Jefferson City, Missouri



Dear Doctor Stewart:

This is in reply to your letter of recent date in which you request an opinion on the following question:

"May I request an opinion from your office as to the legal status of a County Court's authority to donate a site for the construction of such a health center."

Under Section 2480, R. S. Mo. 1939, county courts have general jurisdiction over the properties of their respective counties. This section is as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

However, we think the answer to your question will be controlled by the provisions of Article 2, Chapter 100, R. S. Mo. 1939, pertaining to that situation. Under that chapter, when a county is organized, a county seat is selected for such county. This county seat location must contain not more than 160 acres nor less than 50 acres. (R. S. Mo. 674). Commissioners are selected to transact the business of acquiring such county seat location and their report is finally submitted to the circuit court for approval.

After such tract is finally approved as the county seat location, it is then laid off into lots, squares, avenues, streets, lanes and alleys, as directed by the court. The plat of such plan, after being deposited in the office of the Recorder of Deeds, becomes the official description of such tract and its divisions. Section 13632 of this Chapter provides that the county court shall reserve from sale such lots and squares of ground as it deems necessary for county buildings. In the case of State ex rel. Norman v. Smith, 46 Mo. 60, the court held that the county seat, or seat of jurisdiction, which are synonymous terms, must be within the limits originally selected. At l. c. 64, the court in so holding said:

"* * * The commissioners are then to make report of their proceedings, accompanied by such deeds and abstracts, to the Circuit Court of the county at its next term; and if the court approve the title, it shall cause its decision to be certified to the tribunal transacting county business, and the title of the land so conveyed vests in the county, and the place selected shall be the permanent seat of justice thereof."

It will be noted, however, that this ruling would not prohibit the county court from changing the location of the lands reserved for public buildings so long as the location remained at the county seat or seat of jurisdiction. This rule is further supported by the case of Babcock v. Hahn, 175 Mo. 136, in which case it was held that the recorder's office, so long as it remained within the city of St. Louis, could be removed from its original location.

In our research for an expression by our Missouri courts on this question, we fail to find any case directly at point, however, the case of Van Pelt v. Parry, 218 Mo. 680, the court discussed this question pertaining to the location of county seats and the effect thereof, said at l. c. 698:

"Here, then, was a permanent appropriation and disposition of the land for the purpose of establishing a permanent seat of justice and that visible, actual, palpable appropriation for that important public purpose, coupled with acts in pais in platting the

land into lots and blocks, streets, alleys, lanes, avenues, public squares, etc., and dealing with the property by making sales of lots to build up a county town, made Lamar a permanent seat of justice to all intents and purposes and effectually for all time took the Parry forty out of the salable list of swamp lands as such. It was no longer swamp land but land appropriated for county seat ends -- i. e., county seat land. Barton county having irrevocably devoted it to county seat purposes, could not turn about in after years and trade or sell it as mere swamp land to a purchaser having full notice that it had been devoted to a seat of justice and that such purpose was alive, on foot, and being carried out. Its power to deal with it as swamp land was functus officio, we think. * * * * *

In that case, the rule that lands devoted to county seat purposes could not in after years be disregarded or sold by the county as swamp lands was announced. In case the county court sees fit to sell or convey county lands, it may so proceed as directed by Section 13784, which is as follows:

"The county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner, under his proper hand and seal, for and in behalf of such county, duly acknowledged and recorded, shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed."

In the case of Keatley v. Summers County Court, which was before the Circuit Court of Appeals of West Virginia, 73 S. E. 706, the court, after discussing the authority of the county court in acquiring county seat locations and providing for grounds for courthouse purposes, then went into the question of the quantity of land the county court may reserve or acquire for the courthouse and jail sites. At 1. c. 707 the court said:

"The statute does not prescribe the quantity which a county court may so acquire; what tribunal then, is to be the judge of how much is 'requisite or desirable'? The county court, of course. Its discretion in this matter is without limitation, and its judgment thereon is not subject to review. In the very nature of things, and for the certain and convenient administration of the municipal government of the county, it was necessary for the Legislature to vest such discretionary power as relates to the selection of a location and quantity of ground requisite for courthouse purposes in some one person or tribunal; and the Legislature has seen fit to vest it in the county court. *****
The county court is not limited to any definite quantity of land which it may acquire for courthouse purposes, and it therefore necessarily follows that it must be the judge of how much is requisite or desirable. The amount requisite or desirable at one time, and under certain conditions, might not be requisite or desirable at another time and under different conditions. The county court is the sole judge of that question; it acts ministerially in providing a courthouse and grounds for its county, and is vested with legislative discretion in the matter. The authority to acquire so much land is as requisite or desirable for a certain purpose clearly implies the power to dispose of the surplus, if more than is requisite has been acquired. We do not mean to intimate that the county court is authorized, or would be justified under the statute, to enter into land speculations with the public moneys. It could not buy more land than, in its judgment, is requisite or desirable for the public purpose, simply with a view of making a profit by a resale of a portion thereof; but circumstances may easily arise where it is necessary for a county court to acquire more land than it needs for courthouse purposes, in order to secure a good location; and in such event we clearly think it would have the right to do so, and then to dispose of such portion as is not desirable for the public use."

In the case of Collins v. Commissioners of Big Horn County, which was before the Supreme Court of Wyoming, 126 Pac. 465, an action was brought to prohibit the county court from selling, donating or conveying to the United States, real estate which was a part of the courthouse square and which was to be used by the Government for a post office site. From an examination of that case, it will be seen that the powers and duties of the county court with respect to managing and controlling county property are very similar to those in this state. At l. c. 467 the court said:

"* * * * * The part of it which it is proposed to convey to the United States for a site for a public building is not used for courthouse purposes, nor does it appear to be necessary therefor; and it is not claimed that the commissioners are acting in bad faith. The law invests the board with the powers of the county as a body politic and corporate, and to its judgment is committed the power to determine the extent of the land necessary and proper for courthouse purposes. To hold that the board cannot sell and convey any part of this 10 acre tract upon which it has erected county buildings would be to hold in effect, that the county having acquired title to it and devoted a part of it to courthouse purposes must forever retain its title and not divert any part of it to other purposes. We do not think such a condition was intended by the Legislature. The quantity of land to be acquired and held by the county for public purposes is not fixed by law; and that matter necessarily must be left to the discretion of some person or board, and in this state that discretion has been vested in the board of county commissioners; and when the board has, in good faith, exercised its discretion, its acts are not reviewable by the courts. A case quite similar to the one before us was recently decided by the Supreme Court of Appeals of West Virginia --Keatley et al. v. Summers County Court et al. 73 S. E. 706. In that case the county court of Summers county was about to sell and convey to the United States a part of its courthouse square in the town of Hinton for the purpose of erecting thereon a

government building. The plaintiffs brought suit on behalf of themselves and all other taxpayers of the county to enjoin the sale. The Chesapeake & Ohio Railway Company, in order to secure the location of the county courthouse in that town, conveyed to the county court a certain square of ground in consideration that within a reasonable time thereafter a courthouse should be erected thereon, and the judicial proceedings of the county should be held upon said premises. By the statutes of that state the county courts were authorized to provide at the county seats of their respective counties a suitable courthouse and jail, and to acquire by purchase or otherwise so much land as might be requisite or desirable for county purposes. It was held that the county court was the judge of the quantity of land that was requisite or desirable, and under the statute possessed the implied power to sell so much of the square as it deemed unnecessary for the public purpose. * * * * *

If the county court does not act in good faith in making such a transaction, then such contract may be inquired into under Section 13769. This section reads in part as follows:

"Whenever any fifty resident, solvent and responsible taxpaying citizens of any county in the state shall have good reason to believe, and do believe, that any contract made and entered into by the county court of the county, with any person or corporation, affecting or concerning any public building, lands, moneys or property of the county in any manner whatever, or any extension of any such contract, was not made and entered into in good faith, or for a just consideration, and with due regard for the best interest of the county, or that any such contract previously entered into has not been carried out by the parties thereto in good faith and according to the terms of any such contract, they may bring a suit in the circuit court of any such county

praying that the matter may be inquired into, and thereupon the circuit court shall make a full investigation of the matters alleged, and shall have power to set aside, reform or cause to be enforced any such contract, or any extension of any such contract, as the court shall deem best under the law and the facts.
****"

From our research, we think the weight of authorities is that the county court may dispose of land acquired for courthouse purposes, if such court does not deem it necessary to retain the same for county buildings. Of course, the question of good faith is a condition to be taken into consideration in such transactions.

On the question of the county donating lands to the Government for the purpose of erecting public health centers thereon, we will say that this will depend upon the authority granted by statute to the county court to do so. County courts are created by statute and their duties are purely statutory.

It was said in the case of Bayless v. Gibbs, 251 Mo. 492:

"County courts are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

Also, in the case of State ex rel. Major v. Patterson, 229 Mo. 373, the court said:

"Under the constitution, Article 6, Section 36, providing that a county court shall have jurisdiction to transact all county business and such other business as may be prescribed by law, county courts are denied any rights except those expressly conferred."

In the case of *Blades v. Hawkins*, 240 Mo. 187, county courts are given incidental powers in the following language:

"While the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

Under our Constitution and statutes, county courts may expend public funds for county public purposes. Such expenditures must not only be for public purposes, but they must also be for county public purposes. We find no statute authorizing county courts to expend county public funds for hospitals owned and operated by the state or federal government, nor do we find any statute authorizing such courts to make donations of money or property for such purpose. In the case of *State ex rel. City of Jefferson v. Smith*, State Auditor, 154 S. W. (2d) 101, the Supreme Court recently held that the City of Jefferson, under its authority to erect municipal buildings and issue bonds therefor, could not do this if the building is not to be used for municipal public purposes. In that case, the building which the city contemplated erecting was to be used as an office building for the Unemployment Compensation Commission.

Also in *Vrooman v. City of St. Louis, et al.*, 88 S. W. (2d) 189, the city, by statute and charter, was authorized to contribute funds to the United States for the erection of a national park. This authority, however, was granted by statute. At l. c. 193 the court said:

"A number of cases are cited from this and other jurisdictions asserting the general rule that taxes levied by a municipality must be for both public and municipal purposes. The rule is clearly and concisely stated in *Cooley on Taxation* (4th Ed.) vol. 1, Sec. 178, page 388, 389, as follows: 'The "public" that is concerned in a legal sense in

any matter of government is the public the particular government has been provided for; and the "public purpose" for which that government may tax is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid. * * * The purpose must in every instance pertain to the sovereignty with which the tax originates; * * * * *

The court in this case also held that Section 46 of Article 4 of the Constitution did not prohibit such an act by the city.

CONCLUSION

From the foregoing, it is the opinion of this department that a county court, acting in good faith, may convey lands which are part of the lands reserved for county buildings to the Federal Government for a public health center, providing such lands are not needed for such buildings.

We are further of the opinion that the county court would not be authorized to donate such lands for a public health center to the government.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

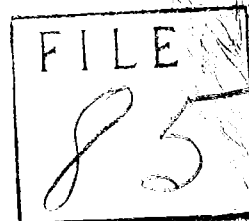
VANE C. THURLO
(Acting) Attorney General

TWB:NS

STATE BOARD OF HEALTH: NURSING SHELTERS OR BOARDING HOMES:
RULES AND REGULATIONS:

December 13, 1941

Dr. James Stewart,
State Health Commissioner
State Board of Health
Jefferson City, Missouri



Dear Doctor Stewart:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts:

"We are enclosing herewith tentative regulations prepared for adoption by the State Board of Health which are designed to regulate convalescent, nursing, shelter, lodging and boarding homes under powers and duties delegated to this Board by Sections 1 to 7, inclusive, Page 368, Laws of Missouri 1941, governing such homes.

"As State Health Commissioner, I wish to be advised whether or not, in your opinion, the enclosed regulations constitute a legal means of control of these establishments, as based upon the statutory powers of this Board. Inasmuch as the State Board of Health desires to act upon these regulations at its December 18 meeting, we would appreciate your opinion in this matter at your earliest possible convenience."

Under the act referred to in your request which is found in Laws of Missouri, 1941, p. 368, and especially under Section 3, thereof, it is provided that the application for a license to establish, maintain, operate or conduct a convalescent, nursing, shelter, lodging or boarding home for aged, chronically or incurables, shall contain such information as the State Board of Health may by law prescribe.

Also, under Section 5 of this act pertaining to the duties of the State Board of Health there is the provision that said Board of Health may promulgate such rules and regulations as it deems necessary. This section is as follows:

"The State Board of Health is empowered and it is hereby made its duty: (1) to inspect, at least annually and as often as shall be necessary, all convalescent, nursing, shelter, lodging and boarding homes for aged, chronically ill or incurable persons; (2) to grant licenses, for a period not to exceed one year, after inspection, to persons to conduct the occupation defined in this Act and may renew the same when expired and to revoke the license of such persons as fail to obey the provisions of this Act or the rules and regulations made by said Board; (3) to promulgate such rules and regulations as it deems necessary for the proper cleanliness and sanitation of said convalescent, nursing, shelter, lodging and boarding homes and for the care, maintenance and safety of the persons residing therein."

It is by virtue of the foregoing provisions of the act that you are authorized to make the rules and regulations which you propose to make. In the case of *State v. Public Service Commission*, 53 S. W. (2d) 868, the Supreme Court of this State held that such regulations must be reasonable and lawful. However, any rule or regulation must be within the general provisions of the act and must not be arbitrary or without a reasonable basis. With this rule in mind, we call your attention to Section 1 of your regulations pertaining to definitions. We think these definitions are limited by the provisions of Sections 1 and 2 of the act. You will note that the rules only refer to Section 1. Under Section 2 of the act you will note that it is as follows:

"The term 'convalescent', 'nursing', 'shelter', 'lodging', and 'boarding' home for the aged, chronically ill or incurables shall mean any place in which three or more aged, chronically ill or incurable persons, not related by blood or marriage to the

owner, operator or manager of said place,
are received, kept and provided with food,
or shelter and care for hire or compensa-
tion, however paid; provided that nothing
in this Act shall apply to any institution
established, maintained or operated by the
State or any county, city, town or village
thereof." (Underscoring ours)

In your definition of these terms you have left out the words underscored above. Under the authorities above stated we think the definitions of the terms defined in Section 2 must be limited by the clause "not related by blood or marriage to the owner, operator or manager of said place." In other words, we think that this clause should be inserted between the words "persons" and "are" in line 6 of Section 1 of your proposed rules and regulations.

We also suggest that the following change be made on Page 6, thereof, in Section 12, by striking out all the first sentence of said Section 12, and inserting in lieu thereof: "Each nursing home shall be under the supervision of a physician registered as required by law." With these suggested changes, it is the opinion of this department that the proposed regulations, a copy of which is hereto attached, are proper and come within the provisions of the authority granted by the act.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

BOARD OF HEALTH: Board of Health may make tourist camp regulations applicable to hotels.
HOTELS:

December 17, 1941

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri



Dear Dr. Stewart:

This will acknowledge receipt of your letter of November 10, 1941, which is as follows:

"The statutes of this state governing resorts and those governing hotels overlap in definition, making it impossible to definitely establish the identity of certain establishments as hotel or resort. There is little emphasis placed upon sanitation in our state hotel laws, and the need of supervision of hotels, especially in areas not served by public utilities, is of significance comparable with that of the neighboring resort.

"We feel that the Health Department has certain obligations in supervision of environmental sanitation at the hotels of this state. We further feel that our existing regulations governing resorts could advantageously be used as a basis of such supervision.

"I, therefore, request that you advise me, as State Health Commissioner, whether or not the enclosed contemplated regulation would constitute a legal means to control environmental sanitation at hotels in this state based on the State Board of Health statutory powers. We are enclosing a copy of our resort regulations for your information."

Section 9931, R. S. Missouri, 1939, defines "hotel" as follows:

"That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, * * * * *."
(Under scoring ours)

Section 9955, R. S. Missouri, 1939, defines "tourist camp and resort" as follows:

"The State Board of Health is empowered and it is hereby made their duty through their deputies to have inspected, at least annually and as often as shall be necessary, for the proper regulation and sanitation thereof, all tourist camps, cabins or resorts of whatever kind kept, used, maintained or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs, are furnished for the accommodation of guests. For this purpose the said inspectors shall have the right of entry and access thereto at any reasonable time." (Under scoring ours)

In your opinion request you state these two definitions overlap, making it impossible to definitely establish the identity of certain establishments as hotels or resorts. We think there is a clear distinction made in the statutes. The statute relating to hotels contemplates that it is a

single building or structure in which ten or more rooms are furnished for the accommodation of guests. The law relating to tourist camps or resorts contemplates that it is a place where more than one room (cabin) is furnished for the accommodation of guests not in a single building or structure. The one complements the other, so that all places furnishing more than one room (except where the number is less than ten and are in one building or structure) for the accommodation of guests are subject to regulation. The principal distinction is that a hotel must have ten or more rooms, all in one building, while a tourist camp must consist of less than ten rooms and need not be all in one structure.

Section 9955b, R. S. Missouri, 1939, is as follows:

"To carry out the provisions of this law the State Board of Health shall be empowered to promulgate such rules and regulations as they deem necessary for the proper cleanliness and sanitation of said tourist camps, cabins or resorts and for the proper regulations of water supplies in connection therewith."

Under the authority of this subsection you advise that the State Board of Health has promulgated certain rules governing the sanitary conditions at such tourist camps or resorts, and submit a copy of the regulation asking whether or not such regulation can be made applicable to hotels. In connection with this question we note that the portion of the act dealing with hotels goes into detail concerning sanitary conditions.

Section 9925, R. S. Missouri, 1939, requires the keeping of records on each hotel inspected "showing its sanitary condition." Section 9940, R. S. Missouri, 1939, requires hotels to be properly plumbed, lighted and ventilated, and conducted in every manner with strict regard to the comfort, health and safety of guests, and goes on to prescribe what is meant by proper illumination, plumbing and ventilation, and lays down certain requirements for sleeping rooms. Section 9941, R. S. Missouri, 1939, deals in detail with toilet facilities and sewerage disposal in cities where there is a

system of water works and sewerage. Section 9942, R. S. Missouri, 1939, makes similar requirements respecting hotels in cities where there is no system of water works and sewerage. Section 9943, R. S. Missouri, 1939, requires a main public washroom. Section 9944, R. S. Missouri, 1939, requires the furnishing of individual towels for guests in the public washroom and in each bedroom and prescribes the size of said towels. Section 9945, R. S. Missouri, 1939, makes certain requirements as to the bed and bed linen, size, quality and prohibits reuse without being laundered. Section 9946, R. S. Missouri, 1939, also pertains to bed and bedding and requires the same to be thoroughly aired, disinfected and kept clean, and prohibits the use of certain products in the construction of mattresses that are used by hotels and deals with vermin. Section 9947, R. S. Missouri, 1939, requires that a kitchen, dining room, cellar, ice boxes and other places where food is prepared and stored be kept in a clean and sanitary condition.

A comparison of the above resume of the hotel law with the rules laid down for tourist camps and resorts discloses that those rules are in the main a mere restatement of what the statutes provide relative to the sanitary conditions of hotels. We see no reason why such rules can not be applicable to hotels, but we do not see the need therefor since, in so far as any of those rules should contravene the statutes heretofore referred to, they would be void and, in so far as they merely restate what the statutes already provide, they would be useless.

CONCLUSION.

It is therefore our opinion that the State Board of Health may, by appropriate regulations, make the rules heretofore promulgated relating to the sanitary conditions of tourist camps and resorts applicable to hotels, in so far as said rules are not contrary to the provisions of the statutes already providing for sanitary conditions of hotels.

Respectfully submitted,

APPROVED:

VANE C. THURLO
(Acting) Attorney General

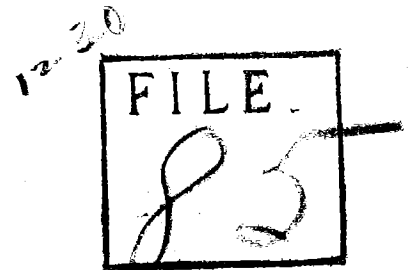
LAWRENCE L. BRADLEY
Assistant Attorney General

LLB/rv

OFFICERS: Any state, county or city officer is eligible as federal agent under the state tire rationing administrator if they serve without pay.

December 29, 1941

Mr. Hugh Stephens, Vice-Chairman
Missouri State Council of Defense
State Office Building
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of December 29, 1941, which is as follows:

"The State Council of Defense has been directed by the U. S. Office of Price Administration to supervise the rationing of tires through means of local tire rationing boards.

"There will be a meeting of the Executive Committee of the Council in Jefferson City tomorrow morning to perfect details and give out instructions. I would like your opinion as to what persons are eligible or not eligible to serve as members of said local rationing boards.

"Section VII, paragraph C, of instructions for rationing reads as follows: 'Each member of the local Tire Rationing Board must take the oath of federal office and become a federal agent, without compensation, to whom the Price Administrator may delegate authority. As in the case of a State Tire Rationing Administrator, the chairman of the local defense council will make sure before selecting members of the tire board that such persons are eligible under state law and local regulation to be such a federal agent.'

"In the selection of approximately ten members of each local council per county, it may happen that there will be included some county or local officers or members of the General Assembly, county extension agents, etc.

"If you can give us an opinion as to eligibility for this service and let us have it by tomorrow morning, it would be appreciated."

There are only three sections of the Constitution applicable to your request. The first section is Section 12, Article IV of the Constitution of Missouri which provides as follows:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

This section is only applicable to the extent that it would prohibit a person from qualifying as member of the General Assembly of this state if he held a lucrative office under the United States.

I am presuming under your request that the members selected as members of the Tire Rationing Board serve the government without pay, that is, payment of a salary that would amount to an inadequate compensation for his services. In the State of Indiana this question was passed upon in the case of State v. Kirk, 44 Ind. 401, 405, 15 Am. Rep.

239, where the court said:

"Const. art. 2, section 9, declares that no person holding a lucrative office or appointment under the United States or under this state shall be eligible to a seat in the General Assembly, nor shall any person hold more than one lucrative office at the same time, except as in the constitution expressly provided, etc. Held, that the term 'lucrative,' as defined by Webster, means 'yielding lucre; gainful; profitable; making increase of money or goods; as a lucrative trade, lucrative business or office'--and that the test was whether the office yielded a pay supposed to be an adequate compensation for the services or duties performed. The lucrateness of an office, which is its net profits, does not depend on the amount of compensation affixed to it, but expenses incident to an office with a high salary may render it less lucrative in this latter sense than other offices having a much lower rate of compensation, but the office is nevertheless a lucrative one."

In such a case and under Section 12, supra, an appointee to the Tire Board would still be eligible to accept an office in the General Assembly for the reason that as an appointee of the Tire Board he is not holding any lucrative office under the United States.

Section 11, 46 Corpus Juris, page 927, states the rule as to office of profit and honorary office wherein it says:

"Offices are classified with reference to compensation as offices of profit and honorary offices. An office of profit, or a lucrative office, is one to which is attached a compensation for

services rendered. An honorary office is one to which are attached no fees, perquisites, profits, or salary.* * * * *

Section 52, 46 Corpus Juris, page 945, further states the rule as follows:

"The holding of more than one office is quite commonly prohibited by constitutional or statutory provisions, as, for example, by a provision that the same person shall not hold two lucrative offices, or offices of profit or of trust or profit, or of emolument, or that one holding a lucrative office under the United States or any other power shall not be eligible to any civil office of profit under the state, or that one holding an office of honor under the United States shall not hold any such office under the state. Such provisions are ordinarily held not to affect positions which are not, strictly speaking, offices. But it is competent, however, for the legislature to prescribe a new meaning for the term 'office' as used in a prohibition against the holding of more than one lucrative office, or to apply it to a position not formerly within the scope of the word. Such a prohibition does not apply to temporary appointments for reasons of necessity. The fact that an officer after termination of his term of office has extended authority to exercise some official functions in the discharge of an uncompleted duty does not render him ineligible to another office."

Another section of the Constitution applicable to your request is Section 4 of Article XIV of the Constitution which provides as follows:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Under this section if the members appointed to the Tire Board receive compensation commensurable with their duties, then they would be ineligible to hold any office of profit under this state.

Another section applicable to your request is Section 18 of Article IX of the Constitution of Missouri which provides as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

This section only applies to state officers, county officers and city officers filling more than one office, but as we understand the state tire rationing administrator and his appointees are considered and will be officers of the United States. We quote this section for the reason that in your request you refer to local officers.

CONCLUSION

In view of the above authorities it is the opinion of this department that a county officer, local officer, members of the General Assembly or county extension agents and other officers of the state and county are eligible under the state law and local regulations to be a federal agent and be appointed by the state tire rationing administrator, chairman of the local defense council and other officers without jeopardizing their present office in any manner.

We base this opinion on the fact that the federal

Mr. Hugh Stephens

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December 29, 1941

agent so appointed is not holding an office of profit or
a lucrative office under the United States.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

HIGHWAY COMMISSION: Right to rescind construction contract by mutual consent by paying for work and materials actually furnished; payment of any sum in excess of money actually earned by contractor under a contract is illegal.

February 15, 1941

Honorable Louis V. Stigall
Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri



Dear Sir:

Your letter of February 8, 1941, is acknowledged and wherein you state:

"On December 19 I wrote you a letter at the instance of Vice-Chairman Gray inquiring if we can legally cancel the contract referred to in said letter. Mr. Gray called me this morning and wants me to change this request for an opinion so that our request will result in asking if such a cancellation can be had when it involves no payment of any consideration other than the unit price of such work as he may have done under the terms of the construction contract.

"Mr. Gray is anxious that this reply can be in Monday and he states he is not interested in getting any other point of law which might be involved in cancellations entailing the payment of considerations therefor. He thinks perhaps the question as originally asked necessitates a longer considera-

Feb. 15, 1941

tion before your opinion could be rendered. Therefore, we kindly request, on behalf of the Vice-Chairman, this opinion from your office."

The facts here involved, as gathered from correspondence and memoranda submitted by your Department, are about as follows:

In February, 1940, the Missouri State Highway Commission entered into two contracts with the McDowell Stone Company for certain grading and construction work on State Highway No. 54 in Cole County, Missouri, pursuant to public bidding in compliance with the law. The contractor proceeded to performance of the contracts and had assembled equipment when stopped by labor difficulties. When notified by the Commission on August 13, 1940, to proceed with the work on or before August 28, 1940, the contractor attempted to comply and was again prevented from doing the work agreed upon by labor disputes. Since such time approximately no work has been done in fulfillment of the contracts.

The contractor evidently now asks that its contracts be rescinded and that it be paid not only for the work actually done, but also for expenses incurred in coming in upon the work.

This Department has not been informed that the contracts are "unit price" contracts, that is, contracts wherein definite sums are fixed for each unit of work completed. However, for the purpose of an attempted solution of the question put it will be assumed that they are "unit price" agreements. The question it seems, involves the right of the Missouri State Highway Commission to waive the failure of a contractor to carry out the terms of his contract and to pay such contractor a sum beyond that actually earned. The appellate courts of this state have never directly passed upon the proposition.

In 1928, following the creation of the Missouri State Highway Commission in 1921, the State Constitution was amended

and Section 44a of Article IV took its present form. This section granted to the State Highway Commission wide and extensive power. The latter portion of paragraph 4 of such section authorizes the Commission to expend the moneys of the State Road Fund and concludes with the following:

"* * to locate, establish, acquire, construct, and maintain, as herein-after provided, supplementary state highways and bridges in each county of the State, in addition to those state highways and bridges designated and laid out under existing law, and to acquire materials therefor, and for such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the State Highway Commission may deem proper."

Section 46 of Article IV is as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

While Section 48 of the same Article provides:

"The General Assembly shall have no power to grant, or to authorize any

county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

The two latter quoted Constitutional provisions were in effect many years before the adoption of Section 44a.

Article 12 of Chapter 42, R. S. Mo. 1929 (Art. 13, Chap. 36, R. S. Mo. 1939) truly makes the Commission "a well-nigh autonomous agency" (State ex rel. McDowell v. Smith, 334 Mo. 653). However, all contracts must be let upon public bids but no provision is made for cancelling a contract once let, or releasing the contractor's bond. Section 8094 R. S. Mo. 1929 (Section 8742, R. S. Mo. 1939) provides that the Commission is vested with all the powers and duties specified in the article and "also all powers necessary or proper to enable the Commission, or any of its officers or employees, to carry out fully and effectively all the purposes of this article."

Executory agreements may ordinarily be rescinded or abandoned by mutual consent and generally if the contract has been executed on one side or is fully executed it may be rescinded upon sufficient consideration. 17 C. J. S. 879, 883; Stodter v. Turner, 237 S. W. 141.

Contracts of state and governmental divisions are generally interpreted as the contracts of individuals and controlled by the same law. 25 R.C.L. 392. However, when a statute or Constitutional provision prohibits extra compensation for work included in a contract by the greater

weight of authority in the United States the payment of extra compensation is not permissible. 59 C. J. 188, 88 A.L.R. 1223. Such provisions prohibiting the Legislature from granting extra compensation bind all of its subordinates, agencies and other departments of government as well.

The Supreme Court of Missouri in the case of *Preiss v. St. Louis County*, 231 Mo. 332, 1. c. 340, held:

"* * * The county court cannot lawfully pay for work done under such a contract a greater price than is therein expressed. In *Anderson v. Ripley County*, 181 Mo. 46, it was held that unless the consideration is expressed in the contract the contractor cannot recover for the work done. In the case at bar the contract calls for grading in the progress of the construction or improvement of the road and it specifies the price to be paid therefor per cubic yard, that is, eighteen cents in one road and twenty-one cents in the other. The county court would have no right, when the work was done, to pay the contractor thirty-six cents per cubic yard in the one instance and forty-two cents in the other, either for all of the grading or for a part of it. * * *"

In passing upon a levee contract and a surety bond executed by a contractor the following was said by the Supreme Court of Mississippi in the case of *Clark v. Miller*, 142 Miss. 123, 105 So. 502, 1. c. 505:

"* * * It is unnecessary for us to here decide the extent of the power conferred by the statute and Constitution upon the levee board, for it

is manifest by section 96 of the Constitution that the broad language in which the power here granted is couched must be restricted so as not to authorize the board to grant extra compensation to any public contractor after the contract is made. The section is as follows:

"The Legislature shall never grant extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, after service rendered or contract made, nor authorize payment, or part payment, of any claim under any contract not authorized by law,' etc.

"It is true that the Legislature only is mentioned in this section of the Constitution, but nevertheless it binds not only the Legislature but all subordinate state agencies created or controlled by it; for what the Legislature cannot do directly it cannot do indirectly by delegating the power so to do to a subordinate agency. * * * * *

In considering and holding invalid a compromise agreement upon the claim of a contractor based upon inadequate estimates, the Supreme Court of Massachusetts (Fuller Co. v. Commonwealth, 21 N. E. (2d) 529, 1. c. 532) wrote:

"* * * Such an agreement in a limited sense is ancillary and related to the original construction contract, but in its primary and ultimate effect, if enforceable, would serve the purpose of creating a new and independent obligation binding upon the Commonwealth,

Feb. 15, 1941

irrespective of the terms of the original contract and unimpeachable except perhaps for fraud. * * * * *

We are not impressed by the argument advanced by the petitioner that by the exercise of such authority the Commonwealth, through the department, may, to its advantage, settle large claims for small amounts. If there is such advantage, we think it is outweighed by the dangers involved in the exercise of the power, and unless the power is either expressly given or required by necessary implication, it ought not to be found. * * *

California's Constitutional Section 32 of Article IV is the same as Missouri's Section 48 of Article IV and its provisions were determined in the case of Highway Commission v. Riley, 218 Pac. 579, 192 Cal. 97. In that case the Supreme Court of California had for determination the cancellation of an agreement of the Commission and one Pollock, a contractor who had agreed to build a certain highway. Subsequent to the construction contract the Commission and Pollock mutually agreed to cancel the contract and end the work thereunder. The Commission was indebted to Pollock in the approximate sum of \$12,000 and the Commission agreed to pay him that sum and an approximate additional sum of \$120,000 for expenses incurred in undertaking the work, or, a total of approximately \$132,000, as consideration for a full release. The State Comptroller refused to pay the sum agreed upon, for expenses - \$120,000, but offered to pay for the work actually done - \$12,000, upon the filing of a proper demand for that sum.

The decision invalidated the compromise agreement and the court said, l. c. 108:

* * * By the execution of such an authorized contract the state acquires certain legal rights and

incurs certain liabilities which are fixed and ascertained, or ascertainable. Thereafter no one can either increase or diminish the rights of the state or increase or reduce its liabilities thereunder unless he has been vested with authority so to do by express grant or clear implication. The state having directed or authorized the making of the contract contemplates its performance and, as in the case of private individuals, the authority to breach such a contract is not to be implied from the mere grant of authority to execute the same. When, as here, the contract has been lawfully executed and has been performed in part, the amount which the contractor is entitled to receive for the work done is fixed by the terms of the contract. For the Commission to pay him more than the contract calls for would, therefore, be to make him a gift of public moneys, unless the Commission has the power and authority to first breach the contract."

In addition it was held, 1. c. 111:

"* * * We are unable to escape from the conclusion that of the money here proposed to be paid to the contractor the major portion represents not compensation for the construction work heretofore performed or hereafter to be performed by him, but compensation for the relinquishment by him of his rights under the subsisting contract, and cannot therefore be regarded as used for the acquisition, construction or improvement of a state highway."

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The Commission is a subordinate branch of the Executive Department (Bush v. State Highway Commission, 46 S. W. (2d) 858, 329 Mo. l. c. 853) and has the right to sue and be sued. It is a legal entity for which the State of Missouri cannot be substituted as a party in a suit. State ex rel. v. Surety Company, 221 Mo. App. 68, 294 S. W. 123.

As the Commission institutes actions upon contracts in its own right it follows that the Commission has the authority to waive a breach of a contract by failing or refusing to take action. A decision by the Commission to forego a breach of contract is within its discretion and is not subject to control by the courts. Bash v. Truman, 335 Mo. 1077, 75 S. W. (2d) 840; State ex rel. Shartel v. Humphreys, 338 Mo. 1091, 93 S. W. (2d) 924.

It is the sole right and responsibility of the Commission to determine its course with respect to suit upon contracts or the forbearance of action thereon. Likewise the Commission may cancel contracts by mutual agreement and pay the contractor the sum actually earned. However, the payment of any sum in excess of that actually due for work and materials as provided by the contracts would be illegal and could be recovered by suit.

CONCLUSION.

It is the conclusion of this Department that the Missouri State Highway Commission has the authority to rescind a contract by mutual consent and to pay the contractor for the work actually performed under such contract, but that the payment of any sum in excess of the work actually performed would be unlawful and such excess over the amount actually earned could be recovered by proper action.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General
VCT:CP

STATE HIGHWAY COMMISSION: May not abandon voluntarily a constitutionally established road.

March 10, 1941

3-12✓



Honorable Louis V. Stigall
Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri

Dear Mr. Stigall:

We acknowledge your recent request for an opinion wherein you state as follows:

"At the suggestion of the War Department we are requesting your opinion upon the powers and duties of the State Highway Commission in relation to a state highway which must be permanently abandoned and closed because located in the Seventh Corps Area Training center adjacent to Fort Leonard Wood. This area is principally in Pulaski County but extends into parts ofaclede and Texas Counties.

"In acquiring the area it has been necessary for the War Department to purchase and condemn thousands of acres in these three counties. There are to be no public roads in the area. State Highway No. 17 now runs south from a point on U. S. Route 66, through Bloodland and Palace in Pulaski County to the Pulaski-Texas County line, thence south to Roby in Texas County. About three miles south of U. S. Route 66 it enters the government reservation

and continues through the reservation to the reservation's southern boundary, about two miles south of the Pulaski-Texas County line, a distance of approximately fifteen miles. As a result of the location of the government area, this mileage on Route 17 within the area will have to be abandoned as a state highway.

"This portion of Route 17 is a part of the Centennial road system laid out in 1921 (Laws of 1921, 1st Ex. Sess. pp. 131-167; Section 8120, R. S. Mo. 1929). The act provides for the road in Pulaski County beginning at Waynesville, thence south via Bloodland to the Pulaski-Texas County line" and the road in Texas County 'beginning at Houston, thence in a northwesterly direction via Plato to the Pulaski-Texas County line.'

"The legislative road designations of the 1921 act were given a constitutional basis in the 1928 road amendment (Section 44a, Article IV, p. 90, Vol. 1, R. S. 1929). This amendment provided for the completion, construction and maintenance of 'the state system of primary and secondary highways as designated and laid out under existing law', which included, of course, the descriptions of the portions of Route 17 set out above, and Section 8134, R. S. 1929, expressly provides that 'when the roads included in the state highway system have been constructed by the Commission, or acquired as provided for herein, they shall be maintained by the Commission and kept in a good state of repair at whatever cost may be required.'

"Incidentally, the Commission cannot relocate within Pulaski County, that

portion of Route 17 now lying between the north boundary of the area and the Pulaski-Texas County line. Any relocation of this portion outside the area in Pulaski County would necessarily have to be either in Phelps County (if to the east) or to the Pulaski-Laclede County line and southward in Laclede County, and not Texas County (if to the east). Either such relocation would involve the construction of a new secondary road other than that prescribed in the Centennial Road Law.

"The War Department has requested the Commission to abandon this part of Route 17 and to convey the State's interest therein to the United States. The Commission concedes the power of the War Department to appropriate and close the highway and is requesting the government to take the proper condemnation proceedings to this end. However, it is the opinion of the Commission that the Commission is without authority to abandon voluntarily the constitutionally established road and that the War Department should exercise its unquestioned right of eminent domain to extinguish the rights of the State in this highway. We will indeed appreciate your advice in this matter, and an answer to the specific question:

"In a case where the government has the right to condemn a state road within an area acquired by the United States for military purposes, has the Commission authority to agree upon the compensation to be paid and to release the State's interest in such road without requiring the government to institute condemnation proceedings."

In determining the question presented, we will first of all examine the power of the State Highway Commission as it relates to the control over the highways and bridges of this State.

In the case of Christeson v. State Highway Commission (1931), 40 S. W. 615, 1. c. 616, the Supreme Court of Missouri said:

"Such commission 'is not the state, but a mere entity created by the state for the purpose of contracting for the building of state highways and bridges and the maintenance of the same and doing all other things pertaining thereto.' State ex rel. Highway Commission v. Bates, 317 Mo. 696, 701, 296 S. W. 418, 421."

And in the case of Burow v. St. Louis Public Service Co., (1936), 339 Mo. 1092, 100 S. W. (2d) 269, 1. c. 270, the Supreme Court of Missouri said:

"On the other hand, the State Highway Commission controls the state highways as a governmental agency. Its control is fixed by the Constitution as follows: 'All the highways and bridges to be constructed and improved with the funds herein provided, shall be constructed, improved and maintained under the direction and supervision of the State Highway Commission, which shall determine the width of right-of-way and surface, and the type and character of construction, improvement, and maintenance.' Section 44a, art. 4, const."

Again in the case of State v. Allen (1937), 100 S. W. (2d) 869, 1. c. 872, the Supreme Court of Missouri said:

"Hitherto our court has substantially held (State ex rel. State Highway

Commission v. Bates, 317 Mo. 696, 296 S. W. 418; State ex rel. McDowell, Inc., v. Smith, 334 Mo. 653, 67 S. W. (2d) 50) that while the State Highway Commission is a quasi corporation--that is to say, it partakes of the nature and has some of the attributes of a corporation--it is essentially an agency of the State and as such exercises broad administrative powers in the public interest. Among such powers, provided by the Legislature, are these: Sections 8115 and 8134 (Mo. St. Ann. Secs. 8115 and 8134, pp. 6899 and 6929) provide that the state highways shall be under the jurisdiction and control of the commission, and the commission 'shall maintain such roads * * * keep them in a good state of repair.'

It is evident after a reading of the above decisions that the State Highway Commission is not the state but an agency created by it and authorized to construct and maintain the highways and bridges of this state.

25 Am. Jur., Section 19, page 350, declares generally that:

"The establishment of highways is embraced within the police power of the state and is a matter which is primarily under the jurisdiction and control of the legislature. Such power may be exercised by the state directly or delegated to municipalities and other subordinate agencies, subject to constitutional limitations and restrictions."

In considering whether there are any constitutional limitations or restrictions on the power of the Legislature or its delegated agency over the control of the highways in this state, we must look to Section 44a of

Article IV of the Missouri Constitution.

Said section provides in part that:

"In addition to the exceptions made and created in section 44, the General Assembly shall, for the purpose of locating, establishing, acquiring, constructing, widening and improving hard-surfaced public highways in the State and in each county thereof, and of acquiring materials therefor and for the purpose of locating and constructing bridges across the rivers and waters of the State and of participating in the construction of toll-free, interstate bridges, have the power to contract or authorize to contracting of a debt or liability on behalf of the State * * *.

"The proceeds of the sale of the seventy-five million dollars (\$75,000,000) of additional bonds herein authorized shall be expended under the direction and supervision of the State Highway Commission for the following purposes: To complete and widen or otherwise improve the state system of primary and secondary highways as designated and laid out under existing law; * * *.

* * * * *

"All the highways and bridges to be constructed and improved with the funds herein provided, shall be constructed, improved and maintained under the direction and supervision of the State Highway Commission, which shall determine the width of right-of-way and surface, and the type and character of construction, improvement, and maintenance.

* * * * *

"Nothing herein contained shall be construed to retard or delay in anywise the completion of the state highway system as designated and laid out under existing law, the construction of which shall proceed concurrently with, or take precedence over, the construction of all other highways provided for herein, as may be determined from time to time by the State Highway Commission.

* * * * *

"

There is nothing in the above constitutional provision which attempts to deprive the General Assembly of its power over roads and highways. The State Highway Commission is merely designated as the agency to expend the funds provided for the completion, construction and maintenance of "the state system of primary and secondary highways as designated and laid out under existing law."

The existing law referred to (Section 8768, R. S. Mo., 1939) provides in part that:

"There is hereby created and established a state wide connected system of hard surfaced public roads extending into each county of the state, which shall be located, acquired, constructed, reconstructed, and improved and ever after maintained as public roads, and the necessary grading, hard surfacing, bridges and culverts therefor shall be constructed by the state of Missouri. Such state wide connected system of hard surfaced roads shall be known as the 'state highway system,' and shall consist of highways along the following described routes:

* * * * *

"Pulaski county.-- * * * * *
Beginning at Waynesville, thence south via Bloodland to the Pulaski-Texas county line.

* * * * *

"Texas county.-- * * * * *
Beginning at Houston, thence in a
northwesterly direction via Plato
to the Pulaski-Texas county line.

* * * * *

The above section was adopted in 1921 and is referred to by the Supreme Court of Missouri, en banc, in the case of State ex rel. v. State Highway Commission (1926), 286 S. W. 1, 1. c. 2, wherein the court said:

"The Commission has not been intrusted with the power to determine the route of any public road. The Legislature itself prescribed the routes of all the roads constituting the state highway system (Section 29, Laws of 1921 (Extra Session) page 145); * * * * *"

In addition to not having the power to determine the route of any public road the State Highway Commission is further restricted as to the circumstances under which it can abandon and relocate public roads.

Sections 8770, 8771 and 8772, R. S. Mo. 1939, provide respectfully as follows:

(Section 8770)

"The state highway commission is hereby authorized to make minor relocations in any state highway or any part thereof when in its opinion such minor relocations are necessary in the interest of safety to the traveling public or in the interest of economy and directness of route: Provided, that no such minor relocations shall deviate from any designated point named in any law which may now or hereafter be in force; Provided, however, the terms, powers and authority herein granted shall apply only

when the conditions exist as enumerated in sections 8771, 8772 and 8515."

(Section 8771)

"Whenever the construction or operation of any water-power, and/or hydro-electric, project results in the inundation of any portion of a state highway, the state highway commission is authorized to abandon said portion of said highway, and, in addition to the relocations mentioned in section 8770 of this article, to relocate, construct and maintain, as in its opinion may be best from considerations of good engineering, safety to the general public, economy and directness of route and service to the locality, so much of said highway as in the judgment of said commission is necessary on account of such inundation, and abandon the portion of the highway in lieu of which the relocation is made, provided that any such relocation shall not deviate from any designated point, if any named in any law, unless such designated point shall itself be inundated: Provided, that when the seat of county government of any county is inundated by virtue of the construction or operation of any water-power, and/or hydro-electric project, rendering necessary the re-establishment and re-location of such seat of county government, such seat of county government having prior to such inundation, been a designated point on any state highway, such relocation and re-established seat of county government shall be considered for all purposes of state road designation and construction, as the original seat of county government of such county."

(Section 8772)

"Whenever the construction or operation by any person, firm, corporation, or association of any water power, and/or hydro-electric project results in the inundation of any land, highway or part of a highway, under the control and supervision of the state highway commission, the state highway commission is hereby empowered to negotiate and agree to a settlement with such person, firm, corporation, or association, their heirs, administrators, executors, assigns, successors, receivers, or trustees, of the damages resulting to any such land, highway or part thereof from any such inundation, provided that all moneys received in any such settlement shall be deposited with the state treasurer to the credit of the state road fund: Provided, however, that sections 8770, 8771 and 8772 shall not operate to deprive any county or other local subdivision of such refund, if any, to which it may otherwise by law be entitled."

(Section 8515, R. S. Mo. 1939, referred to in Section 8770, supra, applies to roads other than state highways.)

It is a well-defined rule of statutory construction that the expression of one thing in a statute is the exclusion of another. Thus, in the very recent case of *Crevisour v. Hendrix* (1939), 136 S. W. (2d) (Mo. App.) 404, 1. c. 408, the court again announced the rule:

"It is an elementary rule of almost universal application that the expression of one thing is the exclusion of another. * * * * *"

The statute having authorized the circumstances under which a road may be abandoned, viz., the inundation of a portion of a state highway resulting from the construction or operation of a water power or hydro-electric

project, the abandonment of a state highway for any other purpose would be unauthorized.

Elliott on Roads and Streets, 4th ed., Vol. 1, Section 509, declares that the:

"Power over roads and streets resides in the legislature, and, except in so far as restricted by constitutional provisions, the legislative power is practically unlimited."

And in Section 511, page 576, it further declares that:

"The legislative power rests upon the principle that the ultimate proprietary right in highways is in the state. As long as a highway exists it is owned by the state."

The duty enjoined on the State Highway Commission that the "state wide connected system of hard surfaced public roads (including that portion of Route 17 now sought to be abandoned) * * shall be * * ever after maintained as public roads * *" (Section 8768, supra) "and kept in a good state of repair at whatever cost may be required" (Section 8782, R. S. Mo. 1939), cannot be surrendered "without the explicit consent of the Legislature" (25 Am. Jur., Sec. 258, p. 553).

From the foregoing we are of the opinion that the State Highway Commission has no authority to abandon voluntarily a constitutionally established road upon an agreed consideration, and that if said road is desired by the War Department it should proceed to obtain same by the exercise of its right of eminent domain.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

COUNTIES: County courts may appropriate monies
FEDERAL SURPLUS for purchase of food stamps, but
COMMODITIES: such purchases must be subject to
✓ FOOD STAMP PLAN: the provisions of the County Budget
✓ COUNTY BUDGET ACT: Act.

March 26, 1941.

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Mr. Stillwell:

This is in reply to yours of recent date wherein you submit the following questions:

"1. Is it legal for a county, through it's County Court to advance a sum of money for the purchase of food stamps in order to cooperate with the Surplus Commodities Corporation in the establishment of a food stamp plan within the county?

"2. If the above be answered in the affirmative, would it be possible for said Court to circumvent the budget of county expenditures for the calendar year 1941 by immediately making appropriation to purchase food stamps."

By the opinion which this department rendered on September 26, 1940, to Mr. Frank W. Hayes, Prosecuting Attorney of Pettis County, we think the answer to your first question will be in the affirmative. You will note, however, that the Hayes opinion concluded with the proviso that the funds which are appropriated for the purpose of purchasing the food stamps are available and the appropriation of same, will not be in conflict with the provisions of the County Budget Act.

Your second question goes to the question of whether or not the county court may circumvent the Budget Act and immediately appropriate money out of the 1941 revenues to purchase the food stamps. The County Budget Act now found at Article 2, Chapter 73, R. S. Mo. 1939, which was enacted in 1933, Laws of Missouri 1933, page 340, has been before our courts on numerous occasions and the courts have, at all times, held that the provisions of this act must be strictly adhered to and the purpose of the act was to place the counties on a cash basis.

You state in your letter that both Marion and Ralls County have ample and adequate funds to finance this food stamp plan, but you do not indicate whether or not these funds are in the classes from which the same may be drawn by authority of the County Budget Act. You may have funds now in Classes 1, 2, 3 and 4 which would be sufficient to finance this revolving fund, but under the provisions of Section 10917 R. S. Mo. 1939, the county court would not have any authority nor would any officer be authorized to pay any of these funds out, for the revolving fund, until it was determined that all of the obligations against these classes had been paid or there were sufficient funds to pay same. The last paragraph of said Section 10917 provides as follows:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

We find another section of the statute which supports our views here, Section 11219 R. S. Mo. 1939, which is as follows:

"It shall be the duty of the county treasurer to separate and divide the revenues of such county in his hands and as they come into his hands in compliance with the provision of law; and it shall be his duty to pay out the revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund which several funds shall be known and designated as provided by law; and no warrant shall be paid out of any fund other than that upon which it has been drawn by order of the court as aforesaid. Any county treasurer or other county officer, who shall fail or refuse to perform the duties required of him or them under the provisions of this chapter, and in the express manner provided and directed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$100, and not more than \$500, and in addition to such punishment, his office shall become vacant."

We think this section should be read with the County Budget Act, and by so doing the officer would not have any authority to pay out revenues from funds other than the class to which they belong. Funds for the food stamp plan may be paid out of Class 5 providing the same were taken into consideration when the county budget was made up by the officers. If it was not so taken into consideration then, in any event, it could be paid out of Class 6.

CONCLUSION

From the foregoing, it is the opinion of this department that county courts may not circumvent the budget of

Hon. Walter G. Stillwell

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March 26, 1941.

county expenditures for the calendar year 1941 by immediately making appropriation to purchase food stamps, but if monies are available in Classes 5 or 6, under the Budget Law, then the county courts may appropriate such monies for the purpose of purchasing the food stamps.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED

VANE C. THURLO
(Acting) Attorney-General

TWB:LB

SCHOOLS: Board does not have statutory authority to appropriate money for sending out delinquent tax notices.

School district is not liable for paving and improving streets adjacent to building.

November 25, 1941

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Sir:

Some time ago you submitted to this Department the following questions for official opinion.

I.

The first question is as follows:

"Has the Hannibal School District, through its regularly constituted Board a right to appropriate a sum of money to be used by the Collector of Revenue of this county for sending out delinquent tax notices? This policy has been adopted in the past with very beneficial results, but I feel that an opinion of your office should be had before it is continued."

We have been unable in our research to find a statute specific enough, or even by a legitimate inference, to authorize the board to use funds for the benefit of county collectors sending out delinquent tax notices.

The decision of In Re Farmers & Merchants Bank of Chillicothe, 63 S. W. (2d) 829, held that a school district has no power or authority to dispose of its public revenues except wherein the statutes so provide. The Board of Directors

of the school district who have charge of maintaining such districts are creatures of the law whose duties are statutory. (Corley v. Montgomery, 46 S. W. (2d) 283).

For the reason, as above stated, we are of the opinion that the school board can not appropriate funds for the use of county collectors in sending out delinquent tax notices.

II.

Your second question is as follows:

"Has the Hannibal School District, by and through its regularly constituted Board a right to appropriate money for the paving of streets in front of and adjacent to school property?"

We assume that the school district in question is the regular school district situated in the City of Hannibal. The general rule, and as a general proposition, a school district is not liable for special benefits from public improvements. In the decision of State v. School District of Kansas City, 62 S. W. (2d) 813, 1. c. 816, this principle is enunciated:

"It is obvious that article VI of the charter furnishes no basis for an assessment of special benefits against public school property. All the way through it speaks of and authorizes only special assessments against private property. Land owned and used for public school purposes is not private property, but strictly public property. This was expressly decided by this court in banc in City of Edina to Use of Pioneer

Trust Co. v. School District, 305 Mo. 452, 267 S. W. 112, 36 A. L. R. 1532, 1540, note. It had been so considered in earlier Missouri cases. In City of Clinton to Use of Thornton v. Henry County, 115 Mo. 557, 568, 569, 22 S. W. 494, 495, 496, 37 Am. St. Rep. 415, referring to Abercrombie v. Ely, 60 Mo. 23, this court said: 'The effort in that case was to enforce a mechanic's lien against a schoolhouse, which was public property.' And further on the opinion said: 'In the first place, property owned by a county or other municipal corporation, and used for public purposes, cannot be sold on execution. * * * Hence it has been held that a schoolhouse cannot be sold under a judgment against the board of education,' citing State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498. What is said in Thogmartin v. Nevada School District, 189 Mo. App. 10, 176 S. W. 472, cited by relator here, does not militate against this view, but accords with it."

Again, we quote the paragraph from the opinion, l. c. 817, which is pertinent to the question:

"We are not to be understood as attempting to pass judgment on the meaning of any of the sections of the Kansas City charter mentioned in this opinion, other than those directly involved in this case. What we do say is that, if the framers thereof had intended that all the land owned by all the public or quasi public entities mentioned in section 319 should be liable to special assessment for any

and all public improvements authorized by the charter, they could and certainly would have said so in clear, plain terms; and it seems they would have put the provision in that part of the charter defining the general powers of the city, rather than to have stated it in vague language in an isolated section dealing with 'Public Improvements.' It is extremely improbable they would have provided in article VI that special benefit assessments in condemnation proceedings should be made against private property, if they had meant by section 319 that all property, whether public or private, should be subject to assessment for that and all other public improvement purposes. At least it can be asserted with positiveness, and we so hold, that neither the general provisions of sections 1 and 3 of article I nor the ambiguous provisions of section 319 are sufficient to overcome the explicit limitations imposed by article VI. Public property belonging to a county, city, or school district will not be held liable to special assessment for public improvements, unless it is made so by express enactment or clear implication. City of Clinton, to Use of Thornton v. Henry County, supra, 115 Mo. loc. cit. 567, 22 S. W. 494, loc. cit. 495, 37 Am. St. Rep. 415; City of St. Louis v. Brown, 155 Mo. 545, 561, 56 S. W. 298, 301; Barber Asphalt Paving Co. v. St. Joseph, 183 Mo. 451, 457, 82 S. W. 64, 65; City of Edina to Use of Pioneer Trust Co. v. School District, supra, 305 Mo. loc. cit. 461, 462, 267 S. W. 112, loc. cit. 115, 36 A. L. R. 1532."

Hon. Walter G. Stillwell

(5)

November 25, 1941

Further authority which strengthens our ultimate conclusion may be found in the case of Normandy Consolidated School District v. Wellston Sewer District, 77 S. W. (2d) 477.

It is our opinion that the Board of Directors of the Hannibal School District is not compelled to appropriate money for the paving of streets in front of and adjacent to the public school property. The only possible exception is that the charter of the City of Hannibal might contain a provision, the writer not being familiar with the charter, or someother special enactment which would specifically make the school district liable.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN/rv

POLL TAX; City of Third Class has right to impose.

January 6, 1941



Mr. Tip Thacker
Poplar Bluff
Missouri

Dear Sir:

We are in receipt of your letter of January 1st wherein you state as follows:

"I would like to know if the City of Poplar Bluff has the authority to collect Poll tax.

"I understand that the Supreme Court of Missouri made a ruling on this several years ago and would appreciate your informing me of this ruling."

The official 1930 Census shows Poplar Bluff, Missouri, to have a population of 7,551, and inasmuch as Section 6092, R. S. Mo. 1929, provides that cities and towns containing three thousand and less than thirty thousand inhabitants may elect to become cities of the third class, we presume that Poplar Bluff comes within the latter category.

Section 6787, R. S. Mo. 1929, provides for the imposition of a poll tax by cities of the third class as follows:

"The city council shall have power to levy, annually, a poll tax, not exceeding two dollars, upon each able-bodied male citizen between

the ages of twenty-one and fifty years, who shall have been a resident of the city for thirty days next preceding the levy of said poll tax, and said poll tax shall be collected by the collector as personal taxes are collected."

In the case of *Kansas City v. Whipple*, 136 Mo. 475, 38 S. W. 295, 35 L. R. A. 747, the Supreme Court, en banc, held a charter provision of Kansas City provided for the levy of a poll tax for sanitary purposes in the years of a general election on every male resident of legal age, unconstitutional, for the reason that it exempted certain persons voting at the election and therefore discriminated between subjects of legislation in the same class.

The charter provision (Section 39, Article 17) provided that:

"Every male person over the age of twenty-one years who shall be a resident of Kansas City shall be assessed for each year in which a general election is held a poll tax of two dollars and fifty cents, which shall be collected and paid in the same manner as any other personal tax; provided, however, that if the person so assessed shall vote at the general city election held in the year for which such tax is levied, and shall receive a certificate from the recorder of voters that he has voted at such election, or shall otherwise establish in such manner as may be provided by ordinance that he has so voted, such certificate or proof shall operate to extinguish such tax for such year; but a failure to pay such tax shall not disqualify any person from voting. The first assessment of such poll tax shall be made for the year 1890.

All moneys collected under this section shall be used for sanitary purposes."

The court said (l. c. 479 (Mo.)):

"Taxes of this character in one form or another have been imposed by statute ever since the organization of the state government, as well as before. 1 Terr. Laws. pp. 34 and 37, secs. 1 and 9; 2 Laws of Mo. 1825, p. 663, sec. 1; R. S. 1835, p. 529, secs. 1 and 3; R. S. 1845, pp. 927 and 928, secs. 1 and 3; R. S. 1855, pp. 1322 and 1324, secs. 1 and 5; G. S. 1865, pp. 95 and 96, secs. 1 and 7; R. S. 1879, secs. 6944, 6945, 6947; R. S. 1889, sec. 7809 et seq. These taxes have always been imposed on a certain class only of the citizens of the state, and it may further be conceded that the constitutional requirement of uniformity is satisfied whenever all citizens of the same class are taxed alike. *St. Louis v. Bowler*, 94 Mo. 630.

"Applying these principles to the charter provision in question it must also be conceded that, if section 39 was stripped of its proviso, it would be a legitimate expression of the taxing power of the city, whereby an equal tax is levied upon all citizens of a certain natural and well defined class. This uniformity is, however, at once destroyed by the proviso which, in effect, exempts from the payment of such tax every registered voter of that class who has voted at the general city election in the year in which the tax is levied, thus discriminating between the subjects of taxation in the same class in violation of the constitutional provision quoted. *St. Louis v. Spiegel*, 75 Mo. 145."

Jan. 6, 1941

Section 6787, supra, is uniform upon the same class of subjects within the territorial limits of the authority levying the tax and is therefore not subject to the criticism outlined in the Whipple Case, supra.

We should point out that at the 1937 Session of the Legislature, Laws of Missouri, 1937, page 440, the following bill was passed:

"That Sections 7879, 7880, 7881, 7882, 7883, 7884, 7885, 7886, 7887, and 7888 of Article Three (3), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929 and Sections 8157, 8158, 8159 and 8160 of Article Fifteen (15), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929, be and the same is hereby repealed."

In an opinion under date of March 25, 1938, to Mr. Charles F. Elmore, Salisbury, Missouri, a copy of which we are enclosing, we pointed out that the above act repealed all of the statutes providing for the levying and collection of poll taxes by counties in this state, with the exception of those poll taxes which cities and villages are authorized to collect.

Section 6787, supra, provides a complete scheme for the levying and collection of poll taxes by the city of Poplar Bluff and is in no way dependent for its efficacy upon the statutes repealed by the Legislature at the 1937 Session.

From the foregoing, we are of the opinion that Poplar Bluff, Missouri, has the authority to collect a poll tax.

Respectfully submitted,

APPROVED:

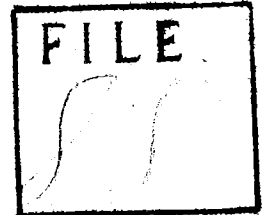
MAX WASSERMAN
Assistant Attorney-General

COVELL R. HEWITT
(Acting) Attorney-General

INTOXICATING LIQUORS:--Provision of ordinance of incorporated city under special charter which excepts licensing and sale of malt liquors in original package at retail liquor stores is invalid, same being inconsistent with state law.

September 18, 1941

Mr. R. B. Taylor
City Attorney
Chillicothe, Missouri



Dear Sir:

We are in receipt of your request for an official opinion under date of August 13, 1941, as follows:

"There are several liquor stores in Chillicothe licensed by the State to sell intoxicating liquor in the original package, not to be consumed on the premises. The State license is \$50.00. The City of Chillicothe licenses these stores and charges one and one-half times the state license, or \$75.00 per year. However, the city makes an exception in its ordinance as to malt liquors. That part of the City ordinance relating to license to sell intoxicating liquor in the original package, except malt liquors, reads as follows:

'Ordinance No. 397. An Ordinance Providing for the Licensing and Regulation of the Sale of Intoxicating Liquor in the City of Chillicothe, Missouri: And Providing for the Punishment of the Violation Thereof.

'Section 1. Required to Take Out License.--It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose to sale in the City of Chillicothe, Missouri, intoxicating liquor, as herein defined, in any quantity, without first having obtained a license from the City therefor.

'Section 2. Amount of License.--Amount of such license shall be as follows:
* * * *

September 18, 1941

'(f) For the privilege of selling at retail, intoxicating liquor in the original package, excepting malt liquors, the sum of 75.00 dollars.'

"This ordinance was passed in 1940.

"Chillicothe is a city under special charter.

"Amendments to City Charter, approved March 17, 1873, (Acts 1873, page 229) provides:

'Section 3. The City Council shall have sole and exclusive power to license, tax and regulate dram-shops and tippling houses, * * * within the corporate limits of the city.'

"The liquor stores above referred to contend that the city has no right by ordinance to make an except of malt liquors and that they have the right to sell malt liquors in the original package. The City Council has asked that I obtain an opinion from your office as to their power to except malt liquors by ordinance in licensing liquor stores to sell intoxicating liquor in the original package."

Section 3 of an Amendment to the City Charter of Chillicothe, was passed by the Legislature and approved March 17, 1873, (Laws of Missouri 1873, page 229) as follows:

"Section 3. The City Council shall have sole and exclusive power to license, tax and regulate dram-shops and tippling houses, * * * within the corporate limits of the city."

Ordinance No. 397 of the City of Chillicothe, passed in 1940, as stated in your letter, provides in Section 2 thereof with reference to liquor licenses.

"(f) For the privilege of selling at retail, intoxicating liquor in the original package, excepting malt liquors, the sum of 75.00 dollars."

Under the State Liquor Control Act intoxicating liquor is defined by Section 4894 R. S. Missouri 1939 to include malt liquors and other liquors as follows:

Section 4894. Definition of "intoxicating liquor".-"The term "intoxicating liquor" as used in this act, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations

September 18, 1941

or mixtures for beverage purposes, containing in excess of three and two-tenths (3.2%) per cent of alcohol by weight."

Section 4901 R. S. Missouri 1939 provides with reference to sale of intoxicating liquor in the original package and the license therefor as follows:

Section 4901. Liquor in original package shall not be consumed on the premises-- license costs.--"Intoxicating liquor shall be sold at retail in the original package upon a license granted by the supervisor of liquor control, and said intoxicating liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor, except as otherwise provided in this act. For every license issued hereunder, for sale at retail in the original package, there shall be paid by the licensee to the supervisor of liquor control, the sum of fifty (\$50.00) dollars per year."

The State Liquor Control Act therefore provides that "intoxicating liquor " may be sold at retail in the original package in certain qualified stores and said act defines "intoxicating liquor " to mean and include "malt liquors" as well as other liquors. Section 4901 R. S. Missouri 1939 also provides with reference to 5% malt liquors:

"The phrase "original package" shall be construed and held to refer to any package containing three or more standard bottles of beer."

Section 4904 R. S. Missouri 1939 with reference to the powers granted to incorporated cities to regulate and license the sales of intoxicating liquor, provides as follows:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act * * * shall pay into the treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, (not exceeding one and one-half times the amount by this act required to be paid into the state treasury for such state permit or license), as the law-making body of such municipality, including the city of St. Louis may by ordinance determine."

"The board of alderman, city council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

The above statute applies to the City of Chillicothe as well as to other incorporated cities. The City of Chillicothe is a city of less than 20,000 population which has not voted as provided by the State Liquor Control Act for the sale of intoxicating liquor by the drink for consumption on the premises where sold. Therefore, as further provided by Section 4901, R. S. Mo., 1939, intoxicating liquor other than malt liquor having an alcoholic content not in excess of 5% by weight can legally be sold only in the original package in said city:

Section 4901. " * * * Provided, that a licensee authorized to sell malt liquor, at retail by the drink for consumption on the premises where sold, shall not be permitted to obtain a license for the sale of intoxicating liquors, other than malt liquor, in the original package, except in cities where the sale of all intoxicating liquors, by the drink at retail for consumption on the premises where sold, is permitted by law."

Section 4941 R. S. Missouri 1939 provides:

"The provisions made by this act for local option shall be held to be applicable only to sales for consumption on the premises where sold, and shall not be construed to prevent the sale of intoxicating liquor in the original package and not to be opened or consumed on the premises where sold, nor to prevent the sale, at retail by the drink for consumption on the premises where sold, of malt liquor containing not to exceed five (5%) per cent of alcohol by weight, under license issued in accordance with the provisions of this act."

By this statute local option powers of incorporated cities are generally limited to the determination by vote of the question whether intoxicating liquor containing alcohol in excess of five (5%) per cent by weight, shall be sold by the drink at re-

tail for consumption on the premises where sold.

Section 7442 R. S. Missouri 1939 provides:

Ordinances to conform to state law.

"Any municipal corporation in this State, whether under general or special charter, and having authority to pass ordinances regulating such matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some provision of its city charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

The Missouri courts hold that municipal corporations may not enact ordinances inconsistent with general laws and policy of the state and ordinances inconsistent therewith are invalid. State ex rel. vs. Anderson (App.) 101 SW (2d) 530; Ex-parte Tarling 241 SW 929. In the recent cases of Kroger Grocery and A. & P. Tea Co. v. City of St. Louis, 106 SW (2d) 435; and Bardenheier Liquor Co. v. City of St. Louis, 135 SW (2d) 345 the Supreme Court held certain intoxicating liquor licensing ordinances of that City, operating under special charter, invalid because they were out of harmony with the state law. A municipal corporation is but a creature or political sub-division of the state, possessing only such powers as are conferred upon it by express or implied provisions of law, and with any reasonable doubt as to whether it has a given power resolved against it. State ex rel. City of Blue Springs v. McWilliams 335 Missouri 816, 74 SW (2d) 363; State ex rel. City of Hannibal v. Smith 335 Missouri 825, 74 SW (2d) 367; Taylor v. Dimmitt 336 Missouri 330, 78 SW (2d) 841; In the case of State ex rel. Spencer v. Anderson, supra, the court said;

"The charter of a municipal corporation as distinguished from our State Constitution, constitutes a grant and not a limitation of power, with the obvious consequence that a municipal corporation can enact no ordinance inconsistent or out of harmony with the general laws and policy of the state which creates it, unless the power it seeks to exercise has been either expressly granted to it by the state or else is fairly and necessarily to be implied from those powers which have been expressly granted."

September 18, 1941

Cases cited, City of St. Louis v. Dreisohner, 243 Missouri 217, 147 SW 998; Carpenter v. Reliance Realty Co., 103 Missouri App. 480, 77 SW 1004. Section 3 of the Amendment to the Special City Charter of the City of Chillicothe contains no special provision granting that City the authority to except malt liquors from licensing and sale in retail liquor stores and the city council of said city should have confined and restricted its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject. Section 7442, supra.

The State Liquor Control Act when passed superseded any regulatory authority over dram-shops and tippling houses granted to the City of Chillicothe under the old special charter insofar as same was inconsistent with or contrary to the new act.

CONCLUSION

It is, therefore, the opinion of this department that that part of sub-section (f) of Section 2 of Ordinance No. 397 of the City of Chillicothe which excepts malt liquors in the original package from sale in package liquor stores in that City is invalid as it is inconsistent with the State Liquor Control Act on the same subject and contrary to the general law of the state. Package liquor stores meeting the requirements of the State Liquor Control Act in that City should be given the privilege and licensed by ordinance to sell intoxicating liquor, which includes malt liquor, at retail in the original package, under the authority granted the City by Section 4904, R. S. Missouri 1939.

Respectfully submitted,

ERNEST HUBBELL

Assistant Attorney-General

APPROVED:

VANE C. THURLO

(Acting) Attorney-General

SALARIES OF COUNTY OFFICERS: Change in salaries occasioned by change in population should be effective as soon as changed report of population is available.

February 21, 1941

Honorable Guy H. Thompson
Prosecuting Attorney
Bolivar, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 15, 1941, asking for an opinion as follows:

"Information is desired relative to salaries of certain county officers in counties of less than 50,000 whose salaries are determined by the last decennial census.

"After approval of the 1941 budget by the court, court unofficial information is received that there has been a decrease in the county population which would put salaries of county officers in a different bracket. Should the court take judicial notice of this unofficial information and if so when would the change in salaries be effective?"

The law authorizing the taking of the census is found in Title 13 U.S.C.A. Sections 201 to 219 inclusive, Cumulative Pocket Part, 1940.

Section 201 authorizes the taking of the census. Section 202 directs when the reports shall be completed and is as follows:

"The period of three years beginning the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed within such period: Provided, That the tabulation of total population by States as required for the apportionment of Representatives shall be completed with eight months from



February 21, 1941.

the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States. (June 18, 1929, c. 28, Sec. 2 46 Stat. 21.)"

Section 206 directs when the actual enumeration shall begin and declares the census shall be effective as of April 1, 1940. This section is as follows:

"The census of the population and of agriculture required by section 201 of this title shall be taken as of the 1st day of April, and it shall be the duty of each enumerator to commence the enumeration of his district on the day following unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event it shall be the duty of each enumerator to prepare the returns hereinbefore required to be made and to forward the same to the supervisor of his district within thirty days from the commencement of the enumeration of his district: Provided, that in any city having two thousand five hundred inhabitants or more under the preceding census the enumeration of the population shall be completed within two weeks from the commencement thereof. (June 18, 1929, c. 28, Sec. 6, 46 Stat. 23.)"

Section 213 authorizes the Director of Census to publish preliminary bulletins and final reports. This section is as follows:

"The Director of the Census is hereby authorized to make requisition upon the Public Printer for such printing as may be necessary to carry out the provisions of this chapter, to wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, and final reports of the results of the several

investigations authorized by this chapter or by chapters 1 and 3 of this title and to publish and distribute said bulletins and reports. (June 18, 1929, c. 28, Sec. 13, 46 Stat. 25.)"

Section 218 authorizes the Director of the Census upon the application of a Governor or a State or of a court of record to furnish certified copies of so much of the population returns as may be requested. This section is as follows:

"The Director of the Census is authorized at his discretion, upon the written request of the governor of any State or Territory or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and \$1 additional for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes, upon payment of the actual cost of searching the records and \$1 for supplying a certificate; and that the Director of the Census is authorized to furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work: Provided, however, That in no case shall information furnished under the authority of this chapter be used to the detriment of the person or persons to whom such information relates. All moneys hereafter received by the Bureau of the Census in payment for labor and materials used in furnishing transcripts of census records or special statistical compilations from such records shall be deposited to the credit of the appropriation for collecting statistics. (June 18, 1929, c. 28, Sec. 13, 46 Stat. 25.)"

By reading the above sections it is apparent that the 1940 census determined what the population was as of April 1, 1940; that the enumeration should commence on the day after the 1st of April, subject to delays occasioned by local conditions and be completed as soon as possible; that the director could furnish preliminary bulletins and certified copies and that the census of population was required to be completed within eight months after its commencement. And it is a matter of common knowledge that preliminary bulletins were sent out within a few weeks after the enumeration was made. It is apparent that the report of the population of Polk County was available prior to the time of the making of the County Budget for the year 1941.

In the case of Carter County v. Huett 303 Mo. 194, in a case involving the payment of salary to a prosecuting attorney, upon a census classification, the Supreme Court said at l. c. 201:

"As to the fact that Carter County as of the first day of January, 1920, had such a population as put it in the class whose prosecuting attorneys were entitled to receive a salary of \$1000 per annum, there is, and can be, no dispute. The substance of plaintiff's contention is that this fact was not and legally could not have been ascertained, within the meaning of the statute, so as to make it applicable to the salary of the prosecuting attorney for the year of 1920. There is nothing here showing an express or specific finding by the county court of the population of the county, but the making of orders for the issuance of warrants for the payment of the increased salary involved an ascertainment of the existence of a population within a given minimum and maximum limit. The defendants judges of the county court, in auditing and paying the salary of the prosecuting attorney, were in the exercise of their statutory authority, and it cannot be said as a matter of law, under the terms of the Census Act, or under the statute, that the population of the county was not ascertained, or that as a matter of law it could not have been ascertained by the decennial census of 1920 for the purpose of determining the salary paid. This is said as applicable to the case against all of the defendants herein."

Hon. Guy H. Thompson. - 5 -

February 21, 1941.

And in the recent case of Kay v. Moniteau County 134 S. W. (2d) 81, also a case involving the salary of a prosecuting attorney, the Supreme Court said at l. c. 83:

"Since the county court paid plaintiff the salary authorized under the census method, it is immaterial to plaintiff as to how the court acquired knowledge of the census. The census method was available and the court was bound under the law to be guided thereby."

In both of these cases there was no official publication of the census until long after the salary had been paid. And the Court upheld the action of paying upon the census figures as soon as they were available, no matter how acquired.

CONCLUSION.

It is the conclusion of this Department that the salaries of the officers of Polk County should have been adjusted to conform to the population classification prior to the making of the County Budget for 1941, as the census figures were available prior to the time it was required to be made out.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

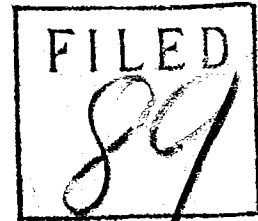
COVELL R. HEWITT
(Acting) Attorney General.

WOJ/mc

COUNTY BOARD OF EQUALIZATION: Cannot equalize values between farm lands and city lots; cannot raise value of a class of property.

April 24, 1941

Honorable W. A. Tibbs
Clerk of the County Court
Macon, Missouri



Dear Sir:

Under date of April 19, 1941, you wrote this office asking for an opinion upon the following questions:

"Is there any way that the County Board of Equalization can raise property under assessed by the Assessor and in the end have a greater valuation than certified by the State Tax Commission? This condition seems to apply to town lots."

"Can the Board raise Town lots and take this amount off of acreage, in an attempt to equalize?"

In order to furnish you with an opinion on your questions, it is necessary to refer to certain sections of the Statutes and these sections are set out herein. The first of these is Section 11036, Article 5, Chapter 74, R. S. Missouri 1939. This section pertains to the duties of the State Auditor and the State Board of Equalization in connection with the equalizing of values. The section is as follows:

"The state auditor shall lay before the board of equalization the abstracts of all the taxable property in the state and the abstracts of the sales of real estate in such counties as returned to him by the respective county clerks and the president of the board of assessors of the city of St. Louis, and the board

April 24, 1941

shall classify all real estate situate in cities, towns and villages as town lots, and all other real estate as farming lands, and shall classify all personal property as follows: First, banking corporations; second, railroad corporations; third, street railway corporations; fourth, all other corporations; fifth, bonds, notes and evidences of indebtedness; sixth, horses, mares and geldings; seventh, mules; eighth, asses and jennets; ninth, neat cattle; tenth, sheep; eleventh, swine; twelfth, farm implements and all other personal property. And the board shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

"First--It shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value. .

"Second--It shall deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value."

It will be noted that for the purposes of equalization this section requires all property to be divided into classes. Real estate being in two classes, namely, Town Lots and Farming Lands. And further that the State Board of Equalization equalizes between the classes.

The next sections are 11002 and 11003, Article 3, Chapter 74, R. S. Missouri 1939, and they prescribe the

powers and duties and the rules to be observed by the County Board of Equalization. The sections are respectively as follows:

"Sec. 11002. Its powers and duties. Said board shall have power to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, and, having each taken an oath, to be administered by the clerk, fairly and impartially to equalize the valuation of all the taxable property in such county, shall immediately proceed to equalize the valuation and assessment of all such property, both real and personal, within their counties respectively, so that each tract of land shall be entered on the tax book at its true value: Provided, that said board shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by said state board of equalization."

"Sec. 11003. Rules to be observed. The following rules shall be observed by county boards of equalization: First, they shall raise the valuation of all such tracts or parcels of land and any personal property, such as in their opinion have been returned below their real value, according to the rule prescribed by this chapter for such valuation; but, after the board shall have raised the valuation of such real estate, it shall give notice of the fact, specifying the property and the amount raised to the persons owning or controlling the same, by personal notice, through the mail or by advertisement in any paper published in the county, and that said board shall meet on the fourth Monday of April, except in counties con-

taining a population of more than seventy thousand and less than one hundred thousand, in which counties such board shall meet on the fourth Monday of March of each year, to hear reasons, if any may be given, why such increase should not be made; second, they shall reduce the valuation of such tract or parcels of land or any personal property which, in their opinion, has been returned above its true value as compared with the average valuation of all the real and personal property of the county."

Attention is called to the fact that the County Board of Equalization is required to equalize the values of the individual parcels or tracts of lands and the items of personal property.

In the case of State ex rel. Thompson, State Auditor, et al. v. Dirckx, County Clerk, 11 S. W. Reporter, 2d Series, page 38, decided by the Supreme Court of Missouri, in discussing the duties and functions of the State Board of Equalization and the County Board of Equalization, after citing and quoting from the sections of the statutes applicable, at page 41 said:

"* * * The latter section requires the state board of equalization to classify all personal property in the state under twelve different heads, and then, 'to equalize the valuation of each class thereof among the respective counties of the state.' In doing so they are bound to add to, or deduct from, the valuation of each class of property of each county such per centum as will bring it to its true value in money. And when the state board in the discharge of this statutory function has determined

and fixed the valuation of a class of property, the county board can neither increase nor reduce it.
The principles determining this construction are so fully set forth in *Mercantile Trust Co. v. Schramm*, 269 Mo. 489, 190 S. W. 886, that a further elaboration of them is unnecessary. * * * * *

And in the case of *First Trust Company of St. Joseph v. Wells, Collector*, 324 Mo. 306, also reported in 23 S. W. (2d) at page 108, the Supreme Court, in discussing assessment and equalization, used the following language at l. c. 312:

"After the county assessor's book is completed, the statute, for the purpose of the equalization of the assessments, classifies personal property under twelve heads, the first of which is that of banking corporations. (Sec. 12855, R. S. 1919.) With respect to the equalization of assessments, the functions of the county board of equalization and the state board of equalization are entirely separate and distinct. The county board's authority is limited to equalizing valuations of property within a class, and in doing so it can neither raise nor lower the aggregate valuation of a class as a whole. (*State ex rel. v. Dirckx*, 11 S. W. (2d) 38.) The state board's authority is limited to the equalization of the valuation of each class as a whole among the respective counties of the State. In so doing it equalizes the valuations of the several classes with respect to each other, because the 'real value in money' is the standard applied to all. It has no power to raise or lower the valuations of specific prop-

April 24, 1941

erties within a class. (State ex rel. v. Vaile, 122 Mo. 33, 26 S. W. 672.) It is wholly immaterial which board completes the discharge of its duties first, because, as stated, they are wholly independent of each other.
* * * * *

And in the more recent case of State ex rel. City of St. Louis v. Caulfield et al., 62 S. W. Reporter, 2nd Series, page 818, in discussing the State Board of Equalization, the Supreme Court, in banc, cited with approval the two above cases.

While the cases above cited were dealing with personal property, the rule seems to be well settled that the County Board of Equalization can only equalize values between individual properties in the same classes. Farming lands and town lots are different classes.

CONCLUSION

The conclusion is obvious that the County Board of Equalization can not equalize values between town lots and farming lands and that it can not increase the valuation of any class above the valuation as certified to it by the State Tax Commission and the State Auditor.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ:DA

TAXATION:
RURAL ELECTRIFICATION:
GOVERNMENT AGENCIES:

Rural Electrification Co-operatives
are not government agencies and are
therefore subject to the provisions
of the Tax laws.

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September 3, 1941

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Honorable Guy H. Thompson
Prosecuting Attorney
Polk County
Bolivar, Missouri



Dear Sir:

This in reply to yours of recent date wherein
you requested an opinion from this department on the
following statement of facts:

"The Rural Electrification Agency maintains a
district office in this county and in connec-
tion with their erection and maintainence
of REA lines throughout the district they
carry a complete line of electrical applian-
ces for sale to users or to any purchasers
that care to buy them. Since this office
is conducted as a government agency would
the county have any right of taxation on
their sale of merchandise?"

Apparently you are under the impression that the
Rural Electric Co-operatives are government agencies and
for that reason are exempt from the provisions of the
Sales Tax Act. You do not state in your request by what
authority the co-operative acts, however some of such
co-operatives are organized and formed under Article 28,
Chapter 102, revised ~~taxes~~ ^{statutes} of Missouri. These co-operatives,
when so formed, under the Federal Act, are permitted to
borrow Federal funds upon which to operate. The authority
for loaning such funds is provided by the Rural Electrification
Act of 1936, 7 U.S.C.A., Section 901 et seq., pp. 378-84.
The applicable provisions of the Act are as follows:

September 3, 1941

"Sec. 2 (Sec. 902). The Administrator is authorized and empowered to make loans in the several States and Territories of the United States for rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service, as hereinafter provided; to make, or cause to be made, studies, investigations, and reports concerning the condition and progress of the electrification of rural areas in the several States and Territories; and to publish and disseminate information with respect thereto."

"Sec. 4 (904). The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans to persons, corporations, * * * and cooperative, nonprofit, or limited-dividend associations organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service: Provided, however, that the Administrator, in making such loans, shall give preference to States, * * * and cooperative, nonprofit, or limited dividend associations, the projects of which comply with the requirements of this chapter."

In the case of Missouri Power & Light Company vs. Louis County R. E. Coop. Association 149 S.W. (2d) 881, the question of the Rural Electric Cooperative Association's authority to sell electric current was under consideration by the Court. In that case the question was not even raised that the Cooperative Association was a government agency.

Hon. Guy Thompson

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September 3, 1941

In our research we failed to find where these Associations have at any time been classed as a government agency. They are incorporated under the laws of the State of Missouri and the only relation they have to the Federal government is that of debtor and creditor.

On April 15, 1940, this department, by an opinion to Honorable Forrest Smith, held that such associations must collect the sales tax from their members for current which they sell to such members. We are inclosing a copy of this opinion for your information.

CONCLUSION.

From the foregoing, it is the opinion of this department that since Rural Electrification Cooperative Associations are not government agencies, that the taxing authorities have authority to impose upon and collect taxes from them, as any other company or association.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

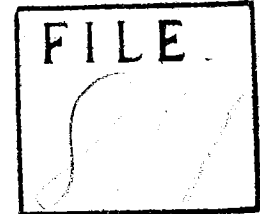
VANE C. THURLO
(Acting) Attorney-General

TWB:DJ

PROSECUTING ATTORNEYS - Prosecuting Attorney not entitled to retain for his services, under Sec. 12942 R. S. Mo., '39, any compensation, but may receive his necessary travelling expenses.

2
October 3, 1941

Hon. Guy H. Thompson
Prosecuting Attorney
Polk County
Bolivar, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of September 30, 1941, which reads as follows:

"Section 12942 R. S. Mo. 1939 provides for the duties of the Prosecuting Attorney in case of appeals and sets a maximum fee of \$25.00 as compensation in addition to the expenses in such cases. Where a county has been sued by a county officer to compel them to pay a surety bond and the case is taken to the Supreme Court on appeal would the prosecuting attorney in representing the county in such a case be entitled to the above mentioned fee or only to his necessary expenses."

Section 12939 R. S. Missouri, 1939, provides the amount of salary prosecuting attorneys of various counties shall receive in payment for their services and how the population of the various counties is ascertained for the purpose of fixing salaries.

Section 1340 R. S. Missouri, 1939, provides that certain fees shall be allowed to the prosecuting

Hon. Guy H. Thompson

-2- October 3, 1941

attorneys.

X Section 12941 R. S. Missouri, 1939, provides in part as follows:

"It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, * * * * *

It will be noted from reading this Section that it is provided that every fee, and that moneys collected by him as fees, shall be turned over to the county treasury.

Section 12942 R. S. Missouri, 1939, provides as follows:

X "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of

error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

In the case of State ex rel Stewart v. Wolfford, 116 Mo. 220, 1. c. 223, we find the following general proposition of law:

"It is well settled law that no officer is entitled to fees of any kind unless provided for by statute, and that the law conferring such right must be strictly construed because of statutory origin and right. Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675; Ford v. Railroad, 29 Mo. App. 616."

Therefore, upon the authority of this general proposition of law, it is incumbent that we trace the history of Sections 12941 and 12942, supra. In doing this, we find that Section 12941 was enacted in its present form in the laws of Missouri, 1913, Page 108 and that Section 12942, has been on our statute books in the present form since the Laws of Missouri, 1881, Page 37. Therefore,

when the legislature saw fit to enact Section 12941, and provided in said Section, as we have heretofore pointed out, "that it shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues to his office and to receive the same and at the end of each month to pay over to the county treasury all moneys collected by him as fees," we think that this Section is broad enough to cover the \$25.00 charge that might be allowed as a fee under Section 12942, supra, and further, as we have shown, Section 12941, supra, was passed many years after Section 12942.

In the case of State v. Cummins, 292 S. W. 1061, 1. c. 1062, the Court had this to say:

"We think there is no question but that the statute provides for two offenses--one for failure of the prosecuting attorney to make out an itemized and accurate list of all fees in his office which have been collected by him and to turn such list over to the county court of Clay county; and the other the failure to make out a similar list of all fees due his office which had not been paid. Each offense is complete within itself, and it will be noted that section 737 provides for a fine 'for each offense.'

* * * * *

It will be noted that the Court in this opinion particularly refers to all fees and the prosecutor's failure to make out a similar list of all fees due his office.

We call your attention to the case of State ex rel Brown, 146 Mo. 401, 406, where the court said:

"It is well settled that no officer is entitled to fees of any kind unless pro-

Hon. Guy H. Thompson

-5- October 3, 1941

vided for by Statute, and being solely of statutory right, the statute allowing the same must be strictly construed."

However, we are of the opinion that a prosecuting attorney is entitled to the necessary travelling expenses that may be incurred by him in the performance of his duties under Section 12942, supra.

CONCLUSION

In conclusion, we are of the opinion that any compensation allowed a prosecuting attorney under Section 12942, supra, must be accounted for by him in his report, and turned over to the county treasury as a collected fee. However, we are of the opinion that a prosecuting attorney is entitled to the necessary travelling expenses that may be incurred by him in the performance of his duties under Section 12942, supra.

Respectfully submitted,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

BRC:RW

COUNTY COURTS: County courts have power to employ watchmen to preserve county property.

December 12, 1941

Hon. D. D. Thomas, Jr.
Prosecuting Attorney
Carrollton, Missouri

Dear Mr. Thomas:



This will acknowledge receipt of your letter of December 11, in which you ask for an opinion as follows:

"In view of the present National crisis, does the County Court have authority to employ and pay guards for County property, including buildings, bridges, etc.?"

Article 4, Chapter 100, R. S. Mo. 1939, is devoted to county buildings and county seats. In this article and chapter is Section 13730, which section is as follows:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."
(Underscoring ours)

In the early case of Walker v. Linn County, 72 Mo. 650, a case involving the power of the county court to procure insurance upon public buildings, the Supreme Court, at l. c. 653, used the following language:

"That a county court is invested with such powers only as are expressly conferred upon it by statute, and such as may be fairly or necessarily implied from those expressly granted, we think cannot

be questioned. It, therefore, follows that the question of the power of the county court to bind the county in a contract such as is here sued upon, must be solved by the statute. That statutory provisions bearing upon the subject, are as follows: 'County courts shall, moreover, have the control and management of the property, real and personal, belonging to the county.' Wag. Stat., 441, Sec. 9. 'The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage.' Wag. Stat., 404, Sec. 17. 'County courts may appoint an agent to make any contract on behalf of such county for erecting any county buildings; or for any other purpose authorized by law; and the contract of such agent duly executed on behalf of such county, shall bind such county.' Wag. Stat., 408, Sec. 3.

"The duty devolved upon county courts in the foregoing sections of taking such measures as shall be necessary to preserve all buildings and property belonging to a county carries with it the power to bind the county in a contract which, in the exercise of the judgment of the court, may seem to be necessary to consummate the object for which the duty was imposed, and which, in point of fact, tends directly to consummate the object. The contract in question is, we think, of this character, and, therefore, binding on the county, provided it is shown by the evidence that it was either made, or ratified and approved by the court."

This case is cited with approval and quoted in the case of Aslin v. Stoddard County, 341 Mo. 138, l. c. 146, in a case involving the hiring of a courthouse janitor.

Under the above authority, it would seem the county court would have authority to employ watchmen for county property if the court deems it necessary for the preservation of county buildings.

Attention is called to Article 2, Chapter 73, R. S. Mo. 1939, to the County Budget Law, which requires the budgeting of estimated expenditures to be made by the county, and prohibits the expenditure of funds not in accordance with the budget. If the budget of the county, as approved, did not have funds which were available for the purpose of paying watchmen, while the court might have authority to employ them, there would be no authority for paying them.

CONCLUSION

It is the conclusion that the county court has authority to employ and pay watchmen for the purpose of protecting and preserving county buildings and property, if the funds to pay such watchmen are available within the county budget.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

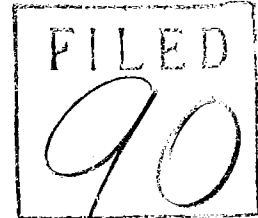
VANE C. THURLO
(Acting) Attorney General

WOJ:NS

COUNTY TREASURER: Surplus monies can only be paid through
suitable order from county court.

January 3, 1941

Honorable Willard S. Tucker
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
dated December 26, 1940, which reads as follows:

"Mr. Kirk Baxter, Treasurer of Greene
County, Missouri, requested the follow-
ing opinion:

'From time to time the proceeds from
the sale of certificates exceeds the
amount of claim the various funds hold
against the property sold. This surplus
is turned to the County Treasurer and
becomes a liability to the county.
What disposition should be made of this
surplus?'

I think the real problem with which Mr.
Baxter is concerned, concerns the ques-
tion as to whether he, as County Treasu-
rer, should attempt to determine who
the owner or agent is and then distri-
bute the surplus, or as to whether the
question of determining the owner or
agent should be decided by the County
Court and the surplus distributed by
the treasurer only on order of the
County Court. Section #9959, R. S. of
Mo., 1929, as Amended Laws of 1933,
Page 425, leaves this question subject
to interpretation.

As the County Treasurer has a considerable amount of money on hand to distribute under this act, we will appreciate your early advice."

Section 9959, Laws of Missouri, 1933, page 428, reads as follows:

"When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said

treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

In construing this section, we are of the opinion that persons who are rightful claimants to funds which have been lodged with the county treasurer, as is designated under the aforesaid section, must appear before the county court of the county, and make positive proof to the county court in order to substantiate their right to said money. Whereupon, it is the duty of the county court to enter its judgment of record, setting forth the court's findings. Upon the certification of the judgment of the county court to the county treasurer, he should, in compliance with its order and judgment of record, pay the moneys to the respective claimants.

We cite Section 9958(b), Laws of Missouri, 1933, page 441, merely for the purpose of showing the legislative intent where tax moneys are to be refunded by the county treasurer. It will be noted by reading this section that the legislature has been consistent in providing a method for county treasurers to refund money.

"No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have

been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court."

CONCLUSION

It is our opinion that a county treasurer can only pay surplus moneys, derived from the sale of lands, to claimants who have made strict proof of their right to same before the county court, and the county court has found, through a judgment of record, that they are the rightful claimants, and certified said order and judgment to said treasurer.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL E. HEWITT
(Acting) Attorney General

BRC:VC

LABOR DEPT: MATTRESSES:
STERILIZATION OF:

Used mattresses must be sterilized before sale, and during renovation. Failure to do so, misdemeanor, and ground for refusal and revocation of license.

November 28, 1941

Hon. Orville S. Traylor
Commissioner
Labor and Industrial Inspection Dept.
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for an official opinion by your recent letter which is in the following terms:

"We would like to have an opinion from your office on the following:

"If a person accepts a mattress from a private home to be renovated, rebuilt or reconditioned, etc., must the mattress be sterilized and/or disinfected before returning to the owner?

"The situation which we are trying to overcome is that of persons complaining that they put back the same mattress into a new ticking and, therefore, believe the law exempts them from sterilizing them."

In a subsequent conversation you requested us to include the question: Must a mattress be sterilized or disinfected before being sold?

A mattress is included in the term "bedding", used in

the law on mattresses, Art. 10, Chap. 68, R. S. Mo., 1939, Sections 10253 to 10264, inclusive.

Section 10253, supra, in part provides:

"The term, 'bedding,' as used in this article shall be construed to mean any mattress, upholstered spring, comforter, pad, cushion or pillow designed and made for use in sleeping or reclining purposes, except where the filling consists exclusively of sterilized feathers.

* * *

"* * * The words, 'previously used,' as used in this article shall mean any material which has been previously used in the manufacture of another article or used for any other purpose." (Underscoring ours.)

Section 10263, supra, in part provides:

"* * * The state commission of labor and industrial inspection shall make reasonable rules and regulations for the enforcement of this article."

Section 10256, supra, provides:

"No person shall sell, offer for sale, deliver, consign for sale, or have in his possession with intent to sell, deliver or consign for sale, any article of bedding which has been used unless the said article of bedding shall first be thoroughly sterilized and disinfected by a process approved by the Missouri state board of health."

We have in our file a copy of the methods of sterilization approved by the State Board of Health, and we assume that has been made available to the mattress industry.

Section 10258, supra, provides that any failure to comply with any provision of the Article, shall be a violation thereof, and Section 10264, supra, provides:

"Any person or corporation violating the provisions of this article shall be guilty of a misdemeanor."

Under the above cited and quoted statutes, a person who sells, or possesses with intent to sell or deliver etc., any mattress which has not been thoroughly sterilized and disinfected by a process approved by the Missouri State Board of Health, is guilty of a misdemeanor.

Regarding renovation, rebuilding or reconditioning of mattresses, Section 10259, supra, in part provides:

"Every place where bedding is made, remade, or renovated, or held for sale, consignment or delivery shall be subject to supervision and inspection of the state commissioner of labor and industrial inspection. Should said commissioner find bedding being made, remade, renovated, or held for sale, consignment or delivery, in other than a sanitary condition, then the said state commissioner of labor and industrial inspection shall give the person responsible for this insanitary condition a reasonable length of time within the discretion of said commissioner, said time, however, not to exceed sixty days, in which to remedy the said insanitary conditions. If the person responsible

therefor fails to remedy the said
sanitary condition, the said failure
shall become a violation of this
article. * * * "

Said Section 10259, supra, prohibits renovation of a
mattress (bedding) "in other than a sanitary condition."
The word renovate is synonymous with repair. Renovate
is defined in 36 Words & Phrases (perm. ed.) p. 896, as:

"'Repair' means to restore to a sound
or good state after decay, injury, di-
lapidation, or partial destruction,
and is synonymous with 'mend' and 'reno-
vate,' * * * . *Mozingo v. Wellsburg*
Electric Light, Heat & Power Co., 131
S. E. 717, 718, 101 W. Va. 79."

Renovate is defined in Webster's New International
Dictionary (2d ed.) p. 2110 as:

"To renew, make over, or repair; to re-
store to freshness, purity, a sound state,
newness of appearance, etc; * * * "
(Underscoring ours.)

In view of those definitions, in our opinion the
word renovate means the same as the words rebuild and re-
condition.

Definitions of the word "sanitary" in 38 Words &
Phrases (perm. ed.) p. 242 are:

"The word 'sanitary,' * * * embraces 'everything pertaining to the health of the inhabitants.' City of Wichita Falls v. Robison, Tex., 46 S. W. 2d 965.

"'Sanitary' is defined as that which pertains to public health with particular reference to cleanliness and freedom from infection and deleterious influences. * * * City of Wichita Falls v. Robison, Tex., 46 S. W. 2d 965."

The Commissioner of Labor and Industrial Inspection has the power to find and determine whether a condition is sanitary (Sec. 10259, supra), and the authority and duty to make reasonable rules and regulation. Under the foregoing definitions, the term "sanitary condition" includes everything pertaining to the health of the public, with particular reference to cleanliness and freedom from infection and injurious influences. Used mattresses which have not been sterilized and disinfected may readily affect the health of the public; they may readily cause the spread of infectious diseases and such deleterious influences. According to the above definition the word renovate connotes a purifying or cleansing, as well as repairing, operation, performed upon a previously used object. In our opinion, the Commissioner has a legal right to determine that used mattresses which have not been sterilized and disinfected are not in a sanitary condition, and to make a rule and regulation to that effect. To renovate used mattresses without sterilizing and disinfecting them would in our opinion, be renovating them in other than a sanitary condition, and would be a violation of the law above quoted.

Section 10264, supra, providing that any violation of Article 10 is a misdemeanor, applies alike to renovation

as well as to sale of mattresses.

A criminal prosecution is not the only method of enforcement available. In addition, the Commissioner of Labor and Industrial Inspection may, for a violation of this law, refuse to renew or issue, or may revoke the license required by law of a person making or renovating mattresses. Section 10259, above quoted, in part provides that certain acts, "shall become a violation of this article, and the said state commissioner of labor and industrial inspection shall revoke and void the permit specified in section 10260. * * * " Section 10260 provides:

"When the state commissioner of labor and industrial inspection has inspected any factory in the state of Missouri where bedding is being made or is to be made, remade or renovated, and has found that the factory conforms to the sanitary conditions prescribed by the state commissioner of labor and industrial inspection, then it shall be the duty of said commissioner to issue to the person operating such factory a permit showing that it has been inspected and declared a proper place in which to make, remake or renovate bedding; and assign it a registry number by which said factory shall thereafter be known and designated in applying and enforcing the labeling and inspection provisions of this article. Said permit shall be posted by the person to whom it is so issued in a conspicuous place in said factory or office thereof."

The license there specified is the same license that is required by Section 10261, which provides:

"No person shall make, remake or renovate bedding, except a person, making, remaking or renovating bedding for his own use, until he has secured a permit from the state commissioner of labor and industrial inspection and has paid to the state commissioner of labor and industrial inspection an inspection and permit fee of twenty dollars, which such payment or charge shall constitute a factory inspection charge for the purpose of enforcing this article. The permit so issued by the state commissioner of labor and industrial inspection shall remain in force and effect until the end of the calendar year in which it was issued or until voided by the state commissioner of labor and industrial inspection for failure to maintain the required sanitary conditions in and around a factory in which bedding is made, remade or renovated or for failure to sterilize and disinfect properly all previously used materials used in making, remaking or renovating bedding."

Sections 10260 and 10261 first appeared together in their present form in Laws of Missouri, 1929, pages 245, 246, Sections 6863 and 6864. There was no requirement of a license in the original law, Laws of Missouri, 1919, p. 496, (R. S. Mo. 1919, Sections 6863, 6864).

Both Sections 10260 and 10261 refer to the license as a factory permit or license, and the place licensed as a place in which to make, remake or renovate bedding (mattresses). In recent conferences you informed us that the establishments involved engage in both making and renovating mattresses, and are licensed as factories engaged in that business.

Section 10260 provides it is the duty of the commissioner to issue the license only after he has found that the establishment conforms to the sanitary conditions prescribed by him. As above stated, the commissioner may require that used mattresses be sterilized and disinfected as a part of the process of renovation, and may, accordingly, refuse to issue or renew a license unless that is done. Section 10261 provides that no person shall make or renovate mattresses without a permit or license from the commissioner; it further provides that the license when granted "shall remain in force and effect until the end of the calendar year in which it was issued or until voided by the state commissioner of labor and industrial inspection for failure . . . to sterilize and disinfect properly all previously used materials used in making, remaking or renovating bedding." Those provisions of Section 10261, and the above quoted provisions of Section 10259, show the legislature intended sterilization and disinfection to be necessary elements of a proper sanitary condition for renovation of mattresses. These statutes plainly mean that all previously used materials used to make or renovate bedding and mattresses shall be sterilized and disinfected, and mean that for a failure to sterilize and disinfect, the commissioner may revoke the license of the offender. For such offense, the commissioner may refuse to issue, or may revoke the license of such offender.

CONCLUSION

It is our opinion that it is unlawful and is a misdemeanor for any person to sell, offer for sale, deliver, consign for sale, or possess with intent to sell, deliver or consign, or for any person to remake, renovate, rebuild or recondition, any used mattress, without sterilizing and disinfecting the same. For such offense, the commissioner may refuse to issue, or may revoke the license of such offender.

APPROVED:

Respectfully submitted

VANE C. THURLO
(Acting) Attorney General

ERNEST HUBBELL
Assistant Attorney General

EH:RW

LABOR, DEPARTMENT OF: Female contestants in a "walkathon" come within the provisions of Section 10171, R. S. Mo. 1939, and cannot participate more than nine hours a day or fifty-four hours a week.

December 8, 1941

12-11

Mr. Orville S. Traylor
Commissioner,
Labor and Industrial Inspection Department
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"Please advise this Department is female contestants of an establishment known as a "walkathon", come within the prohibition of Section 10171, R. S. Mo., 1939.

"As I understand it, a "walkathon" is a place of amusement where spectators are charged an admission fee to watch the contestants walk around a platform or track twenty-four hours a day with the exception of a fifteen minute rest period each hour. The contest usually lasts five or six weeks and a prize is given for the last contestant able to walk the track, a contest of the most gruelling sort.

"Also advise if the above female contestants are prohibited if they received compensation other than the prize given at the end of the contest."

Section 10171, R. S. Mo. 1939, provides as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical,

in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: * * * * *

This statute has never been passed upon by the appellate courts of this State. It might be well to note, however, that our Supreme Court in *State v. Cantwell*, 179 Mo. 245, 78 S. W. 569, sustained a statute prohibiting persons from working beneath the earth while searching for minerals or coal longer than eight hours a day. The court held that the police power of the State extended to the hours of labor in dangerous occupations. However, in *State v. Miksicek*, 225 Mo. 561, 125 S. W. 507, a statute regulating the hours that employees in a bakery could be worked, was held unconstitutional because the court could see no direct relation to the public health, welfare or morals. This case was decided upon authority of *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937, 25 S. Ct. 539, which involved an identical statute and which statute the Supreme Court of the United States by a five to four decision held to be unconstitutional.

An examination of the cases which deal with statutes limiting the hours of labor in private employment of women have almost universally been upheld as a valid exercise of the police power of the state. The principal case is that of *Muller v. Oregon*, 208 U. S. 412, 52 L. Ed. 551, 28 S. Ct. 324. The court in that case in deciding the purpose of this type of statute said:

"That woman's physical structure and the performance of maternal

functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . . * * * * *

The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. * * * * "

It is a rule of statutory construction that statutes limiting hours of service are liberally construed to effect their purpose. 31 Am. Jr., p. 1057. In determining what employers are within the meaning of statutes regulating hours of labor it has been said that the statutes should be "read in the light of the general purpose of the Legislature in enacting" them. Commonwealth v. Riley, 210 Mass. 386, 97 N. E. 367. Of course, the legislative intent must be determined, and, when determined, is controlling. State v. Pacific

American Fisheries, 73 Wash. 37, 131 Pac. 452.

As was pointed out in Schapp v. Bloomer, 181 N. Y. 125, 73 N. E. 568, that in construing statutes regulating hours of labor the court should endeavor to ascertain their fair and reasonable meaning so as to avoid any construction which would either extend or limit their provisions beyond that which was evidently intended.

The evident purpose of Section 10171, supra, is to protect women from "the physiological phenomenon, fatigue" and to provide "rest to repair the waste of the toxin." Frankfurter's, Hours of Labor and Realism, 29 Harvard Law Review 353. Such laws are justifiable in so far as they relate to woman because of her physical organization, her maternal functions, the rearing and education of children and the maintenance of the home. 31 Am. Jr. 1062.

The question so arises - Are women who participate in a "walkathon," being allowed to "work in a place of amusement," within the meaning of Section 10171, supra?

A "walkathon" has been defined in Sportatorium Inc. v. State, 104 S. W. (2d) 912, as:

"A further variation of the Marathon Dance in which contestants walk instead of dance."

In Weaver v. Stone, 11 Fed. Supp. 559, the court gives the following definition (l. c. 560):

"Although the term has not yet found its way into the dictionaries, a 'marathon dance' is generally understood to be a commercialized evolution of the marathon race. It is an indoor endurance contest in which the contestants, instead of running, profess to dance in couples in an arena over long periods of time, with short but insufficient intermissions for rest and hygiene, the usual periods being 45 minutes of dancing and 15 minutes of rest in each hour during the continuance of the contest, thus

competing against each other until one by one they are eliminated by exhaustion until only one couple remains.

"A 'walkathon' is also well understood to be a further variation of the marathon dance in which the contestants walk instead of dance. In short, it is just such an endurance contest as the plaintiff describes in his bill and alleges that he proposes to conduct. * * * * *

That such an exhibition has a deleterious and harmful effect upon the health of the contestants, especially the women, we believe is apparent upon its face. For a woman to walk forty-five minutes out of every hour, twenty-four hours a day, for a number of days, would have the effect of seriously impairing or injuring the health of said woman.

In *People v. Bernquist*, 3 N. Y. S. (2d) 594, the court commented upon the appearance of the women contestants as follows (l. c. 596):

"The girl contestants appeared in court worn and tired. They were pale, nervous, showed effects of eyestrain and had circles under their eyes; they were continually rubbing their eyes and biting their finger nails and, at the conclusion, many broke down and sobbed. During the hearing one of the girls suddenly had a nose bleed and all appeared in a high state of nervous tension. The boys appeared normal and endured the hardships of this long-distance dance contest much better than the girls."

Therefore, it is apparent that the Legislature in enacting Section 10171, supra, intended to prohibit the very thing that is brought about by the participation of women in such an exhibition as a "walkathon." However, if such

a contest does not come within the purview of the statutes, then there is nothing that the state can do in stopping such a spectacle but the matter must be left to the good sense and decency of the public as a whole.

We do not think it can be questioned that a contest such as a "walkathon" is a place of amusement. According to the facts submitted, it is held indoors, to which structure an admission fee is charged to all those who desire to watch the contestants. The contestants are upon a platform upon which they walk and around said platform are seats for those who desire to watch them. A place of amusement has been defined as "a place to which people resort for the purpose primarily of being entertained and amused." *Brown v. Meyer Sanitary Milk Co.*, 96 Pac. (2d) 651, 150 Kans. 931.

In the case of *In Re Shibe*, 177 Atl. 234, the Superior Court of Pennsylvania held that a baseball park was "a place of amusement." The court pointed out that although an exhibition was conducted in which one team contested against another, that it was viewed from the pavilion by spectators, and that it differed not at all from a circus or a theatrical performance. The same reasoning is applicable in the instant case because although the "walkathon" might be a contest in so far as those who participate are concerned, still the primary purpose in conducting such a contest is to attract spectators who will pay their money to view the proceedings and thereby be "entertained" and "amused."

The question next arises whether these contestants may be said "to work" within the meaning of the statute.

The cases which are most analogous to the proposition at hand are those which involve statutes which forbid the employment of minors "to work" in theaters. In *State v. Rose*, 51 So. 496, 125 La. 462, the Supreme Court of Louisiana said (l. c. 497):

"The word 'work' has a much more comprehensive meaning than the term 'labor,' and has been thus defined:

"To exert one's self for a purpose, to put forth effort for the attainment

of an object; to be engaged in the performance of a task, duty or the like.' See Webster's Int. Dict. verbo.

"The term as thus defined covers all forms of physical or mental exertions, or both combined, for the attainment of some object other than recreation or amusement."

In the well considered case of Commonwealth v. Griffith, 90 N. E. 394, 204 Mass. 18, the court said:

"The word 'work' is of broad signification. One of its primary meanings, as it is defined in Webster's International Dictionary, is 'effort directed to an end,' and the author quotes, from Shakespeare, Portia's call:

"'Come on, Herissa; I have work in hand

"That you yet know not of.'

"The object of the statute forbids restriction of the word to a narrow meaning.

"Another question is whether the jury could find that the defendant employed these children. Here again, if we go to the lexicographer, we have as a meaning of 'employ,' 'To use as a servant, agent, or representative.' These children were engaged in a regular service for the defendant in Boston, for two weeks. He depended upon them to do what was a necessary part of that which he was presenting every evening for the entertainment of theater goers. Without them his business could not go on; at least, it could not go on in the way that he desired to have it go. The facts find that he 'procured the boy to appear

in the play as aforesaid.' He allowed a compensation for the service of the girl. He gave to the boy an opportunity for valuable training, and for constant companionship with his father, who was an actor in the company. The service was rendered regularly, under an engagement relied on by both parties, for such benefits as might result from it. The payment of compensation, as such, is not a necessary element of employment. If one is procured to work regularly under an engagement, rendering valuable service for a specified time, it may be found that he is employed, although he receives nothing as an agreed compensation. He is used and relied upon to accomplish the purpose of his employer."

The above case recognizes the rule that since these statutes are health statutes and are designed primarily to protect those within their scope from such work as would be harmful, that whether compensation is received or not is of no importance. Therefore, even if these contestants receive no compensation, still it would seem that they come within the purview of the section.

If the female contestants receive compensation we believe it is obvious that they are "employed to work."

Conclusion

It is, therefore, the opinion of this Department that a female contestant in a "walkathon" is "employed to work . . . in a place of amusement" within the meaning of Section 10171, R. S. No. 1939, and cannot be employed for more than nine hours a day or more than fifty-four hours a week.

Respectfully submitted,

APPROVED:

ARTHUR D'KEEFE
Assistant Attorney-General

VANE C. TURNLO
(Acting) Attorney-General

NEPOTISM

Section 13, of Article XIV, of the Constitution of Missouri, does not prohibit the appointing by a public officer of a husband of a wife whose great grandfather was the brother of the grandfather of the office holder.

July 3, 1941

Hon. Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of June 30, 1941, which reads as follows:

"I am writing to request an opinion from your office as to whether or not the following appointment, if made, would be a violation of Section 13, Article 14, of the Constitution of Missouri.

"An office holder, duly elected in our County, is desirous of appointing as one of his deputies a married man. The great grandfather of the wife of this particular prospective appointee, according to closest calculation that can be made, was the brother of the grandfather of the duly elected office holder who desires to make the appointment.

"The appointment is in no way connected with this remote relationship and as a matter of fact the relationship to the prospective appointee's wife was not even known until after the election.

July 3, 1941

"Although it seems that the possibility of any violation of the nepotism statute is very remote, before making the appointment, however, the office holder wants to be sure that such an appointment will not be a violation of the law by being within the 4th degree of consanguinity."

In reply, we wish to state that our office, on October 17, 1933, rendered an opinion to Mr. J. B. McGuffin, Prosecuting Attorney, at Mt. Vernon, Missouri, which we are enclosing herewith. This opinion rules that the calculation of kinship, either by affinity or consanguinity, is determined in Missouri through the civil rule method. This method is explained in the opinion.

Therefore, in applying the civil rule method it is our opinion that the appointee is more than four times removed from the office holder, and his appointment would not violate Section 13, Article XIV of the Constitution of Missouri.

In this connection we call attention to the case of State ex inf. Norman, Prosecuting Attorney v. Ellis, Circuit Court Clerk, 28 S. W. (2d) 363. This case seems to be authority that a relationship by affinity does not extend to the relatives of the other spouse by affinity only. In other words, relationship by affinity is confined to the blood relatives of the other spouse.

CONCLUSION.

In conclusion we are of the opinion that Section 13, of Article XIV of the Constitution of Missouri, does not prohibit the appointing by a public officer of a husband of a wife whose great grandfather was the brother of the

Hon. Stanley Wallach

(3)

July 3, 1941

grandfather of the office holder.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

AP PROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

SHERIFFS' DEPUTIES: Not necessary for private guards to be
PRIVATE GUARDS: commissioned as deputy sheriffs.

December 31, 1941

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Mr. Wallach:

Under date of December 26, 1941, you wrote this
office requesting an opinion as follows:

"My office is in receipt of a request for a legal opinion from the McDonnell Aircraft Corporation at Lambert-Saint Louis Airport, Robertson, Missouri, relative to a problem which confronts them. Inasmuch as this is a matter of public importance and there probably are a number of plants in the State of Missouri similarly situated, I feel that it is best to procure an opinion from your office concerning this situation.

"Will you kindly let me have your opinion in this matter so that I may advise the McDonnell Aircraft Corporation whether they may legally arm their guards in the manner indicated in their letter, without the guards being deputized as deputy sheriffs or deputy constables. I spoke to Arnold J. Willmann, Sheriff of St. Louis County and he informed me that he has appointed the full number of

deputies provided for his office under the order of the County Court, but states it is possible for him to provide deputies for the protection of this and other plants similarly situated with the approval of the Judges of the Circuit Court, if the plant that desires the protection will pay the amount for the services of these deputies. However, these additional deputies are subject to call for any service that may be required of them as deputies in any part of St. Louis County.

"As St. Louis County comes under the provision of Laws of 1939, page 683, relative to the number of deputy constables to be appointed in counties having a population between 200,000 and 400,000 inhabitants, there is no manner in which additional deputy constables could be appointed for the protection of plants of this nature.

"It is my thought that to permit these plants to employ guards without deputizing them as officers, would lead to a great deal of confusion and it would be a great deal better to have men selected by the Sheriff and approved by our four Circuit judges to provide the necessary protection."

A copy of the letter received by you from the McDonnell Aircraft Corporation and which was enclosed with your letter to this office is as follows:

"Would you please give me your legal opinion on a problem which confronts McDonnell Aircraft Corporation?

"Firearms have been issued to the plant guards. These revolvers are worn by the guards only on plant property and are passed on from one guard shift to another. They will at no time be taken from plant property and will be worn in sight at all times while in use.

"Will it be necessary to have each guard deputized or just what procedure would you advise?"

The duties of a sheriff are set out in Sections 13136 and 13138, R. S. Missouri 1939. Briefly summarized, a sheriff's duties are to conserve the peace and cause all offenders against the law, in his view, to enter into recognizance to keep the peace and to appear at the next term of court, and to quell and suppress assaults and batteries, riots, routs, affrays and insurrections and apprehend and commit to jail all felons and traitors, and to serve civil and criminal writs and processes, and attend upon court of record and a sheriff should be alert and vigorous to prevent unlawful acts as far as it is within his power to do so, but an examination of the statutes and cases reveals that the routine guarding of private property is not one of the sheriff's duties.

It is recognized in this State that commissioned police officers may in some instances act as private watchmen and guard private property. (Brill v. Eddy, 115 Mo., 596; Murphy v. Southwest Missouri Railroad Company, 168 Missouri Appeal Reports, 588.) It is a question of fact to be determined by the trial court in each case whether such police officers act as public officers or as private employees. If they act as private employees or under the orders of a private employer, then such private employer is liable of the wrongful acts just as for the wrongful acts of any other employee. If wrongful acts are committed by a public officer then the bond of such officer, or the bond of his superior, if he is a deputy, will be liable for any wrong act as such public officer.

In this State it is the privilege and duty of the citizen to protect and own property as far as possible. This is recog-

nized by the constitution of the State, Section 17, Article 2, which is as follows:

"That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons." (Underscoring ours.)

CONCLUSION

It is the conclusion that the McDonnell Aircraft Corporation has an excellent plan for guarding their own property; that there is no occasion for having the guards of this company selected and commissioned by the sheriff of St. Louis County. It is much better for the company to select its own employees for whose acts it will be liable.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ:EAW

SCHOOLS: Benefits for teachers in St. Louis. Act can include requirement that teacher reside in St. Louis during time required for obtaining pension; not necessary to pass amendment to the Constitution for legislative act to be valid for teachers only in St. Louis. March 27, 1941

Honorable C. T. Watson
State Senator
Jefferson City, Missouri

Dear Senator Watson:

You have referred to this department Senate Bill No. 47 relating to an act providing for the creation, maintenance and administration of a Public School Retirement System in all school districts of the state which may have a population of 700,000, or more, inhabitants.

You also enclose Senate Bills Nos. 48 and 49. We assume that No. 48 attempts to prevent or overcome a conflict which might have occurred by the passage of Senate Bill No. 47. Senate Bill No. 49 repeals Sections 9569-9577, inclusive. It appears that Senate Bill No. 47 is similar in purport to the provisions of Section 9569-9577, inclusive, but is much broader in detail, and much more definite.

You desire to know in the first instance whether a proviso or an amendment can be added to Senate Bill No. 47 to the effect that no teacher may participate in the benefits or in the retirement program, unless said teacher resides within the corporate limits of the city of St. Louis. Due to the fact that the act will only apply to cities of 700,000 or more, it is obvious that it is only applicable at the present time to the city of St. Louis. The question arises as to whether or not the proposed amendment to Senate Bill No. 47, relating to the residence of the teachers, is a reasonable condition precedent for a teacher participating in the benefits. The General Assembly has always placed certain qualifications or conditions necessary for a beneficiary to meet before obtaining benefits under other

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pension laws.

In the recent decision of Ben Howlett, Respondent, vs. State Social Security Commission, Appellant, No. 37518, as yet unpublished, the Court holds in effect that the legislature can impose the conditions and qualifications upon persons applying for Old Age Assistance as long as such conditions are reasonable. It further holds to the effect that one class of pensioners may be excluded and as long as the classification is not arbitrary and all in a given class are not discriminated against, such a law is constitutional.

In the decision of United States vs. Scott 25 Fed. Rep. 470, in referring to a similiar question, the Court said,

"Now, applying that rule to this case, we find that our pension acts give pensions to certain persons under given conditions exactly defined. Both as to the particular persons entitled and the particular circumstances giving the right to a pension, the laws are very precise and they constitute a system of regulations for the whole subject."

We think the proposed amendment relating to the residential requirements of a teacher are not unreasonable or arbitrary, and this amendment would be legal. Further argument might be advanced that the hiring of teachers from year to year comes within the duties of the school board. In determining the qualifications of prospective teachers it has authority, among other qualifications, to demand that the teacher reside in the city of St. Louis and, in fact, it would not invalidate the contract to include such a requirement within it.

Sections 9569-9577, inclusive, have never been passed upon by our courts. They do not in reality deal strictly

with pensions in the sense that they are gifts or gratuities as in the case of old age assistance. Nor do we think Senate Bill No. 47, strictly speaking, is a pension bill. It is similar in nature to workmen's unemployment compensation insurance and does not violate the provisions of Section 47 of Article IV of the Constitution of Missouri relating to "municipality not to lend credit or grant public money--pension firemen, etc.,--pensioning blind--pensioning or assistance to aged persons."

Section 47a of Article IV of the Constitution of Missouri provides as follows:

"Nothing in this Constitution contained shall be construed as prohibiting payments, from any public funds, into a fund or funds, for paying benefits, upon retirement, disability, or death, to persons employed and paid out of any public fund, for educational services, their beneficiaries, or their estates."

The above section, we think, enables the General Assembly to pass such an act as contemplated by Senate Bill No. 47. The only question arises as to whether or not the proposed act is a special or local law as defined by Section 53 of Article IV of the Constitution, which states in substance: "The General Assembly shall not pass any local or special law", and then sets forth thirty-three subdivisions enumerating laws which shall not be passed. Subsection 19 is as follows:

"Regulating the management of public schools, the building or repairing of schoolhouses and the raising of money for such purposes:"

The above subsection, of course, has no bearing on the subject

March 27, 1941

matter as contained in Senate Bill No. 47. The only question arising as mentioned above is whether or not it is necessary for an additional constitutional amendment to enable St. Louis to pass such an act. Bearing in mind the provisions of Section 47a, quoted supra, and the fact there are numerous holdings to the effect that there is no constitutional inhibition on the legislature enacting a law to apply to cities or counties containing a certain population when such laws meet other constitutional requirements, although at the time of their enactment they may apply but to one city. Cases bearing with this principle of law are State ex inf. vs. Southern 265 Mo. 575 and State ex rel. vs. St. Louis 318 Mo. 910. Bearing in mind that the proposed act contains a section to the effect that the act shall apply to all cities of 700,000 or more, we think that Senate Bill No. 47 is not a local or special law and hence does not violate the provisions of Section 53 of Article IV, and are of the further opinion that it will not be necessary for the people to vote another constitutional amendment permitting the city of St. Louis to provide for a Public School Retirement System. We assume that the contemplated amendment with reference to residence of teachers will apply during the time the teacher is actually engaged in teaching for the required time in order to qualify ultimately for retirement benefits, and will not include any provisions to the effect that after receiving the benefits the teacher will be compelled to reside within the city of St. Louis. We think any amendment to the act requiring residence after retiring and receiving the benefits would be unconstitutional.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General
OWN:RT

TAXATION: -
EXTENSION OF TAXES BY
COUNTY CLERK: -

The ninety-day period in which County Clerk shall extend taxes and turn books over to Collector, begins to run when County Board of Appeals has completed its work and the certificate from the State Tax Commission has been received.

August 8, 1941

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Hon. D. Mandville Weems
Clerk of County Court
Newton County
Neosho, Missouri



Dear Sir:

Replying to yours of recent date, wherein you request an opinion from this Department on the question of the date of delivery of tax books to the county collector, we find that Section 11048 R. S. Missouri, 1939, pertains to this question. This Section reads as follows:

"As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extensions, which book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax book for the use of the Collector; and when the Assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the Clerk with the seal of the Court. And upon a failure to make out such extension of taxes in the Assessor's book or books, as the case may be, and deliver same to the Collector in the time specified, the County Court shall deduct twenty per centum from the amount of fees which may be due the Clerk for making such extension, and such Assessor's book, with the taxes so extended therein, shall be called the 'Tax Book.'"

August 8, 1941

Under Section 10990 R. S. Missouri, 1939, the assessor must make out and return to the county court a copy of his books, on or before January 20th of each year. Then, the county clerk must, by February 20th of that year, make out an abstract of the assessor's books and forward same to the State Auditor to be laid before the State Board of Equalization.

The State Board of Equalization meets on the last Wednesday in February, (Section 11035 R. S. Mo., 1939), at which time the State Auditor lays before the Board of Equalization the copy of the abstract of the assessor's books, as furnished him by the county clerks, under the provisions of Section 10990, supra.

Under Section 11038 R. S. Missouri, 1939, when the State Board of Equalization completes its work the State Auditor immediately transmits to each county clerk the per cent added to, or deducted from the valuation of the property of his county, specifying the percentage added to, or deducted from the real property and the personal property, respectively, and shows the value of real and personal property of his county, as equalized by said Board, and the said clerk shall furnish one copy thereof to the assessor and one copy to be laid before the annual County Board of Equalization, which meets on the first Monday in April of each year. (Sec. 11001 R. S. Mo., 1939).

The Board of Equalization again meets as a Board of Appeals, on the fourth Monday in April, except in counties of seventy-five thousand to one hundred thousand, where it meets on the fourth Monday in March of each year. (Section 11003 R. S. Mo., 1939).

In your request you suggest that the fourth Monday in April might be the date from which the beginning of the ninety-day period for the county clerk to deliver the books to the collectors starts. The books, under the statute, should not be delivered to the Collector until the report from the State Board of Equalization and the State Tax Commission is received, because, by Section 11007, R. S. Missouri, 1939, it is provided:

"In case the report from the state board of equalization be not received at or during the session of said county board, then it shall be the duty of the county clerk to adjust the tax books according to such report when received."

This Section seems to have been enacted to take care of cases in which the Board of Equalization as a Board, or as a Board of Appeals, might adjourn before receiving this report from the State Auditor. The tax assessment referred to in Section 11048 R. S. Missouri, 1939, cannot be corrected and adjusted until all reports from the taxing boards have come in to the clerk's office.

Section 11028 R. S. Missouri, 1939, provides in part, as follows:

"After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof, * * * ."

The remainder of this Section, provides for a hearing before the State Tax Commission, on the assessment in which property may be omitted, or in cases in which individual assessments have not been made in compliance with the law. It will be noted by the quoted part of this Section, supra, that this procedure can take place before the State Tax Commission, after the several Boards of Equalization have had the assessment before them. Therefore, this procedure could take place after the county Board of Appeals meets in April.

August 8, 1941

Under Section 11029 R. S. Missouri, 1939, it is provided, in part, as follows:

"When the work of assessment and equalization shall have been completed, the secretary of the state tax commission shall immediately certify to each county clerk a statement giving the per centum added to or deducted from the valuation of the property of his county, specifying the percentage added to or deducted from the real property and the personal property respectively, and also the value of the real and personal property of his county as equalized; and the said clerk shall furnish one copy thereof to the assessor and one copy to be laid before the annual county board of equalization. * * * "

This Section would indicate that the certificate from the secretary of the Tax Commission would be received by the county clerk in time to be laid before the annual County Board of Equalization; but the first part of Section 11028 provides that the work of the Tax Commission may be done at any time before the making and delivery of the tax rolls to the proper officer for the collection of the taxes. In such a contingency, the provisions of Section 11009 R. S. Missouri, 1939, would be applicable, and it would then be the duty of the county clerk to adjust the books according to the report.

The procedure for the taxing officials, in regard to an assessment, is well stated in the case of *State ex rel Thompson v. Bethards*, 9 S. W. (2d) 603, 1. c. 605, wherein the Court said:

"The regular course is as follows:
After fixing the valuation under sec-

August 8, 1941

tion 12802, the assessor makes an abstract of his footings and forwards the same to the state auditor. Section 12810, R. S. 1919. (Section 10990 R. S. Mo., 1939). The clerk is liable to a penalty if he fails to do that. And when erroneous assessments are corrected by the county court for persons who make complaints (section 12817), (Sec. 10998 R. S. Mo., 1939) the clerk shall correct the tracts on the books under orders made by the county court (section 12818). (Section 10999 R. S. Mo., 1939).

"The state auditor, under section 12855, (Section 11036 R. S. Mo., 1939) must lay before the state board of equalization the abstracts of all the taxable property of the state returned to him by the respective county clerks. The state board then equalizes the valuations of property between the several counties. Under section 12857, (Section 11038 R. S. Mo., 1939) when the state board of equalization shall have completed its labors, it must transmit to each county clerk the per cent, added to or deducted from the valuation of the property of his county. Then the clerk shall furnish one copy thereof to the assessor, and one copy shall be laid before the annual county board of equalization. In this case the copy laid before the county board of equalization was the one upon which that board acted without authority, as noted above.

"In this emergency it is contended by respondent that the clerk of the county court had no duty to perform unless ordered by the county board. He cites section 12826, R. S. 1919, (11007 R. S. Mo., 1939) which provides that:

"In case the report from the state board of equalization be not received at or during the session of said county board, then it shall be the duty of the county clerk to adjust the tax books according to such report when received."

"Thus it was argued that the duty of the county clerk with respect to the report of the state board and the carrying out of the purpose of that report is limited to the single instance in which the report is not received during the session of the county board. The record here shows that the county board was in session at the time.

"That section, by that provision, does not negative any duty of the county clerk. Whatever its purpose, by its terms it is not exclusive. If there are other sections which require the clerk to perform the duty required here, then such performance may be compelled.

"The county board of equalization, under article 3, c. 119, sec. 12821, is authorized to hear complaints and equalize valuations made by the assessor. It is nowhere authorized to increase or reduce the aggregate valuation fixed by the state board of equalization. It has no power to assess. State ex rel. v. Baker, 170 Mo. loc. cit. 391, 70 S. W. 872. Its duty is to equalize among the separate tracts the valuations fixed by the assessor. * * * " (The reference to the 1939 statutes are interposed by us.)

August 8, 1941

We have made inquiry at the office of the State Tax Commission and we find that the certificate required under said Section 11029 R. S. Missouri, 1939, was forwarded to your county clerk on April 4, 1941. So, since this certificate was received before the duties of the county Board of Appeals were finished, then the date when the county Board of Appeals adjourned will be considered the date when the assessor's books in your county were corrected and adjusted, and the date from which the ninety-days, within which you should extend the taxes would begin.

In your letter you indicate that it would be impossible to complete your books within the period that is provided by the statutes. We have diligently searched through the laws pertaining to assessments, levies and collection of taxes, and we fail to find any other provisions which are applicable. If a condition exists wherein it is impossible for officers to perform a duty within the time prescribed, then that is a matter which should be directed to the legislature.

CONCLUSION

From the foregoing, it is the opinion of this Department that the ninety-day period, referred to in Section 11048 R. S. Missouri, 1939, in which the county clerk shall extend taxes and turn the tax books over to the collector, begins to run when the county Board of Appeals has finished its work and the certificate from the State Tax Commission has been received, and in case the certificate from the State Tax Commission is not received until after the county Board of Appeals completes its work, then the period begins to run at the date when the county clerk has adjusted the books, in accordance with the certificate from the State Tax Commission.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

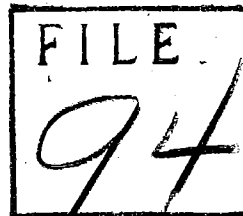
VANE C. THURLO
(Acting) Attorney General

TWB:RW

CIRCUIT JUDGE: Exercises same powers as a member of the county court as jury commissioner.

August 26, 1941

Honorable Randolph H. Weber
Attorney at Law
Poplar Bluff, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated August 22, 1941, as follows:

"Mr. Charles T. Bloodworth, Jr.,
Prosecuting Attorney of Butler County,
Missouri, is temporarily out of the
County and I am acting as his duly
appointed assistant for that period.

"The County Court, and others interested,
have asked for an opinion in interpre-
tation of Section 13394 of the Revised
Statutes of Missouri for 1939, relating
to Circuit Judges being Jury Commission-
ers in Circuits of two or more counties
where there is one Circuit Judge.

"The exact question raised and the point
an opinion is desired on, is just what
are the duties of the Circuit Judge in
such Circuits, as defined by the Statute?
Does the wording 'assist the County Court
in preparing the list as provided in
Sections 705 and 706', mean, that the
Circuit Judge helps to prepare the list,
submits names, and votes thereon? Or
does it mean that he acts in a super-
visory capacity to see that the County
Court properly follows out the provi-
sions of those sections? If he does
have a voice in the selection of the
list and the names to be put therein,
does he have a vote on the selection of
those names?

August 26, 1941

"As you know, there are three Judges of the County Court, and if the Circuit Judge has a vote under Section 13394, there can be a possibility of a divided vote of the court (2 and 2) and in that event what would be the proper procedure and action in the selection of names for the jury list?"

Section 13394, R. S. Mo. 1939, is as follows:

"In all counties in this state which now constitute, or may hereafter constitute, a separate judicial circuit with only one judge of the circuit court therein, the judge of such circuit court is hereby constituted a jury commissioner, whose duties as such commissioner shall be to assist the county court to prepare jury lists and to draw names as provided for in sections 705 and 706 Revised Statutes 1939. Each such jury commissioner shall, as compensation for his services as jury commissioner solely, as provided in this section, receive a salary of twelve hundred dollars per annum, said salary to be paid by the county in equal monthly installments. In all judicial circuits in this state which circuits are constituted of two or more counties the circuit judge is hereby constituted a jury commissioner charged with the powers and duties herein prescribed, and for the performance of said duties he shall receive a salary of \$1300.00, per annum, to be paid in equal monthly installments out of the State Treasury."

Sections 705 and 706, R. S. Mo. 1939, to which the foregoing section refers, set out the duties of the county court with regard to the preparation of the jury list, and are as follows:

"Sec. 705. The county court of each county at a term thereof not less than thirty days before the commencement of the circuit court or other court having civil and criminal jurisdiction, or civil or criminal jurisdiction, shall select names of not less than four hundred persons having all requisite qualifications of jurors; and the court in selecting such names shall select, as near as practicable, the same number from each township in the county according to the relative population, and shall determine how many petit jurors and alternate petit jurors shall be selected from each township in said county and the names of such persons and the township from which they are selected shall be written on separate slips of paper of the same size and kind and all the names so selected from any one township shall be placed in a box with a sliding lid to be provided for that purpose and thoroughly mixed.

"Sec. 706. The clerk of the county court so situated as to be unable to see the names on such slips shall, publicly, in the presence of said court and in open court, proceed to draw out names separately and singly from one township until he gets the number of names required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned; and in the same manner shall continue to draw names from each of the remaining townships, separately and singly, until he shall have drawn the names of twenty-four persons who shall serve as petit jurors at the next ensuing term of said court for which said petit jurors are drawn, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively

from one to twenty-four, inclusive, in the order in which they are drawn: Provided, that in all cases where the county court shall fail to select such jurors and alternates according to the provisions of articles 1 and 4 of this chapter the sheriff of the county shall summon such petit jurors from the several townships in the county, according to their respective populations, as nearly as may be, and not less than ten days before the first day of the term of the court for which such jurors are summoned; and the sheriff when ordered by the court demanding such jury shall summon petit jurors during such term from the bystanders, after the list of alternate petit jurors has been exhausted; and provided further, that no person shall be summoned as such standing juror twice within the period of one year in any court of record."

A reference to these latter sections does not clearly disclose the duties of the circuit judge as a jury commissioner since that term is not to be found in either of the two latter sections. We must, therefore, arrive at the intent of the Legislature as manifested by its use of the words "assist" and "jury commissioner."

In Webster's New International Dictionary "assist" is defined as, "To lend aid; to help." In Words and Phrases, Volume 4, we find the following definitions, page 551:

"To 'assist' is to lend aid to; to help.
Peabody v. Town of Holland, 178 A. 888,
889, 107 Vt. 237, 98 A. L. R. 866.

"*** To 'aid' or 'assist' is the doing of such an act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose. Moss v. Peoples, 51 N. C. 140, 142."

It is apparent from the foregoing definitions that the Legislature intended that the circuit judge, as jury commissioner, act in a capacity similar to that of the members of the county court since any real assistance could be given only by actual participation in the action of the county court, as set out in Section 705, supra. The fact that the term "jury commissioner" is used bears out this view.

Section 766, of Article V, Chapter 5, R. S. Mo. 1939, makes provision for the appointment of a jury commissioner in cities having more than 100,000 inhabitants.

Section 773, R. S. Mo. 1939, provides that the jury commissioner shall visit every house within the limits of the city for which he is commissioner, and take down the name, occupation and place of residence of every person residing in the city who is qualified for jury duty.

Under Section 781, R. S. Mo. 1939, the sheriff, or other officer, obtains a number of names from the jury commissioner, which are placed in a wheel and drawn, as provided in that statute.

Under Section 799, Article VII, Chapter 5, R. S. Mo. 1939, the circuit judges and judges of the court having criminal jurisdiction in counties having not less than 200,000 or more than 400,000 inhabitants constitute a board of jury commissioners. The duties of this board, as set out in Section 800, R. S. Mo. 1939, are to compile a list, alphabetically arranged, of all the qualified jurors in the county with their respective residences.

In each instance, where the Legislature has used the term "jury commissioner," where the duties of such officer are defined, that person selects the names of the properly qualified citizens from which the petit jury panel is drawn.

We must, therefore, arrive at the conclusion that the Legislature viewed each member of the county court, under Section 705, as a "jury commissioner" and intended the circuit judge to occupy a similar position, having the same right to submit names of persons who, in his opinion, are qualified jurors, and the further right to actually

vote for his choice of said persons. These are the duties enjoined on the county court by Section 705, and the sole duty of the circuit judge, as jury commissioner, under Section 706, is to sit with the county court when names are drawn from the prepared list publicly and in the presence of the county court in session.

In answer to the second proposition presented in your request, that of a possible tie vote on the name of any proposed juror to be placed on the eligible list, we fail to find any statute which directly governs, and, therefore, make reference to the general principles of parliamentary procedure in Cushing's Law and Practice of Legislative Assemblies. We find the direct answer to your question in the following language, l. c. 167:

"The rule of decision, in all councils and deliberative assemblies, whose members are equal in point of right, is, that the will of the greater number of those present and voting, -- the assembly being duly constituted, -- is the will of the whole body. Hence whatever is regularly agreed upon by a majority of the members of a legislative assembly is a thing 'done and past' by that body. Where the assembly is equally divided, there is, of course not a majority in favor of the proposition, which is put to vote, and that proposition is consequently decided in the negative."

The principle of majority rule has always been followed in the United States. (See Hughes' American Parliamentary Guide) Clearly, therefore, any person whose name is proposed for the jury list, who does not receive a majority of the votes cast, cannot be placed on the eligible list from which the juries are selected.

CONCLUSION

It is the conclusion of this department that the duties of the circuit judge as jury commissioner, where he is judge of

August 26, 1941

two or more counties in a circuit, require him to sit with the county court in the selection of the list of qualified jurors from which the petit jurors and their alternates are to be drawn, with the same powers with regard to the selection of persons appearing on said list as that possessed by any member of the county court under Section 705, R. S. Mo. 1939, and he is required to sit with the court when the names are publicly drawn in open court by the county clerk.

It is further the opinion of this department that a majority of the votes cast must be favorable to any person offered for the eligible list before he is entitled to a place thereon.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

RLH:VC

OFFICERS:) State cannot place deposit with airplane
TRAVELING EXPENSES:) company to cover traveling expenses of
state officials and employees.

November 6, 1941

Mr. W. A. Weeks
Public Service Commission
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"The commercial airlines operating within the Continental United States and certain lines operating in the Dominion of Canada, have what they term an 'Air Travel Plan' whereby a company or individual may enter into a contract with the airlines for purchase of air transportation at a 15 percent discount from the one-way fares. Under the plan, the subscriber deposits with the airline \$425.00, thus establishing an account against which transportation sold will be charged. This represents the cost at published one-way fares of \$500.00 in air transportation less 15 percent. Each subscriber is furnished with an 'Air Travel Card' for use by such persons as may be designated by the subscriber.

"The Federal Government can not make the initial deposit of \$425.00 required under the plan as a subscriber. The airlines have extended this discount to Federal Government employees traveling on official business without such

Nov. 6, 1941

deposit. So far as I know, the airlines do not extend this 15 percent discount to others without the deposit.

"It appears that many states may be prohibited by statute from depositing \$425.00 in this manner to secure the 15 percent discount in fares.

"At the 1941 Convention of the National Association of Railroad and Utility Commissioners, the president of that association was authorized to name a committee to investigate this matter with the view of having the airlines extend this discount to the states without the necessity of making the deposit.

"Will you please make an investigation and advise me as quickly as possible whether or not the laws of our state will permit, without special action of the legislature, the deposit of \$425.00 with the airlines for the purpose of securing this discount."

Section 13027, R. S. Mo. 1939, provides in part as follows:

"Whenever any official, employee or any other person shall travel at the public expense of the state and is paid or reimbursed from any public funds derived from taxes, fees, licenses, or in any other manner prescribed by law, the provisions herein set forth shall govern and no other.

* * * * *

"(c) Before any payment or reimbursement is made to any person on account of any traveling expenses, the original written

authority provided herein shall be filed with the state auditor. All claims for reimbursement shall be submitted to the state auditor upon a form approved by him, which form shall contain the information herein provided. It shall be made out in duplicate and the original shall be sworn to by the person claiming payment or reimbursement, and the original shall remain in the files of the state auditor and the duplicate shall be retained in the files of the department granting the authority. The form shall contain the following information and in addition such other information as the state auditor, may deem necessary and shall be uniform for all departments: Date and place expense was incurred. If account is for more than one day, it shall be itemized showing the amount of each day's expense and the purpose for which each day's expense was incurred. Transportation charge, sleeping-car fare, lodging and meals shall each be shown as separate items and the amount for each stated. If any item of expense exceeds one dollar (\$1.00), it shall be supported by a sub-voucher or receipt signed by the person to whom payment was made by the official, employee or person traveling at the public expense as herein provided and such sub-voucher or receipt shall show in detail the information required by this section. Also the place and date. No official, employee or person traveling at the public expense shall submit any voucher or claim for partial payment or reimbursement on account of traveling expenses but such a voucher or claim must contain all and every expense incurred within the time it purports to cover. The oath or affirmation of the official, employee or person traveling at the public expense shall be in the following form:

"I, _____, do solemnly swear, 'or affirm' the above claim is correct and just, that no part of the same has been paid, that the expense was necessary to the public business of the state, that payment was made out of personal funds and that I have not been reimbursed therefor, and I have not received and will not receive from any source whatever any payment of any part thereof except as provided by law."

The primary rule of statutory construction is to ascertain and give effect to the lawmakers' intent and this should be done from the words used, considering the language honestly and faithfully. *City of St. Louis v. Senter Commission Co.*, 85 S. E. (2d) 21, 337 Mo. 238; *Dennis v. Wrought Iron Range Co.*, 89 S. W. (2d) 127.

We believe from a reading of the above statute that before the state may pay for any transportation expense of a public official or employee that said official or employee must first have paid the same from his personal funds and then have submitted a claim to the state for reimbursement. Section 13027, *supra*, provides that "all claims for reimbursement shall be submitted to the state auditor" and that the claim must contain "all and every expense incurred within the time it purports to cover." It will further be noted that the oath or affirmation attached to the claim provides that the person has made payment out of personal funds. Therefore, we are of the opinion that any deposit by the state of money for transportation expenses which have not yet accrued, is illegal and contrary to Section 13027, *supra*.

Conclusion

It is, therefore, the opinion of this Department that a deposit may not be made with an airplane company to pay for transportation of state officials and employees in

Mr. W. A. Weeks

-5-

Nov. 6, 1941

the future, because under Section 13027, R. S. Mo. 1939, transportation expenses must be paid by the state official or employee from his personal funds and he shall then be reimbursed from the state funds.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

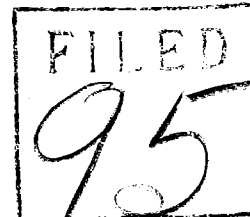
APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

COUNTY TREASURER: Not authorized to issue check in payment of judgment until warrant was presented.

February 13, 1941



Hon. Joe Welborn
Prosecuting Attorney
Bloomfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 11, 1941, asking for an opinion as follows:

"Will you please favor me with an opinion on the following legal proposition:

"Can a County Treasurer in a County of a population of 33,000, pay a judgment, given in Circuit Court, without requiring the judgment holder to procure a warrant from the County Court.

"I am of the opinion that the judgment holder would at first have to obtain a warrant, in view of section 12136 R. S. Mo. 1929, which provides that the County Treasurer shall 'disburse the same (money) on warrants drawn by order of the County Court.' It is my opinion that the County Treasurer can only pay out money on warrants.

"I shall appreciate very much an opinion from your office on this matter."

The handling of county funds, and the method of payment of obligations of a county is fully provided for in the statutes. These provisions are found in Chapter 85, Revised Statutes of Missouri 1929. Section 12136 R. S. Mo. 1929, mentioned in your letter is one of them, and is as follows:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court

shall provide said county treasurer with suitable rooms, and a secure vault in the courthouse or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Other pertinent sections are 12161, which requires a county clerk to keep accounts between the county and the treasurer.

Section 12162 which directs the county court to audit and settle all accounts.

Section 12169 which sets out form of demand, and form of warrant.

And Section 12163 which also prescribes the form of warrant.

Section 12170 directs when warrants shall be drawn, and is as follows:

"Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed by the president of the court whilst the court is in session, attested by the clerk, and warrants shall be numbered progressively throughout each year: Provided, that where the claim allowed is for more than twenty-five dollars, the claimant may, on his own motion, in open court, have as many warrants issued for separate parts of such claim as he may desire, the whole amount of said warrants not to exceed the amount of the claim allowed, upon his paying the costs of the additional warrants."

Hon. Joe Welborn.

- 3 -

February 13, 1941.

And Section 12195 which provides when the treasurer may issue checks. This section is as follows:

"It shall be the duty of the county treasurer, upon presentation to him of any warrant drawn by the proper authority, if there shall be money enough in the depositary belonging to the fund upon which said warrant is drawn and out of which the same is payable, to draw his check as county treasurer upon a county depositary in favor of the legal holder of said warrant, and to take up said warrant and charge the same to the fund upon which it is drawn; but no county treasurer shall draw any check upon the funds in any depositary unless there is sufficient money belonging to said fund upon which said warrant is drawn to pay the same, and no money belonging to said county shall be paid by any depositary except upon checks of the county treasurer. In case any bonds, coupons or other indebtedness of said county are payable by the terms of the bonds, coupons or other debts at any particular place other than the treasury of the county, nothing herein contained shall prevent any county court from causing the treasurer to place a sufficient sum at the place where said debts shall be payable, at the time of their maturity, to meet the same."

At no place in the above sections of the law is found any authority for a treasurer to issue checks for the payment of obligations of the county without first having a warrant properly drawn.

In the recent case of Security State Bank v. Dent County 137 S. W. (2d) 960, it is held that mandamus is the proper method to collect a judgment from a county.

CONCLUSION.

The conclusion is obvious that a county treasurer has no authority to issue a check in payment of a judgment procured against a county without having presented to him a properly prepared warrant.

Respectfully submitted,

APPROVED:

W. O. JACKSON

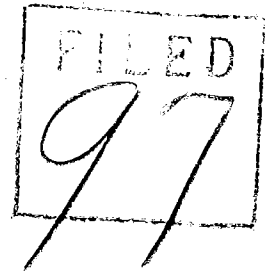
Assistant Attorney General

COVELL R. HEWITT
(Acting Attorney General
WOS/me

ROAD DISTRICTS: Special Road District may make
levy under Section 8067 R. S.
Missouri, 1929, for repairing
Roads & Bridges: roads in the district and may
also purchase rock crusher, to
crush rock to be used in re-
pairing said roads.

February 7, 1941

Hon. R. P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This will acknowledge receipt of your letter
under date of January 17, 1941, requesting the follow-
ing opinion:

"In our County, the Parkville Benefit
Assessment Special Road District Com-
missioners desire to levy a tax on
the property in the district for the
purpose of raising money for rock
crusher operation, the rock to be used
on the roads in the district.

"Is it necessary for the Board of
Commissioners to call a special elec-
tion to vote on the levy, or may the
Board, under Section 8067 R.S. Mo.
1929, simply levy general taxes on
the property taxable in the district?"

We are enclosing a copy of an opinion rendered
by this department, under date of March 7, 1939, to
Hon. F. M. Brady, Prosecuting Attorney, Benton County,

Hon. R. P. C. Wilson, III

(2) February 7, 1941

Missouri, which the writer believes will answer your request. The enclosed opinion holds that it does not require a vote of the people to levy a tax under Section 8067 R. S. Missouri, 1929. However, the opinion goes further by holding that the Commission, under Section 8067, supra, cannot levy for construction of roads.

The writer assumes by the above use of the word "construction" it is meant to build a new road and not merely maintain or repair the roads in the district.

In Article 10, Chapter 42, Section 8065 R. S. Missouri, 1929, under Special Road Districts, we find the Commission is required to keep all such roads, bridges and culverts in good condition, and for such purposes may rent, lease or buy teams, implements, tools and machinery, all kinds of motor power and all things needed to carry on such work. This Section reads in part as follows:

"Said commissioners * * * shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

Section 8067 R. S. Missouri, 1929, among other things provides that the board of commissioners shall

have the power to levy for working, repairing and dragging roads in the district. Section 8067, supra, reads in part as follows:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, * * *

In *Barber Asphalt Pav. Co. v. Hezel*, 155 Mo. 391, l. c. 399, the Court defined the words "maintain" and "repair" as used in statutes pertaining to maintenance and repair of streets, in the following manner:

"The word "maintain" does not mean to provide or construct, but means to keep up; to keep from change; to preserve (*Worcester Dict.*); to hold or keep in any particular state or condition; to keep up (*Webster Dict.*).

'In *Moon v. Durden*, 2 Exch. 21, it was said: "The verb 'to maintain,'..... signifies to support what has already been brought into existence." See, also, *Railroad v. Godman*, 4 N. E. Rep. (Ind.) 163.

"To repair" means to restore to a sound or good state after decay, injury, dilapidation or partial destruction. (*Webster; Street Railway, etc., Co. v. Galveston*, 69 Tex. loc. cit. 663. See, also, *Railroad v. Pittsburg*, 80 Pa. St. loc. cit. 76.)

February 7, 1941

"It will thus be seen that "maintenance" and "repair" when applied to a street practically mean one and the same thing."

In Boston & M. R. R. v. County Commissioners, 133 N. E. 67,68, the Court said:

"It should require no authority to show that the word 'maintain' includes the word 'repair'."

Also, in Fuche v. City of Cedar Rapids, 139 N. W. 903, 904, the Court held:

"To 'repair' presupposes the existence of the thing to be repaired; thus we say the thing needs repairing; the thing is out of repair; and so, when we speak of repairs, we assume that the thing to be repaired is in existence, and the word 'repair' contemplates an existing structure or thing which has become imperfect by reason of the action of the elements, or otherwise; and, when we repair, we restore to a sound or good state, after decay, waste, injury, or partial destruction, the existing structure or thing which needs to be restored to its original condition, or, in other words, we supply, in the original existing structure, that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be."

Hon. R. P. C. Wilson, III (5) February 7, 1941

CONCLUSION.

Therefore, it is the opinion of this department that the board of commissioners may make a levy under authority granted in Section 8067, supra, to repair roads in the district, and, in this connection we are of the opinion the commission may levy for the purchase of a rock crusher, when same is to be used to crush rock which will be used in the repair of said roads in the district.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(ACTING) ATTORNEY GENERAL.

ARH, Jr. :RW

COUNTY COLLECTOR: Back taxes are not to be included in
the limitation of fees under Section 11106
R. S. Mo. 1939.

February 19, 1941

Mr. A. A. Willard
Collector Revenue
Dallas County
Buffalo, Missouri



Dear Sir:

This department is in receipt of your letter of
February 12th, wherein you make the following inquiry:

"Will you please give your opinion on
Section 9935 Revised Statutes of Missouri
1937, which sets out counties in differ-
ent brackets according to the charges of
tax books for the current year as to
collector's pay for his services in col-
lecting revenue, except back taxes.

Then in the latter part of the section is
stated, provided that the limitation on
the amount to be retained as herein pro-
vided shall apply to fees and commissions
on current tax but shall not apply to
fees and commissions on the collection of
back and delinquent taxes.

If collection of back taxes are to be
included in the limitation, what law so
provides?"

We assume the section to which you refer is Section
11106 R. S. Mo. 1939, Laws of 1937, page 547. The last
proviso is as follows:

"Provided, that the limitation on the

amount to be retained as herein provided shall apply to fees and commissions on current taxes, but shall not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes, and the compensation of the county collector for the collection of levee taxes and ditch taxes, collected for drainage purposes, shall be one per cent of the amount collected."

We refer you to the first paragraph of said section which contains a provision with respect to back taxes:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:"

The section in question which you present was under consideration in the case of State vs. Davis 335 Mo. 159, l.c. 162:

"It will be noted that in the first paragraph of the section it is provided that 'the collector shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more.' In State ex rel. v. Hawkins, 169 Mo. 615, 70 S. W. 119, it was contended that, by this paragraph, 'back taxes' were excluded from the provisions of Section 9935. We ruled to the contrary and held

that, under said section, a collector was entitled to compensation for collecting delinquent taxes, to be deducted from the taxes collected, and further compensation under Section 9969, Revised Statutes 1929, for collecting said taxes, to be taxed against the delinquent taxpayer as penalty and costs.

In this situation plaintiff contends that the word 'levied' as used in the clause 'the total amount of all such taxes and licenses levied for any one year' should be held to mean 'charged.' If so held, the delinquent taxes charged to the collector in 1932 would be added to the taxes levied for that year, and the compensation of the collector fixed by subdivision XIII of Section 9935 instead of subdivision XI of said section.

(2) The word 'levy' as applied to taxes has a well-defined and understood meaning. It means the formal order, by the proper authority, declaring property at its assessed valuation, subject to taxation at a fixed rate. (State ex rel. Hamilton v. Hannibal & St. J. Ry. Co., 113 Mo. 297, 1.c. 307, 21 S. W. 14.) The clause under consideration is not ambiguous, and the Legislature must have used the word 'levied' advisedly. In this connection it should be noted that before taxes become delinquent they must have been current. It follows that the delinquent taxes charged to defendant in 1932 were counted in fixing the compensation of the collector when they were current. Plaintiff seeks to again have said taxes counted in fixing said compensation. It may be, as contended by plaintiff, that inequalities of compensation

February 19, 1941

occur as between collectors only charged with current taxes and collectors charged with both current and delinquent taxes. If so, this court is without authority to amend the statute by substituting the words 'charged and remaining uncollected at the beginning of any year,' for the words 'levied for any one year.' If inequalities of compensation occur, it is a matter for the consideration of the Legislature. Furthermore, the language used being unambiguous, executive construction of these provisions of the statute is not for consideration.

Plaintiff cites States ex rel. Scotland County v. Ewing, 116 Mo. 129, 22 S. W. 476; State v. Ascotin County (Wash.), 140 Pac. 914. Those cases do not authorize a court amendment of the statute. The judgment should be affirmed."

The effect of the holding in the above case is that delinquent taxes are not to be included in determining the rate of compensation of the collector and we accordingly so hold.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

COUNTY BUDGET ACT: Traveling expenses of prosecuting attorney
can be paid out of surplus in class 5,
or can be paid out of class 6.

February 26, 1941

Mr. Robert P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This department is in receipt of your letter of
February 10th, wherein you make the following inquiry:

"A problem has arisen confronting the
county court in this county and I res-
pectfully request an official opinion
from your office on that problem.

During my predecessor's term namely,
during the course of the year 1939,
he incurred traveling expenses in the
discharge of his official duties.
When our county court met last week
he then presented the bill to it for
payment. I desire your opinion of
whether there would be any objection
to the payment of this bill at this
time.

A somewhat relevant fact in the case
may be the fact that at the close of the
year 1939 a surplus existed in all five
classes.

If your answer to my first question is
in the negative, then I desire advice
as to what class payment should be made
from."

February 26, 1941

There does not appear to be any controversy over your predecessor's request for reimbursement of his traveling expenses. We assume that it is a legal obligation of the county. We are enclosing pertinent opinions rendered by this department on March 1, 1937 to Honorable Lee Barham, Circuit Clerk of Stoddard County, and Honorable R. L. Jones, Clerk of the County Court of New Madrid County, Missouri. These opinions, in effect, answer your question as to whether or not the obligation can be met at this time. We are of the opinion that same can be met at the present time and for the further reason that you state you have a surplus in all classes for the year 1939. We, therefore, assume that you have no outstanding warrants for prior years and that you have met all current obligations that were estimated in the budget for 1939.

Under Section 10911 R. S. Mo. 1939, the section being known as part of the county budget law, there are five classes of expenditure. Class 4 relates to the payment of salaries of county officers. The officers are privileged only to include in the estimate for the conduct of the offices blanks and supplies of an expendable nature, and we are of the opinion that traveling expenses of the prosecuting attorney could not be classed under class 4. Class 5 contains a provision relative to expenditures for the contingent and emergency expenses of the county and further provides that a transfer of any surplus funds from the prior classes may be made to class 5. It contains the direct prohibition against the paying of personal services which have been estimated and included under class 4 of county officers. Under class 6 any balance which we interpret to mean a surplus may be expended for any lawful purpose.

CONCLUSION

We are of the opinion that if the expenses of your predecessor were not included in his budget when making his estimate under class 4, that the same may be paid out of any surplus in class 5, or the same may be paid

Mr. Robert P. C. Wilson III -3- February 26, 1941

from any funds in class 6 provided that no lawful
outstanding warrants are now in existence.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

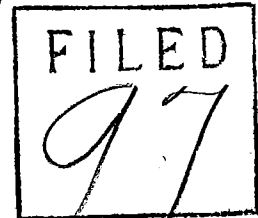
OWN:RT

COUNTY COURT: The county and circuit courts may
JURY COMMISSIONERS: examine a poll book in preparing,
before selecting, persons qualified
to serve as jurors as provided in
Section 705 and Section 706 R. S. Mo. 1939.

March 14, 1941.

Honorable C. A. Wiegenstein
Presiding Judge
Madison County
Fredericktown, Missouri

3-15



Dear Sir:

This will acknowledge receipt of your request
for an official opinion, under date of March 6, 1941,
which reads as follows:

"It has been the common practice
of the County Court of this County,
in fulfilling his duties under
Section 705 supra, to select the
Four Hundred names to be placed in
the box from which the names of
petit jurors are drawn by first
studying the various poll books of
the County.

"At the February Term of the County
Court of this County, while in
conference with Hon. Frank Fenwick,
Judge of the Circuit Court, I was
informed that the use of the poll
books for this purpose was unlawful.
I have read the citations under the
above section and also section 706
RSMO 1939, and I do not find where
this point has been decided in any
of our Appellant courts. I know
that we are not allowed to select
jurors from a list prepared by any-
one else, but as the poll books do

not contain a list of names prepared by anyone and is a public record, I can see no reason for the law that the use of the poll books is unlawful.

"I would appreciate a letter of advice from you on your point at your earliest convenience.

"I remain"

Section 705, R. S. Mo. 1939, provides the manner by which the county court shall select persons qualified for jury service and reads as follows:

"The county court of each county at a term thereof not less than thirty days before the commencement of the circuit court or other court having civil and criminal jurisdiction, or civil or criminal jurisdiction, shall select names of not less than four hundred persons having all requisite qualifications of jurors; and the court in selecting such names shall select, as near as practicable, the same number from each township in the county according to the relative population, and shall determine how many petit jurors and alternate petit jurors shall be selected from each township in said county and the names of such persons and the township from which they are selected shall be written on separate slips of paper of the same size and kind and all the names so selected from any one township shall be placed in a box with a sliding lid to be provided for that purpose and thoroughly mixed."

Section 13394, R. S. Mo. 1939, provides the circuit court shall constitute a jury committee in certain circuits and shall assist the county court in preparing jury lists and draw names as provided in Sections 706 and 707, R. S. Mo. 1939:

"In all counties in this state which now constitute, or may hereafter constitute, a separate judicial circuit with only one judge of the circuit court therein, the judge of such circuit court is hereby constituted a jury commissioner, whose duties as such commissioner shall be to assist the county court to prepare jury lists and to draw names as provided for in sections 705 and 706 Revised Statutes 1939. Each such jury commissioner shall, as compensation for his services as jury commissioner solely, as provided in this section, receive a salary of twelve hundred dollars per annum, said salary to be paid by the county in equal monthly installments. In all judicial circuits in this state which circuits are constituted of two or more counties the circuit judge is hereby constituted a jury commissioner charged with the powers and duties herein prescribed, and for the performance of said duties he shall receive a salary of \$1300.00, per annum, to be paid in equal monthly installments out of the State Treasury."

In construing statutory provisions, one of the cardinal rules of construction is to determine the intention of the legislature and to give it that construction if at all possible. (Wallace v. Woods, 102 S. W. (2d) 91, 340 Mo. 452.

Your request requires an inspection of the law pertaining to the possession of poll books and whether such records are public records and may be inspected by any one. Section 11614, R. S. Mo. 1939, requires one poll book to be delivered to the clerk of the county court, subject to the power of the county clerk to send the Sheriff for same if this is not done. This section further provides, that the other poll book shall be retained in the possession of the Judges of the Election, open to the inspection of all persons:

"At the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion to the clerk of the county court in the county in which the election was held within two days thereafter; if the poll books are not returned in the time provided the clerk shall have the power to either send the sheriff or a messenger for said books; the other poll book shall be retained in the possession of the judges of election open to the inspection of all persons: Provided, that if such poll books be transmitted by messenger, the county court shall pay such messenger for such service at the rate of ten cents per mile for each mile necessarily traveled, going and returning."

The county court, under Section 13775, R. S. Mo. 1939, shall direct the Sheriff of the county to burn the poll books but not until same have been filed for five years. Said section reads as follows:

"The county courts of the several counties in this state are hereby

authorized to direct the sheriff of their respective counties to destroy, by burning, during the session of and in the presence of the county court, the papers hereinafter designated, after a period of five years after the filing thereof, to wit: Assessment lists, dramshop petitions, dramshop receipts and statements, dramshop bonds, merchants' and manufacturers' statements, school enumeration lists, school estimates, poll books, annual settlements and bonds of road overseers, canceled county warrants, settlements of county treasurer, settlements of superintendent of poor farm, canceled school district warrants, justice of the peace papers, estray papers, appointments of deputies, reports and receipts of the collectors of the revenue, certificates of fines, statements of campaign expenses, quarterly statements of fees received by county officers, income tax reports, birth and death reports, settlements of village school district treasurers, road overseers' reports, road commissioners' reports, poll tax lists and accounts, and bills allowed against the county." (Underscoring ours)

Unquestionably it was the intention of the legislature in enacting such statutory provisions, to permit any person to examine the poll books and that said poll books shall not be destroyed for five years after same are filed. While we hesitate to disagree with the learned chancellor, we are unable to find anything in Section 705, supra, or any other statutory restriction placed upon the county and circuit court from examining a poll book before they select persons for jury service, nor are we able to conceive any valid reason why this should be criticized.

Hon. C. A. Wiegstein

-6-

March 14, 1941.

It appears to the writer that an examination of the poll book, by the county and circuit court before performing this statutory duty, would be very helpful to the court.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

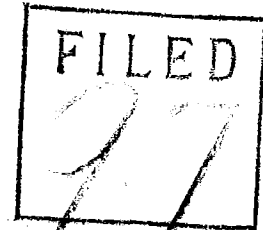
VANE C. THURLO
(Acting) Attorney-General

ARH:LB

SCHOOL DISTRICTS: May sell school buildings if no longer required and new building is provided.

March 24, 1941

Mr. Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of March 4, 1941, which is as follows:

"I respectfully request the opinion of your department on the question presented by the following factual situation:

"A consolidated school district in our county has closed several schools in the rural area in the district consolidated. The board now wishes to make some disposition of the old school houses inasmuch as insurance must be paid on them when they are idle and inasmuch as there is considerable depreciation on the materials in the buildings. The board would like to tear down these old buildings and dispose of them in this manner if such is a permissible course of action. May such action be taken, and if so, what is the proper procedure for the board to take in so doing?"

Mr. Robert P.C. Wilson, III (2) March 24, 1941

From your request we assume that the school district in question is one organized under the provisions of Section 10487, R. S. Mo. 1939, and governed by the provisions of Article V of Chapter 72 of R. S. Mo. 1939.

Section 10471, R. S. Mo. 1939, reads in part as follows:

"* * *; and whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

This provision would seem to authorize the board of directors to dispose of any school property that is no longer required for the use of the school district. We also refer you to Section 10403, R. S. Mo. 1939, contained in the laws applicable to all classes of schools wherein it is provided that no "school cite shall be abandoned or sold until another cite and house are provided for such school district." I take it that in the present instance the consolidated district has another schoolhouse in which instruction may be given or they would not have desired to abandon the buildings in contemplation.

Under the above provisions it is our opinion that the board of directors of this school district is authorized to sell the building and cite of the abandoned schoolhouse, if said buildings are not now required by the district in order to carry on its educational program. We see nothing that would prevent the district from selling the buildings and cites intact or tearing down an old building and disposing of the materials after destruction. In any event, it is the sale of the school district's property which the board is authorized to do.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

LLB/rv

TOWNSHIPS: Arbitrary refusal of chairman to sign order for purchase price of road machinery where the majority of the members of the board have voted for the issuance of said order, forces the recipient of said order to bring court action.

April 14, 1941

Hon. Mark Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated April 11, 1941, which reads as follows:

"One of our township boards has submitted a proposition to me on which I was unable to give an opinion and I told them I would write for your opinion.

"It appears that the old township board purchased a rock crusher. The president of the board refused to sign the contract to purchase and also the warrant for the first payment on the crusher. Two of the three members of the board agreed to purchase the crusher and one of the members signed the warrant and the contract as chairman. The seller of the crusher was present at the board meeting and the president

Hon. Mark Wilson

(2)

April 14, 1941

of the board declared to him that he would not sign the contract or sign the warrant for the first payment. The new board has now come into office and does not want the crusher and would like to have the money back already paid by the warrant and the contract to purchase declared null and void. The question seems to narrow down to whether or not two members of the board have a right to contract and issue a warrant without the consent and signature of the president of the board."

In answer, we wish to say that we are enclosing an opinion heretofore rendered by this office to Hon. Robert W. Smart, Prosecuting Attorney of Lawrence County, Mount Vernon, Missouri, dated January 20, 1941. The purpose for enclosing the opinion is for the reason that it is no doubt determinative of one of the points confronting you in this situation. Therefore, you can see that the first question to determine is, whether the person who sold the crusher is entitled to a legal claim from the township for the purchase price thereof.

For the purpose of this opinion, we assume that there was sufficient current revenues, and anticipated revenues to pay the contract price of the crusher, after all the allowed prior claims had been paid.

Section 13968 R. S. Missouri, 1939, provides, in part, as follows:

"Money to be paid out only on order of township board--school districts not affected. - The township trustee and ex officio treasurer shall not pay out any moneys belonging to the

Hon. Mark Wilson

(3)

April 14, 1941

township for any purpose whatever, except upon the order of the township board of directors, signed by the chairman of said board and attested by the township clerk: * * *

It will be noted in reading the first part of this section that it is provided that the township trustee, ex officio treasurer, shall not pay out any money belonging to the township for any purpose whatever, except upon the order of the township board of directors, signed by the chairman of said board and attested by the township clerk.

Section 13978 R. S. Missouri, 1939, reads as follows:

"Claims against a township, how presented. - Any person having a claim or account against the township may file such claim or account in the office of the township clerk, to be kept by the said clerk, and laid before the township board at their next meeting: Provided, however, that any person having a claim against the township may present said claim to the township board himself, or by an agent, at any legally convened meeting of said board; said board shall have the power to determine the legality or illegality of any claim or account against the township, and to reject said claim, or any part thereof, as to them appears just and proper; but in no case shall the township board be authorized

to allow any claim, or any part thereof, until the claimant makes out a statement, verified by affidavit to the amount and nature of his claim, setting forth that the same is correct and unpaid, or, if any part thereof has been paid, setting forth how much."

Section 13983 R. S. Missouri, 1939, provides as follows:

"Claims against township, how collected. - When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed - said order to be signed by the president of said board, and attested by the township clerk and delivered to said claimant."

Therefore, from the reading of the foregoing sections, it will be noted that the law provides emphatically that the order of the township board shall be signed by the chairman.

In your request you state that two of the members voted for the purchase of the crusher and of course would bind the township and would create a legal obligation upon the township if they were entering into an agreement which they had a legal right to do. Hence, the first question that presents itself is: Was the board within its legal rights in the purchase of the rock crusher? This question can be determined by the opinion which is hereto attached. Therefore, if the contract for the purchase of the machinery was for a greater sum than

the current revenue and the anticipated revenue, added together, - of that particular year, - after subtracting all the prior allowed claims, then, in that event the board would be doing an illegal act and the chairman of the board, on that ground, could refuse to issue the order. The seller of the crusher, in our opinion, would be unable to force the board, and the chairman, in a court action, to issue an order, and thereby force the treasurer, through suitable court order, to pay for the crusher. On the other hand, if the purchase of the crusher was a legal purchase, and the board had a right to obligate the township for the purchase thereof, then the vote by the two members who voted for the purchase of said crusher, (providing there were suitable orders and minutes made by the board) would create a legal obligation upon the township, and the seller of the crusher would have a right to bring an action to force the chairman of the board to fulfill his legal duty, namely, issue an order for the purchase price of the crusher; or, as you state his term of office having expired, could, through suitable action force the present township board to issue the order through its township chairman, and have the same duly honored and paid by the treasurer.

CONCLUSION.

In conclusion, it is our opinion that where a township chairman refuses to sign an order, that if the board, of which he is chairman, has the legal right and does through a legal meeting, vote and rule that such an order shall be made, that he shall sign the same, creates a legal claim which is binding upon the township, but, where the chairman refuses to sign the order, the only way that the order for the purchase price can be procured, during the incumbency of the chairman, is by an order forcing the chairman to carry out his duty placed upon him by statute, procured through suitable court order in a court of record.

Hon. Mark Wilson

(6)

April 14, 1941

On the other hand, if two members of the board, through their vote, attempt to place upon the township a money obligation which in truth and in fact, they have no legal authority to do, then, in that event, the person for whom the purported order is sought to be made cannot recover.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

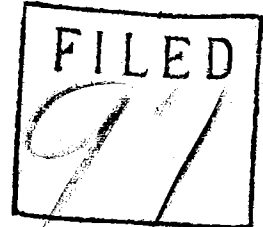
VANE C. THURLO
(Acting) Attorney General

BRC:RW
ENC (1)

TAXATION:

Omitted personal property on a return to the assessor cannot be assessed as to previous years.

May 21, 1941



Honorable Robert P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of May 17, 1941, which reads as follows:

"A short time ago a wealthy man in this county died. In years heretofore, including the present year, it had been his custom to turn in to the County Assessor a list of but a few hundred dollars in personalty to be taxed. It now develops that he may have as much as one hundred thousand dollars in stocks and bonds which he has never turned in to the Assessor. I respectfully request an opinion from your office on whether or not there is any way for the county to collect any taxes on this property above the amount he has been in the habit of turning in."

In the case of City of Hannibal ex rel. v. Bowman, 98 Mo. App. 103, l. c. 108, the court said:

"There is, therefore, no such thing as an equity in a county or in a city that will authorize an assessor, after he has completed his assessment and turned over his books to the proper officer and after his assessment has passed the boards of equalization and of appeals, to repossess

May 21, 1941

himself of the assessor's books and enter therein personal property, which by accident or intention was omitted from the list furnished by the taxpayer and which escaped the notice of the assessor. He can only proceed at the time and in the manner pointed out by statute and to justify his assessment he must be able to put his finger on the statute that gives him the authority to make it. Welty on Assessments, p. 36; Cooley on Taxation (2 Ed.), p. 42, note 3; Hamilton v. Amsden, 88 Ind. 304; Whitney v. Thomas, 23 N. Y. 281. The assessment is the basis of the tax. Therefore, if the assessment is void it necessarily follows that the tax is likewise void. The State ex rel. Wyatt v. The Wabash R'y Co., 114 Mo. 1. c. 11; State ex rel. v. Edwards, 136 Mo. 360; State ex rel. v. Thompson, 149 Mo. 441."

Also, in the case of Tumulty v. District of Columbia, 102 F. (2d) 254, pars. 7, 8, the court said:

"* * * But it is a well known rule of law that in the absence of statutory provision for reassessment for prior years, none can validly be made. Faced with a valid assessment, the action of changing the names of field books, tax ledgers and tax bills, instead of those originally found there, would, in fact, be a reassessment of property regularly assessed. When property has once been finally assessed it cannot be again assessed. Commonwealth v. Robinson, Norton & Co., 146 Ky. 218, 142 S. W. 406; City of Georgetown v. Graves' Adm'r, 165 Ky. 676, 178 S. W. 1035. It is not the policy of the law to favor reassessments. Unless

May 21, 1941

the taxing statute expressly provides for a reassessment, such action is void. State v. April Fool Gold Min. & Mill. Co., 26 Nev. 87, 64 P. 3. If the property has been validly assessed against its owner, the liability becoming final, there is no power in the statute for a revision of the assessment or the reassessment of the property. People's Sav. Bank v. Layman, supra."

Also, in the case of State ex rel. Ford Motor Co. v. Gehner, 325 Mo. 24, 1. c. 32, the court said:

"No doubt if specific real property is overlooked or omitted it can be subsequently assessed for the previous omitted years, but can it be said the personal estate was omitted when as in this case a lumping assessment is made in one year and the taxes extended and paid, and the next year another equally general description is made the basis of a back assessment, only increased in amount. How can it be known that the same property is not at least partially assessed twice for the same year. This is not a technical reassessment, but is the ex parte act of the assessor only, correcting his first assessment, without notice to the taxpayer, and without opportunity to be heard before the board of equalization.

"This ordinance permits the assessor, not the county clerk, to extend the arrearages of taxes. The general statutes of the State only permits this back assessment of real estate and they govern in the city as well as the county. (R. S. 1889, sec. 1902.) But conceding that the ordinance is valid, still we think

May 21, 1941

the back assessment when compared with the alleged omitted year should show on its face the specific property omitted, and unless it does so it is void. It necessarily follows that without reference to other points raised, the so-called back assessment for the year 1891, did not constitute any ground of liability and the court erred in not sustaining the objection to the evidence of plaintiff and in not finding for defendant on said count.'

"To the same general effect is *Hannibal ex rel. v. Bowman*, supra. If the assessors in the *Buehrmann* and *Bowman* cases were without authority to assess additional personal property where the taxpayer in the previous years had returned an insufficient amount of such property, how can it be possible that respondent assessor may go back two years to make an additional assessment for income actually appearing on the face of relator's return which was not taxed because relator, with the concurrence of the assessor at the time and without subsequent challenge from the board of equalization, was knowingly permitted to omit same from the assessment as a claimed deduction?

"Respondents cite Sections 12819, 12801 and 12969, Revised Statutes 1919, in support of the contention that respondent assessor had jurisdiction to correct the omission in relator's 1926 income-tax assessment. Section 12819 provides a scheme for subsequent assessment and collection of taxes where 'there has been a failure to assess the property in any county for any year or years.' This section covers the situation where the entire assessment for the county has been omitted for any year or the assessment sought to

Hon. Robert P. C. Wilson III (5)

May 21, 1941

be made has been held void for some reason. The section has no application to the omission of assessable personal property from the return of an individual taxpayer. * * * *

Under the holdings in the above cases, they specifically state that real estate which has been overlooked or omitted can be assessed for the previous omitted years but the personal property, when omitted, cannot be reassessed for the previous years.

CONCLUSION

In view of the above authorities it is the opinion of this department that when a private person does not make a true return of his personal property to the assessor and the books of the assessor have been closed the omitted property for the previous years cannot be assessed.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

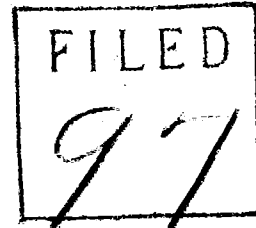
VANE C. THURLO
(Acting) Attorney General

WJB:DA

CONSTABLES: County court is not prohibited from appointing
OFFICERS: a constable who is in the general mercantile
business.

August 7, 1941

Honorable Robert P. C. Wilson III
Prosecuting Attorney
Platte City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of August 4, 1941, which reads as follows:

"The county court recently appointed a merchant to serve as constable in one of the townships in this county. At that time I advised them that I was of the opinion such action did not violate any of the provisions of our Statutes and Constitution. I pointed out the provisions of Section 13376 R. S. Mo. 1939, but told them that there was nothing in that section which referred to Constables, and that that section had reference only to Deputy Constables. I would like the official opinion of your department as to whether I was correct in my analysis of that section, and as to whether there is any other provision in the Constitution or our Statutes which would prevent the appointment as Constable of a person engaged in the general mercantile business."

In your request you state that the county court has recently appointed a merchant to serve as constable in one of the townships in your county. This appointment of constable was probably made under Section 2523, R. S. Missouri 1939, where the appointment is made in case of the division or the extension of a municipal township. If the appointment was made under this section, the appointment should have been made by the justices of the peace who were also appointed by the county court in case of a division or extension of a township. But

August 7, 1941

since you state in your letter that the county court appointed the constable it will be presumed that the appointment was made under Section 13374, R. S. Missouri 1939, which reads as follows:

"If any vacancy occur in the office of constable, the county court of the county where in such vacancy may happen shall appoint a constable, who shall continue in office until the next general election, and until a successor be qualified, and the constable appointed shall execute a bond similar to that given by a constable who is elected. And whenever a petition shall be presented to the county court of any county in this state, signed by twelve qualified voters of any unincorporated town or village in such county containing three hundred or more population, setting forth that there is no constable nor deputy constable residing therein, or within one mile thereof, the county court shall appoint an additional constable for the township in which said town or village is situated, who shall be a resident of such town or village, and shall qualify as constables are by law required to qualify, and shall possess all the powers and perform all the duties of the constable of the township."

This section provides that in case of a vacancy in the office of constable the county court shall appoint a constable and whenever a petition shall be presented to the county court of any county signed by twelve qualified voters in any unincorporated town or village containing three hundred or more population, the county court shall appoint an additional constable for the township. The only qualification set out in this section is that they shall qualify as regular constables are by law required to qualify.

Section 13370, R. S. Missouri 1939, partially reads as follows:

August 7, 1941

"At the general election to be held in 1920, and at each general election every two years thereafter, the qualified voters of each township in every county in this state shall elect a constable, who shall be a resident of the township for which he is elected, and who shall hold his office for two years and until his successor be elected and qualified: * * * * *

The only qualification mentioned in the above partial section and in the whole section is that the constable shall be a resident of the township for which he is elected. There is no restriction as to the election or the appointment of a constable who is a merchant.

As mentioned in your request, Section 13376, R. S. Missouri 1939, a deputy constable cannot be appointed who is or may be directly or indirectly connected with or engaged in the mercantile business, or a member of any firm engaged in such business, or a member of or connected with any collection agency, credit house, installment house or loan agency where money or moneys are sought to be collected by suit. After careful research of the statutes in reference to constables we find no law prohibiting the appointment of a constable who is a merchant.

CONCLUSION

Since no law prohibits the appointment of a merchant as constable, it is the opinion of this department that the county court may appoint a merchant to serve as constable, and in view of Section 13376, R. S. Missouri 1939, this constable cannot appoint a deputy constable who comes within the provisions mentioned in said section as to merchants and other employments mentioned therein.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

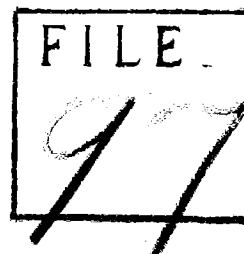
VANE C. THURLO
(Acting) Attorney General

WJB:DA

TAXATION: Amount of levy that may be made for township
TOWNSHIP: purposes, including special road and bridge fund.

✓ / ✓ 2
September 5, 1941

Honorable Mark Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"IN RE: Opinion concerning taxing power of township boards.

"The county court of this county, the county clerk, and several township boards have requested an opinion on the above matter.

"Your attention is directed particularly to Section 13985 and Section 8821 R. S. Mo. 1939. There may be other sections which are also involved and undoubtedly the constitution itself is involved.

"This county runs a levy for county purposes in the amount of 35¢ on the \$100.00 valuation. How much of a levy can township boards make for incidental expenses of the township?

"What is the maximum levy which a township can run for road and bridge purposes?

"What is the maximum levy for all purposes that can be made by the township or for township purposes exclusive of county purposes?

"Would a levy made by the county for township purposes be legal and collectible if the township board had not previously complied with the provisions of Section 13985 supra, in making the estimate and account and filing same with the county clerk? Would failure to make and file such an account as is mentioned in Section 13985, supra, be jurisdictional so far as the county court's power to levy taxes for township purposes is concerned?

"These questions have presented themselves in this county and the statutes above mentioned are conflicting and contradictory of each other in their terms and no doubt the statutes may also be modified by the general provisions of the constitution. It is a question whether or not the total tax for ordinary expenses and road and bridge funds levied by the county plus that of the township may exceed 50% on the \$100 valuation. If that be true what levy could a township make for its incidental purposes plus special road and bridge purposes (exclusive of bonded indebtedness) if the court levied 50% for county purposes?"

We believe that a summary of the rights and powers of a county and township to levy taxes would clarify the procedure about which you ask and would facilitate the answering of the questions submitted in your request.

Article X, Section 11, of the Constitution of Missouri, provides in part as follows:

"Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city

or school district for State and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; * * * "

Article X, Section 22, of the Constitution of Missouri, provides:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

Section 8821, R. S. Mo. 1939, reads:

"The township board of directors of any township may, annually, in their discretion, at the same time and in the same manner as taxes are now required by law to be levied for county purposes, levy an annual tax in addition to those now authorized by law, in any amount not exceeding twenty-five cents on each one hundred dollars valuation on all property subject to taxation in such township, to be known

as a special road and bridge fund: Provided, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the order of the township road and bridge fund and be used in construction and maintenance of roads and improving or repairing any street in any incorporated city or village in the township, if said street shall form a part of a continuous highway of said township leading through such city or village."

Section 11047, R. S. Mo. 1939, provides:

"In all counties in this state which have now or may hereafter adopt township organization, if the amount of revenue desired and estimated by the county court for county purposes and the amount desired and estimated by any township board for township purposes shall together exceed the rate per cent on the one hundred dollars valuation allowed by section 11 of article X of the Constitution of Missouri 'for county purposes,' then it shall be the duty of the county court to apportion the tax 'for county purposes' between the county organization and the township organization in the following manner, to-wit: Eighty per cent of the taxes which may be legally levied 'for county purposes' shall be apportioned to the county organization for county purposes, and twenty per cent of such taxes shall be apportioned to the township organization for the purposes provided by section 13980 of the township organization law, as specified by the township board; but the combined rate for both the county and township organizations shall not exceed the maximum rate provided by the Constitution."

Section 13985, R. S. Mo. 1939, reads as follows:

"The township board of directors shall make out an account of the amount of money necessary to defray the township expenses during the next ensuing year; said account shall be made out not more than sixty nor less than twenty days prior to the meeting of the county court at which the assessment for county purposes is made; said account shall be signed by the president of the board, and attested by the clerk, and filed with the clerk of the county court on or before the first day of said court, who shall cause the same to be placed upon the tax books of said township: Provided, that said expenses shall not, together with the amount levied for road purposes and special bridge tax, exceed in any one year twenty cents on the one hundred dollars valuation; and provided further, that in counties having a population exceeding thirty-five thousand inhabitants said tax shall not exceed for any one year fifteen cents on the hundred dollars valuation, and until the next decennial census shall have been taken, said population shall be determined by multiplying the aggregate number of votes cast for the respective candidates for president in 1888 in said county by five, and the product thus obtained shall determine as to such population."

From a reading of your request we deduce that Henry County falls in the bracket of counties having six million dollars or less property valuation, since you state that the maximum rate that can be charged there is fifty cents. Therefore, this opinion is written upon that basis.

Under Article X, Section 11, supra, the annual rate on property "for county purposes" cannot exceed fifty cents on the one hundred dollars valuation. It is well settled in Missouri that the term "for county purposes" includes not only the tax levied by the county but also the tax that is levied for the use of the township. As was said in *State ex rel. Hirni v. Mo. Pac. R'y. Co.*, 123 Mo. 72, 1. c. 80:

"It can not be doubted that the restrictions contained in this section were intended to apply to every county in the state, whatever its internal organization might be, and that all taxes of every kind and description levied for county purposes, it matters not by whom or how levied and the purposes for which levied, must be within the limits of the rates therein fixed; what is called a township tax, levied in a county under township organization, having been known and recognized from the beginning of the state government as within that class of purposes; the limitation of this section must apply to taxes levied for such purposes, the same as to those for any other county purpose, unless, elsewhere in the constitution is to be found some provision taking counties under township organization from the operation of its provisions."

This rule is succinctly stated in *State ex rel. Conrad v. Piper*, 214 Mo. 439, 1. c. 445, as follows:

"The Constitution, article 10, section 11, in imposing this limitation on tax assessments used the words, 'For county purposes,' which include in their meaning all subdivisions of the county for the use of which taxes may be imposed."

Therefore, when Article X, Section 11, supra, sets the maximum amount at fifty cents on the one hundred dollars

valuation, it means that only that amount may be levied for the entire expenses of both county and townships. Section 13985, supra, provides that the expenses of the township shall not exceed twenty cents on the one hundred dollars valuation, which expenses include the amount levied for road purposes and special bridge tax and those set forth in Section 13980, R. S. Mo. 1939, which are as follows:

- (1) The compensation of township officers for their services rendered in their respective townships;
- (2) Contingent expenses necessarily incurred for the use and benefit of the township;
- (3) The moneys authorized to be raised by the township board of directors for any purpose, for the use of the township.

However, it must be noted that the county has the primary right to levy any amount of taxes up to the maximum provided for by the Constitution for county expenses, and the right of the township to a levy of twenty cents on the one hundred dollars valuation is subservient to the prior right of the county. As was pointed out in the Piper Case, supra, (1. c. 445):

"That would render the county court, when making provision for the expense of conducting the county affairs, to a large extent, subordinate to the township boards. That was not, originally at least the intention of the General Assembly as expressed in the statutes governing this subject, and if the Legislature has ever changed its purpose in that particular, it has not expressly said so, * * * "

Therefore, the county, in making its levy to obtain money sufficient to conduct the county affairs, may levy any

amount it wishes, even up to the maximum. The township, in putting in its account as to how much will be needed for township purposes, is limited to twenty per cent. If the combined estimates of the two subdivisions exceed the maximum amount provided for by the Constitution (which in this case is fifty cents), then Section 11047, supra, becomes controlling. That section, which is quoted above, provides that in such a case the county court shall apportion the tax "for county purposes," which is fifty cents, between the county organization and the township organization in the following manner, to-wit: eighty per cent of the taxes which may be legally levied shall go to the county organization, and twenty per cent of such taxes shall be apportioned to the township organization. Under this section if at any time the combined amount of revenue desired and estimated exceeds fifty cents, then the county shall receive forty cents and the township ten cents. However, we do not in this opinion pass upon the question as to what would be the apportionment if the county desired thirty-five cents and the township made an estimate of twenty cents. It will be noted that under this situation the combined amount would be fifty-five cents, and in the apportionment under Section 11047, supra, the township would only get ten cents, while if the township had estimated a fifteen cent rate on the one hundred dollars valuation, then it would receive the same. Such condition would seem inequitable and unjust because of the county receiving more than it desires and the township being cut below a figure to which it was legally entitled.

The question next arises whether a township, if it feels the need for more money for road purposes, can obtain the same. As stated in Section 13985, supra, the amount received by the township from the amount provided in Article X, Section 11, supra, includes moneys for road purposes and the special bridge tax. However, the people of Missouri, recognizing the fact that perhaps this amount of money for road purposes would not be sufficient, in 1908 amended the Constitution by placing therein Article X, Section 22, which provides for a special road and bridge tax not exceeding twenty-five cents on each one hundred dollars valuation. This tax may be levied in addition to other road and bridge taxes.

In State ex rel. Vaught v. A., T. & S. F. R'y Co., 270 Mo. 251, 265, this provision was before the court for

interpretation and Judge Brown said:

"The constitutional amendment permits the twenty-five cent levy 'in addition to taxes authorized to be levied for county purposes under and by virtue of section 11,' and the statutes enacted in pursuance of it contain the same authority. The amendment simply increases the amount which the county was authorized to levy under the provisions of section 11 from fifty cents to seventy-five cents on each one hundred dollars valuation, with the limitation that the entire additional levy must be made and used for road and bridge purposes and for no other purpose whatever. It imposes no duty upon the county court to appropriate any part of the levy for county purposes under section 11 to such uses, but left the power undisturbed."

To like effect is State ex rel. Kersey v. Pemiscot Land and Cooperage Co., 295 S. W. 78, 317 Mo. 41.

Therefore, the township board in its discretion may impose a tax up to twenty-five cents on the one hundred dollars valuation for the use of roads and bridges, which is in addition to that provided for in its estimate submitted to the county court.

Taking what has been said above as a guide, we will proceed to answer your questions in the order in which they are submitted.

I

When the county runs a levy for county purposes in the amount of thirty-five cents on the one hundred dollars valuation, then the township board may ask for a levy of fifteen cents.

II

The maximum levy which a township can make for road and bridge purposes is twenty cents, less the amount needed for township expenses provided for in Section 13980, supra. This, of course, depends upon the fact that the county has only estimated a thirty cent levy for county purposes. However, a township may in its discretion levy up to twenty-five cents on the one hundred dollars valuation under Section 22, supra, in addition to the other levy for road and bridge purposes.

III

The maximum levy for all purposes that can be made by the township is twenty cents, provided that the county has not desired and estimated more than thirty cents on the one hundred dollars valuation. If the county has estimated more than thirty cents, then the township is subservient to and controlled by that amount.

IV

If the county levied fifty cents, then the amount estimated by the township would make the total of the two over fifty cents and the funds would have to be apportioned, which would be forty cents to the county and ten cents to the township.

In answer to your question as to what effect the failure of the township board to make, sign and file an account for the amount of money necessary to defray the township expenses as provided for in Section 13985, supra, would have on the county court's power to levy taxes for township purposes, we refer you to the general rule as stated in 61 C. J., page 562, par. 688, which is as follows:

"Where it is required by constitutional or statutory provision that

certain authorities of a political division or subdivision of the state shall make and file, with specified officers, a certificate, budget or estimate of the rate or amount of taxes which they require to be raised, as a condition precedent to the levy thereof, it is essential, before the tax can be lawfully levied, that there shall be a compliance with such requirement in every substantial particular."

This is the rule in Missouri, as is shown by the case of State ex rel. Wheat v. St. L. & S. F. R'y Co., 135 Mo. 77, which involved the validity of a levy made under a statute which required each city to certify to the county court a statement of the assessments and the rate of taxation levied by the city on all property for municipal purposes. The county court upon receipt of such certificate had levied the tax. The facts showed no such certificate was made by the city in this case. The court said (1. c. 87):

"In the absence of such certificate the county court was without authority to make the levy, for it is made one of the prerequisites of its power to do so by section 7731, supra. The power to tax is one of the prerogative rights of the state, and when the legislature grants that power to another tribunal on specific terms and conditions it can only be exercised in strict compliance therewith."

Therefore, we rule that if the township board did not make out an account, or if said account was not signed by the president of the board and attested by the clerk, or if said account was not filed with the clerk of the county

Hon. Mark Wilson

-12-

Sept. 5, 1941

court, then the county court was without power to levy any taxes for township purposes.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

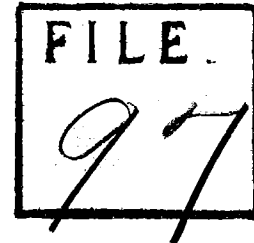
VANE C. THURLO
(Acting) Attorney-General

AO'K:EG

5
MUNICIPAL CORPORATIONS: Violation of city ordinance regulating automobile speed is offense against city and is not a State offense.

October 7, 1941

Honorable R. P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"I respectfully request an opinion on the construction to be given to Section 8395, R. S. Missouri, 1939. I desire to know whether, after a municipality passes an ordinance as provided for under that section, limiting the speed of motor vehicles passing through the municipality on the state highway, the violation of the ordinance so passed is to be considered a violation of the state laws."

Section 8395, R. S. Mo. 1939, provides as follows:

"Municipalities may, by ordinance, establish reasonable speed regulations for motor vehicles within the limits of such municipalities: * * * * *"

As was said in Ex Parte Williams, 139 S. W. (2d) 485, 1. c. 489:

"The extent of this (police) power of a city thus derived is subject to, and dependent upon, the limitations of its charter. The city is a

Oct. 7, 1941

creature of the state; and before it can exercise a particular police power it must fairly be included in the grant of powers by its charter."

As was pointed out in *Kansas City v. Case Machinery Co.*, 87 S. W. (2d) 195, 337 Mo. 913, a municipal corporation has no inherent police power but derives it solely from delegation by the State. Judge Hyde in the above opinion said (1. c. 202):

"The protection of life, liberty, and property, and the preservation of the public peace and order, in every part, division, and subdivision of the state, is a governmental duty, which devolves upon the State, and not upon its municipalities, any further than the state, in its sovereignty, may see fit to impose upon or delegate it to the municipalities."

While there is no question but that careless and reckless driving is a violation of State law (Section 8383, R. S. Mo. 1939), still the Legislature has delegated to the municipal corporations the right to regulate the speed of motor vehicles within the confines of the corporation. Therefore, a city, in pursuance to the authority granted by the Legislature, which enacts an ordinance setting the speed limit for such city, may properly arrest and prosecute a person who violates the terms of the ordinance. That this violation is a wrong against the city and not the State, is the view of the Supreme Court of Missouri. The rule is stated in *McQuillin Municipal Corporations*, (2d Ed.) Vol. 3, page 50, as follows:

"The doctrine generally supported may be thus stated: That the single act being made punishable both by the state law and by the municipal ordinance of the place wherein it was committed constitutes two distinct and several offenses; an offense against the state and an offense against the municipality. The

Oct. 7, 1941

purpose of the ordinance is to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation; the state law has a more enlarged object in view, namely, the maintenance of the peace and dignity of the state. * * *

In support of this statement is cited the following Missouri cases: State v. Muir, 164 Mo. 610, 65 S. W. 285; St. Louis v. Knox, 74 Mo. 79; Ex parte Hollwedell, 74 Mo. 395.

Therefore, it will be seen that a violation of a city ordinance setting the maximum speed that may be traveled by a motor vehicle within the confines of a municipality, is a wrong against the municipality and is not a State offense, and the prosecution must be conducted by the city attorney and not the Prosecuting Attorney of the county.

Conclusion

In view of the above authorities it is the opinion of this Department that the violation of a city ordinance regulating the speed of a motor vehicle is an offense against the municipality and not against the State, and the prosecution of same must be conducted by the city attorney.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(ACTING) Attorney-General

AO'K:EG

PRISON MADE GOODS:
SHIPMENT PRIOR TO OCT. 14th:

Prison made goods may be shipped
outside Missouri prior to midnight
October 13, 1941

October 11, 1941

Mr. P. F. Willis
Commissioner of Industries
Department of Penal Institutions
Jefferson City, Missouri



Dear Mr. Willis:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts:

"Mr. Autenrieth, wants for his file an opinion from you as to the matter of shipping 'prison made' goods outside the State of Missouri."

"As you are aware October 14th is the deadline and what we desire to know is whether we would be violating the law if we should make a shipment whose destination was outside Missouri, prior to October 14th and the shipment would be received by the consignee in another State on October 14th or thereafter. In other words are we safe in making a shipment outside Missouri prior to midnight of October 13th."

In view of the fact that you have such a short time for which to act under this opinion, we are preparing it without citing particular authorities, but are offering general rules of law which would be applicable.

As a general rule of law, criminal statutes are strictly contrued. They cannot be retroactive. In your statement you indicate that the act prohibiting the shipment of goods in inter-state commerce goes into effect on October 14. Any shipment which you make prior

Mr. P. F. Willis

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October 11, 1941

to the date that act goes into effect would not be in violation thereof.

CONCLUSION

It is, therefore, the opinion of this department that you may ship prison made goods in inter-state commerce at any time prior to midnight of October 13, 1941.

Respectfully submitted,

TYRE W. BURTON
Assitant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

SHERIFF:) County Counselor of St. Louis County is sole
COUNTIES:) attorney for sheriff.

(25)

October 18, 1941

10-20

Mr. Arnold J. Willmann
Sheriff
St. Louis County
Clayton, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"I am writing requesting your opinion as to whether or not it is mandatory upon me to accept the services of the County Counselor as my attorney, under the provisions of House Bill 143, passed during the last session of the Legislature and which was recently signed by the Governor.

"For your information, I took office on January 1, 1941, and appointed an attorney under the provisions of Section 8a, Laws of Missouri, 1939. The salary of my Attorney was fixed by the County Court at \$100.00 per month."

From your request we gather that your attorney was appointed under authority of an act passed by the Sixtieth General Assembly which dealt with officers in counties of from 200,000 to 400,000 inhabitants (Laws of Missouri, 1939, page 679). Section 8a of that act provides as follows:

"* * * The sheriff shall be entitled to employ an attorney to represent him in his official capacity, which said employment shall be approved by the county court. Said attorney shall receive an annual salary of not to exceed \$2000.00 per year, as may be fixed by the county court, which salary shall be in full for all services rendered the sheriff and in lieu of any fees, commissions and charges fixed by law."

However, the 1941 Legislature amended Section 12993, R. S. Mo. 1939, by adding two new sections, designated 12993a and 12993b, which sections read as follows (Laws of Missouri, 1941, page 318):

"Section 12993a. Provided that in all counties which now have, or may hereafter have not less than 200,000 and not more than 400,000 inhabitants, a County Counselor shall be appointed by the County Court who shall hold his office for a term of four years and until his successor is appointed, commissioned and qualified and who shall devote his entire time to said office. In addition to the duties as prescribed by Section 12991 of the Revised Statutes of Missouri 1939, it shall be the duty of the County Counselor to commence, prosecute or defend, as the case may require, all civil suits or actions in which any county officer or commission is a party in his or its official capacity, and when requested, shall give his opinion to any county officer, including any planning or zoning commission established by law, upon any question of law relative to their respective offices or the discharge of their duties; and he shall be required to

appear in behalf of the county and prosecute or defend, as the case may require, all appeals, writs of error or any proceeding to which the county may be a party, or any county officer or commission is a party in his or its official capacity, in any of the appellate courts of this State; and shall give his opinion to the board of equalization of such county on any question of law that may arise in their deliberations."

"Section 12993b. The term of the office of County Counselor as herein provided shall begin immediately upon the going into effect of this article, and shall continue until the first day of January, 1945, and until a successor is duly appointed, and thereafter a successor shall be appointed who shall hold his office for a term of four years; and he shall receive a salary of \$6,500 per year, payable pro rata, monthly, out of the County Treasury by warrant issued by the County Court; and he shall be authorized to appoint two assistants who shall be paid monthly as compensation for their services the following sums, to wit: to the first assistant, \$300 per month, and to the second assistant, the sum of \$250 per month, one of whom shall attend each sitting of the County Court and give his advice on all legal questions that may arise; and it shall be the duty of the County Court to provide adequate office accommodations and facilities necessary to carry on and perform the duties and functions of said office, including an adequate law library; and the said County Counselor

with the approval of County Court is authorized to employ such stenographic assistance as may be necessary in the discharge of his official duties. No more than two stenographers shall be employed who shall each receive as compensation no more than one hundred dollars per month. Such assistants and employees shall hold their positions at the pleasure of the County Counselor, and be paid monthly by the County Court out of the County Treasury. After the passage of this Act, the county court shall not appropriate any sums for legal services in behalf of any elected county officer, except, however, for such legal services as are provided by law for the collector of such county for the collection of delinquent taxes. Any County Counselor heretofore appointed and acting under the provisions of this Article, and now subject to the provisions of this Act, shall continue in office until the expiration of his commission and until his successor is duly appointed and qualified under the provisions of this Act on the first day of January, 1945, and he shall receive such additional compensation for his services and such assistants as provided for herein by reason of the new and additional duties enjoined upon him by virtue of said office."

From a reading of the above statutes it will be seen that the County Counselor of St. Louis County is now required to discharge all the duties theretofore performed by the Attorney for the Sheriff and the act specifically states that the county court shall not appropriate any sums for legal services in behalf of any elected county officer, except for legal services for the collector.

We believe that this act does away with and abolishes the attorney for the sheriff as provided for in Section 8a, Laws of Missouri, 1939, page 679, supra. While an attorney for a sheriff is not a public officer (State ex rel. Pickett v. Truman, 64 S. W. (2d) 105, 333 Mo. 1018), still the rule in regard to the right of a legislature to abolish an office is equally applicable to an employee. Mansfield v. Chambers, 26 Cal. App. 499, 147 Pac. 595. The rule in Missouri is well settled that the legislature which possesses the power to create an office, has the power to abolish the office. In State ex rel. Tolerton v. Gordon, 236 Mo. 142, this is succinctly stated as follows:

"Neither is there any doubt as to its (legislature's) power to abolish any office not provided for by the Constitution."

In the early case of State ex rel. Attorney-General v. Davis, 44 Mo. 129, it is said (l. c. 131):

"A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it. In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private interests. Not so in the American States; they are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact."

Therefore, we are of the opinion that the Legislature has abolished the employment of attorney for the Sheriff of St. Louis County and that under Sections 12993a and 12993b, Laws of Missouri, 1941, page 318, the Sheriff of St. Louis County is required to look to the County Counselor for legal advice and representation.

Oct. 18, 1941

Conclusion

It is, therefore, the opinion of this Department that Sections 12993a and 12993b, Laws of Missouri, 1941, page 318, which provide that the County Counselor of counties of from 200,000 to 400,000 inhabitants shall be the sole legal representative of the county officers, superseded and repealed Section 8a, Laws of Missouri, 1939, page 679, which provided that the Sheriff of such counties could appoint an attorney, and that the Sheriff must now look to the County Counselor for legal advice and representation.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

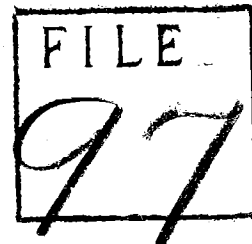
AO'K:EG

TAXATION:
PERSONAL TAXES:
PRIORITY OF LIEN:

The state's lien on personal property seized to satisfy personal taxes is superior to all prior liens, including chattel mortgages.

October 29, 1941

Hon. Mark Wilson
Prosecuting Attorney
Clinton, Missouri



Dear Mr. Wilson:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of "whether or not a judgment for personal taxes upon execution is prior to a chattel mortgage on an automobile."

This question involves the question of whether or not the state's lien for personal taxes is superior to the lien of a mortgage of the property of the delinquent personal taxpayer. Under what is termed "distress warrant" the collection may seize and sell property for delinquent personal taxes by virtue of the provision of Section 11086, R. S. Mo. 1939. Personal taxes may also be collected by actions at law commenced before the Justice Court or the Circuit Court and against the party assessed. (Section 11112, R. S. Mo. 1939). Under this section an execution on the judgment is issued out of the court in which the judgment is rendered. Under Section 11086, supra, delivering the delinquent tax bill to the officer takes the place of the execution.

With either the tax bill or the execution, the officer is authorized to seize the property of the delinquent, levy upon it and advertize it for sale after being in compliance with the statutes as to notice.

At this stage of the procedure, your question comes in. That is: "If there is a chattel mortgage on the property seized (in your case, a car) does the officer have to sell the property subject to the mortgage or is the lien for the taxes superior to the lien of the chattel?"

In our research, we fail to find where this question has been directly before the courts of this state. In some states it seems that the lien of the state for taxes is inferior to that of the mortgage dated prior to the tax lien unless provided otherwise by statute. The text writers have

differed on this question as well as the courts. In Vol. 61, C. J., Page 925, Section 1176, the rule is stated as follows:

"Where no preference or priority is given by constitutional or statutory provision, one view recognized in some cases is that a tax lien has no preference over other liens and encumbrances. However, in other cases the view is taken or asserted that real estate taxes constitute ex proprio vigore a prior lien against the property on which they are assessed, not depending on any express declaration of the statute to that effect in the absence of some legislative declaration to the contrary; it having been said that it does not follow that because the legislature has failed to declare expressly that, a lien for taxes is superior to all other liens that such lien is subordinate; but, on the contrary, the inference is that the legislature intended the lien to be superior to all liens, prior or subsequent, claimed by individuals. Under certain constitutional provisions tax liens on real property cannot be made subordinate to other liens."

The Missouri lawmakers have not enacted any statute giving such liens priority, nor have they enacted any statutes providing that such liens are not prior to chattel mortgages. However, the statement of the Supreme Court in *Stafford v. Fizer*, 82 Mo. 393, 397, clearly indicates that the tax lien is prior to the lien of the mortgage unless the Legislature provides otherwise. There the court said (l. c. 397):

"* * * The lien of the State is the superior one, although subsequent in time, a superiority invariably accorded to it in absence of some legislative declaration to the contrary. *Cadmus v. Jackson*, 52 Penn. 295; *Doane v. Chittenden*, 25 Ga. 103; *Hopper v. Malleson*, 16 N. J. Eq. 332; *Cooper v. Corbin*, 105 Ill. 224. No system of jurisprudence would command respect which failed to maintain and enforce the benefits of this priority by all necessary and reasonable proceedings to that end. * * *"

This statement is supported by the statement in the opinion of the Court in State of Missouri, to use of Phillips, Assignee of the Illinois R. P. Co., v. Rowse, 49 Mo. 536, 592, wherein the court said:

"By the common law all debts due the crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. The liability for them is not an ordinary one, and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government, and I know of no authority that places the obligation to pay them upon a level with liabilities upon contracts. If the claim of the State were an ordinary one, such as might arise on behalf of an individual, the authorities cited might show that its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statutory provision upon the subject."

In the Phillips case, supra, the delinquent personal tax payer had assigned his property to Phillips, and the tax collector seized and sold sufficient of the assigned goods to satisfy the tax claim. There the court held that the lien for personal taxes prevails over claims of creditors.

The case of State of Minnesota v. Central Trust Co. of N. Y., 94 Fed. 244, 36 C. C. A. 214, dated April 10, 1899, was a case in which a question similar to the one here presented was in issue. The opinion was issued from the U. S. Supreme Court of Appeals, Eighth Circuit. The Minnesota tax statute at that time was quite similar to the Missouri statutes pertaining to procedure, (l. c. 245). The contention of the taxpayer, whose property was about to be sold for delinquent personal taxes, was stated as follows (l. c. 246):

"It is contended in behalf of the appellee, and so the lower court appears to have held, that the lien created by the mortgage in favor of the Central Trust Company, from the time when that instrument was recorded, to wit, February 23, 1889, was and is paramount, so far as the personal property conveyed by the mortgage is concerned, to any lien thereon which the state can assert under a

subsequent assessment of such personal property for taxation, and in accordance with that view it was held that the personal taxes due to the State of Minnesota from the Water Company for the years 1894, 1895, 1896 and 1897 could not be paid out of the proceeds of the foreclosure sale, the amount received at such sale being insufficient to discharge the mortgage indebtedness.!! * * * * *

After reviewing a number of state decisions the court further said, (l. c. 247):

"It has been held frequently that a tax lawfully imposed by the state on its citizens is not an ordinary debt, but is an obligation which by its very nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare such priority. And in some well-considered cases the same priority has been accorded to a tax, although the statute imposing it failed to provide in so many words, that it should be a lien on the property of the taxpayer. Such decisions proceed on the theory that the maintenance of good government and the public welfare are to such an extent dependent upon the prompt collection of taxes that demands of that nature should take precedence of all claims founded upon private contracts. (Citing cases) Greeley v. Bank, 98 Mo. 458, 460, 11 S. W. 980. These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the state for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has

been a common practice to provide summary remedies for enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been sustained as affording due process of law, if the proceedings had related to the collection of purely private debts. * * * * *

We call attention to the fact that in support of this rule the court cited the case of Greeley v. Bank, 98 Mo. 458, 460. In the Greeley case, supra, the assets of the bank had been placed in the hands of a receiver and the tax collector had intervened, asking that the receiver be ordered to pay the delinquent personal taxes of the bank. In treating this question, the court said (l. c. 460):

" * * * It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets (Acts, 1881, p. 180, sec. 7; Ib. p. 35; State to use v. Rowse, 49 Mo. 586), a right which it could have enforced through its revenue officers by the summary process of distress (R. S. 1879, sec. 6754) but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which, depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets in custodia legis except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the courts, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be

reduced to the level of an ordinary debt and be cut off unless presented to the court for allowance within a given time."

The court there ordered that the tax claim be paid.

Referring back to the Minnesota case, supra, l. c. 248, the court further said:

" * * * * The sole question at issue, then, is whether the lien of the state should be regarded as inferior to that of the mortgagee because the legislature did not expressly declare that it should be paramount. In behalf of the appellee it is conceded, apparently, that if the taxes in question had been levied upon real property the lien would prevail over a prior incumbrance thereon, without any express legislative declaration to that effect, and so it has been held on several occasions. Parker v. Baxter, 2 Gray, 185; Eastman v. Thayer, 60 N. H. 408, and cases heretofore cited. This rule with respect to the lien for real taxes is said to be due, however, to the fact that such taxes are assessed originally against the very thing to which the lien applies, whereas personal taxes are assessed against the person, and that when, as in the case at bar, the statute gives a lien for personal taxes on personal property of the taxpayer owned at a certain time, it is not a lien upon the same property on account of which the assessment was levied, and is therefore a lien of less dignity. With reference to this distinction between personal and real taxes, it is only necessary to say that, while it is doubtless true that in some cases personal property owned by the taxpayer when he is assessed for taxation is not identical with that which he owns when the lien attaches, yet we can perceive no reason why this fact should have any effect upon the paramount character of the lien imposed for personal taxes. The state has an undoubted power to create a lien for a personal tax on other property of the

tax debtor than that which was assessed for the tax, and to make the same superior to all other liens. It will also be found, we think, that taxpayers generally retain the bulk of their personal property from the time when they are assessed for taxation until the tax becomes a lien, so that in the majority of cases the statute with which we are now dealing will impose a lien on the bulk of the same property on account of which the tax was assessed. But whether it will or will not have such effect must be deemed immaterial in considering the paramount nature of the lien.

"It is manifest from a glance at the situation that if the view which prevailed in the lower court is approved, and the lien for the taxes in controversy is reduced to the grade of a lien created by private contract, no more serious obstacle could be interposed in the way of the collection of personal taxes in the state from whence the appeal comes. A large percentage of personal property in nearly every community is usually subject to liens which, in one form or another, have been created by the owners thereof, and, if these shall be held to be of the same dignity as the lien given by a public statute for taxes, the state and the political subdivisions thereof will doubtless lose a considerable portion of the revenues which would otherwise be derived from taxes assessed on personal property. In the present case personal property of great value was covered by a mortgage for a period of 10 years, on account of which the state will lose personal taxes, assessed during a period of 4 years, to the amount of about \$60,000, if the contention of the appellee shall prevail. Besides, a construction of the statute which will make a tax lien subordinate to a private lien will afford a ready means of enabling those who are so disposed to avoid the payment of personal taxes altogether, and thereby afford additional ground for the complaint so frequently heard, because so much of the

taxable wealth of the country escapes taxation. No state, so far as we are aware, has ever made provision for redeeming property on which it imposes taxes from prior liens in favor of individuals, in order to secure its own revenue therefrom; nor is it either expedient or desirable that laws of that nature should be enacted, and that the state, like an individual, should be compelled to indulge in a race of diligence to secure its taxes. If it is deemed best for any reason to make a lien for taxes which are imposed on personal property subordinate to private liens, then we perceive no reason why it would not be equally wise to exempt all mortgaged personal property from taxation. * * * * *

And at l. c. 250, the court further said:

"In view of what has already been said, we are of opinion that it cannot be inferred that the lien for personal taxes declared by section 1623, supra, was intended to be subordinate to all prior private liens, because the legislature failed to say that it should be deemed paramount. On the contrary considering the character of the obligation and the dignity usually accorded to such liens, in public estimation, and above all, considering the necessity which exists for giving them priority in order that the public revenues may be promptly and faithfully collected, we conclude that the inference should be that the lien was intended by the legislature to be superior to all liens, prior or subsequent, claimed by individuals, and that nothing should be allowed to overcome this inference but a plain expression of a different purpose found in the statute itself. * * * * *

The U. S. Supreme Court of Appeals for the Second Circuit in the case of Liberty Mutual Insurance Co. v. Johnson Shipyards Corporation, 6 F. (2d) 752, dated April 24, 1925, had before it the question of the priority of claims of the United States in receivership cases. In

speaking of claims due the sovereignty and especially taxes, the court at l. c. 756 said:

"It has frequently been pointed out that a tax lawfully imposed is not to be regarded as an ordinary debt, but is an obligation which is to be regarded as paramount to all other demands, although the law imposing the tax does not expressly provide that it is to have priority. These cases proceed upon the theory that the maintenance of the government and the public welfare are so dependent upon the collection of taxes that payment should have precedence over all other claims; and it is thought that taxes levied for the support of government are founded upon a higher obligation than other demands. See *State of Minnesota v. Central Trust Co.*, 94 F. 244, 247, 248, 36 C. C. A. 214, and cases there cited.

"These courts have sustained in numerous cases the right to priority of payment of taxes over all other claims (Citing cases)."

A review of the decisions of the Missouri courts reveals that the rule enacted in the Minnesota case, supra, is being followed in this state. We refer to the opinion of the Supreme Court of Missouri in the case of *Construction Co. v. Ice Rink Co.*, dated April 9, 1912, 242 Mo. 241, l. c. 253, wherein the court said:

"Our conclusion on this point rests as well upon sound reason. It is uniformly recognized that the claim of the State for the taxes necessary for its support is superior to demands created by private contract. In *State of Minnesota v. Central Trust Co.*, 36 C. C. A. 214, Thayer, J., discusses this subject fully upon authority and reason. He cites numerous cases to sustain the proposition which he enunciates thus: 'It has been held frequently that a tax lawfully imposed by the State on its citizens is not an ordinary debt, but is an obligation which by its very nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare

such priority.' And then he says: 'These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the State for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has been a common practice to provide summary remedies by enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been sustained as affording due process of law, if the proceedings had related to the collection of purely private debts.'

" This thought is in line with what is said by the Supreme Court of Illinois in *Dennis v. Maynard*, 15 Ill. 477: 'All the principles applicable to the prerogative priority of the crown in this respect equally apply to public dues for taxes.'

And, at l. c. 250, the court further said:

"* * * It will be observed that we are dealing with two liens, one created by law in favor of the State which necessarily takes precedence of other prior as well as subsequent liens, on account of its peculiar character (R. S. 1879, secs. 6831, 6832; *Blossom v. Van Court*, 34 Mo. 390; *McLaren v. Shieble*, 45 Mo. 130; *Dunlap v. Gallatin Co.*, 15 Ill. 7; *Almy v. Hunt*, 48 Ill. 45; *Binkert v. Wabash Ry. Co.*, 98 Ill. 205); the other in favor of creditors, created by the act of the debtor. Those two liens have been foreclosed, and the purchasers stand opposed to each other with deeds under the proceedings respectively employed for enforcing them.

The lien of the State is the superior one, although subsequent in time, a superiority invariably accorded to it in the absence of some legislative declaration to the contrary."

In all of these decisions it will be noted that the courts all held that the lien of the sovereign tax is superior unless there is some legislative declaration to the contrary.

In State ex rel. v. Farmers' Exchange Bank of Gallatin et al, dated December 14, 1932, 56 S. W. (2d) 129, 331 Mo. 688, the priority of a claim for license fees deposited in a bank which was in liquidation was before the court. In that case the State based its contention that the State's claim for this deposit should be preferred over all other claims on the provisions of Sec. 3542, R. S. Mo., 1939, which is as follows:

"Whenever any person indebted to the state of Missouri is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the state of Missouri shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with the priority of the United States as secured by law, or the payment of the expenses of the last sickness, wages of servants, demands for medicine and medical attendance during the last sickness of the deceased, nor funeral expenses."

In considering this contention, the court said (l. c. 697):

"* * * * Respondents contend that Section 3152 applies only to debts in the strict sense of that term, or as respondents phrase it, 'merely provided for priority to the State amounting to a preference on obligations arising out of the debtor and creditor relationship and which ordinarily and otherwise would constitute simply a general claim entitled to no preference over other general creditors.' In view of the principle of public money underlying the common-law right of the sovereign to priority of payment and said statute which is substantially declaratory thereof (In re Holland Banking Co., supra, 313 Mo. 1. c. 321), respondents' said contention is, to say the least, open to serious question. The statute seems to have been given a more liberal construction in favor of the State in Greeley v. The Provident Savings Bank, 98 Mo. 458, 11 S. W. 980, wherein it was held that the obligation to pay taxes on personal property comes within the purview of said priority statute. * * * * *"

It will be noted here that the court indicated that Section 3152 R. S. Mo. 1929 (now 3542 R. S. Mo. 1939) was substantially declaratory of the common law. It will also be noted in this case that the court cited the case of Greeley v. Provident Savings Bank, 98 Mo. 458, without criticism. This same case was cited as authority by the Federal Court in the Minnesota case, supra. Again the court said in the Farmers' Exchange Bank of Gallatin case, supra:

"* * * * That the State's right to priority of payment of demands due to it may be waived by legislative enactment will be conceded. * * * * *"

We have failed to find where the legislature has waived the State's right to priority of payments of its demands for personal taxes. The case of State ex rel. Bardell v. Cardwell Bank, et al, 124 S. W. (2d) 677 and 678, the court in speaking of the allowance of a tax attorney's fee, said:

October 29, 1941

"(4,5) It is our conclusion that a judgment for taxes, such as in this case, should be paid prior to all other claims (unless it be a claim of the United States, a point not at issue in this case, and not passed on by us). Section 3152, R. S. 1929, Section 3152, page 4969, Mo. St. Ann. * * "

Since the lien of the sovereign state is, under the common law, superior to all other claims, and since the state has not waived its right to this priority, then it seems that the state's lien is superior and prior to all claims, whether secured or not.

CONCLUSION

The opinion of this department is, therefore, that a judgment for personal taxes upon execution is prior to a chattel mortgage on an automobile or any other property seized under such execution. We are further of the opinion that this rule applies also in cases where property is seized and levied upon by virtue of a tax bill in the hands of the proper official who has seized such property for the payment of taxes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

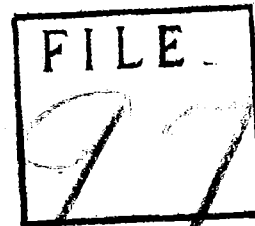
VANE C. THURLO
(Acting) Attorney General

TWB:NS

COUNTIES: Deficit in road districts can not be paid out of the current revenue, but must be paid out of the delinquent taxes or surplus in subsequent years.

November 25, 1941

2/17.6
Honorable R. P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This Department is in receipt of your letter of sometime ago, wherein you made the following inquiry:

"I respectfully request the opinion of your department on the question presented in the facts following.

"The County Court that preceded the present Court in office exceeded the revenue in expenditures on some Road Districts in this county, and this fact is shown by the audit.

"The County Treasurer argues that the present court should stop spending money in these districts until the red balances are liquidated out.

"The present County Court takes the position that they are not responsible for the red balances left by the old court, and that they can expend the amount of money anticipated from current taxes derived from those districts in the districts, regardless of the red balances left by the old court."

November 25, 1941

You state in your letter that the previous county court exceeded the revenue in expenditures on some of the road districts. We can not determine whether the court exceeded the anticipated revenue, or the expenditures were within the anticipated revenue, but all the revenue was not derived from the collection of taxes. In addition, we can not determine whether the road districts mentioned in your letter are what is termed common road districts or special road districts. However, we assume that they are common road districts, as the special road districts have a system of taxation more or less independent of the county court.

If the revenue was exceeded, that is, over and above the anticipated revenue, it may be possible that the amount of the exceeded expenditures is now invalid, but if within the anticipated revenue, the deficit is valid. The question arises as to the current revenue being used to retire the deficit. The position of the county court appears to be, in effect, correct that they are not responsible for the deficit.

The decision of State ex rel. v. Johnson, 162 Mo. 621, seems to bear out the position of the court, l. c. 629:

"It was ruled in Book v. Earl, 87 Mo., 246, that 'the evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year.' But it was at the same time said: 'Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.'

November 25, 1941

"It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrent was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years. (Randolph v. Knox County, 114 Mo. 142; Andrew County v. Schell, 135 Mo. loc. cit. 39; State ex rel. v. Payne, 151 Mo. loc. cit. 673; Railroad Co. v. Thornton, 152 Mo. 570; State ex rel. v. Allison, 155 Mo. loc. cit. 344; and on this point, Reynolds v. Norman, 114 Mo. 509.)"

The decision and cases mentioned therein have never been overruled by later decisions, and we are of the opinion that the Johnson Case is the controlling decision on the question.

We are therefore, of the opinion that the county court does not have to use the current revenue of the present year to pay prior indebtedness in the road districts. Such indebtedness may be paid from delinquent taxes or surplus of revenue which may arise in subsequent years.

APPROVED:

Respectfully submitted,

VANE C. THURLO
(Acting) Attorney General

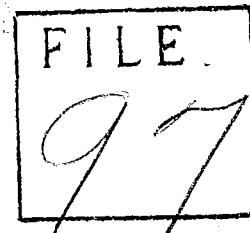
OLLIVER W. NOLAN
Assistant Attorney General

OWN/rv

ADMINISTRATION: Section 301, Laws of Missouri 1941, is procedural in character and becomes effective ninety days after the adjournment of the Legislature.

November 29, 1941.

Mr. S. F. Wier
Judge of the Probate Court
Atchison County
Rockport, Missouri



Dear Sir:

We are in receipt of your letter of November 15th wherein you request the opinion of this department on the following statement of facts:

"As Probate Judge of Atchison County I desire your opinion upon the following facts with reference to the hereinafter mentioned statute:

"Prior to the general election of 1940 one Clark H. Gore was public administrator of Atchison County. At said general election Mrs. George Deatz was elected to that office. She duly qualified as such public administrator on December 6, 1940. After said qualification of his successor, Mr. Gore continued in charge of the estates he had been handling as public administrator under section 301, R. S. Missouri, 1939.

"The late General Assembly repealed said section 301 and passed in lieu thereof another section relating to public administrators which will be found in Laws of Missouri, 1941, page 286. By said new act, public administrators shall, before the first day of the regular term of the Probate Court, after the expiration of one year after their successors in office shall have qualified, publish notice of final settlement for all estates in their charge as public administrator in which final settlement can be made during that term of court. Upon the first day of said term the

November 29, 1941.

Probate Judge, on his own motion, shall order the public administrator to account for and deliver all money, property and papers belonging to estates in his hands in which such final settlement cannot be made during that term of court, to his successor in office.

"Said act of 1941, not being passed with an emergency clause, went into effect on October 10, 1941.

"As Mr. Gore's successor qualified on December 6, 1940, the year mentioned in said new section 301 would expire on December 6, 1941.

"Does this new section 301 apply to Mr. Gore, so that he must publish notice of final settlement as in said section mentioned? The first term of court at which said settlement could be made would be my February, 1942, term.

"In my opinion said act of 1941 does apply, and it is Mr. Gore's duty to give proper notice of final settlement in all estates he had theretofore held as public administrator, and my duty under said new section 301 to make the order required therein at the proper time.

"Please give me your opinion in the matter."

Section 301, Laws of Missouri 1941, page 286, reads as follows:

"The public administrator shall before the first day of the regular term of the probate court after the expiration of one year after his successor in office shall have qualified, publish notice of final settlement as is provided in Section 229, of the Revised Statutes of Missouri, 1939, for all estates in his charge as public administrator in which final settlement can be made during that term of court. Upon the first day of said term, the Probate Judge shall upon his own motion, order the public administrator to account for and deliver all money, property or papers belonging to all

estates in his hands in which final settlement can not be made during that term of court, to his successor in office, or to the heirs of said estate, or to any executor or administrator regularly appointed, as provided by law, and such accounting and delivery shall be accomplished during that term of court. Provided that when the Public Administrator shall turn over the assets of an estate to his successor in office, or to any other executor or administrator regularly appointed as is provided by law, and before any final distribution has been made of the assets of the estate, the Probate Judge shall allow him compensation based on the proportionate part of the services and trouble rendered for the period of time such Public Administrator actually served as such administrator, and provided that such compensation for services rendered by both the original and succeeding administrator who shall complete the work of such administration shall not exceed a commission of five per cent on personal property and all money arising from the sale of real estate."

Section 301, R. S. Mo. 1939, was repealed by the aforesaid section and reads as follows:

"When a public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or is discharged in the ordinary course of law as the administrator."

We call attention to the case of *McManus v. Park*, 287 Mo. 115, and we herewith quote from the opinion as follows:

"The appellant contends that the Act of 1911 should be construed so as to apply only to trust estates created after the enactment of that law; that otherwise it would be unconstitutional, * * * * *

"This argument proceeds upon the theory that if it is made to apply to existing trusts and trustees it is retrospective in operation. * * *"

"This court said in case of Mainwaring v. Lumber Co., 200 Mo. l. c. 732-733:

'Acts changing remedies in any way that do not destroy or impair vested rights, are excluded from the rule invalidating retrospective laws, even when they are intended to retroact.' * * * * *

"* * * There is no vested right in a particular mode of procedure.' * * * * *

"In the Abbott Mining Company case, 255 Mo. l. c. 384, this court, Division One said:

'A vested right in the sense in which the term was used in the foregoing quotation is a property interest in the thing itself whether it exist in contract or possession; and it is subject to whatever burden may be imposed by the State for the general welfare; that is to say, for the enforcement and protection of the rights of all. Laws providing and regulating remedies for the protection and enforcement of legal rights are peculiarly within this rule.' * * * * *

"* * * Such trustee has no vested right in the manner of accounting for his trust. The statute may be construed to affect trust estates and trustees created before its passage without being contrary to the section of the Constitution. * * * * *

"* * * In this country, the general rule seems to be, in accordance with the English, that statutes pertaining to the remedy, i. e., such as relate to the course and form of proceedings for the enforcement of a right, but do not affect the substance of the judgment pronounced, and neither directly nor indirectly destroy all remedy whatever for the enforcement of the right, are retrospective, so as to apply to causes of action subsisting at the date of their passage.' And further quoting from the same author: 'It is said that an act dealing

with procedure only applies unless the contrary intention is expressed, to all actions falling within its terms whether commenced before or after the enactment.' * * * * *

"It has been held by this court that where the terms of an act are ambiguous recourse may be had to the title in ascertaining the intention of the Legislature. (Straughan v. Meyers, 268 Mo. 1. c. 588.) * * * * *

"We think that a construction of the statute under consideration so as to make it apply to trustees appointed as well as trust estates created, before and after the passage of the act, would meet the evident intention of the Legislature, and not do violence to the plain meaning of the language used. * * * * *"

From the reading of the McManus case, supra, we find that the court has logically reasoned that a statute which is procedural in character becomes the law of the case when said statute becomes effective which is ninety days after the adjournment of the Legislature. State vs. Schenk, 142 S. W. 263, 238 Mo. 429.

The policy of the law as set forth clearly in the McManus case has been adhered to uniformly in Missouri, and for other citations we quote as follows: State vs. Haid, 52 S. W. (2d), 183 1. c. 186.

"* * * It is a well-settled rule that, if before final decision in a case a new statute as to procedure goes into effect, it must from that time govern and regulate the proceedings. Clark v. Railroad, 219 Mo. 524, 118 S. W. 40. And a like result is produced by a change in the construction of a statute relating to procedure by a court of last resort. * * *"

State vs. Producers R. R. Company, 111 S. W. (2d) 521, 1. c. 525, Aetna Ins. Co. vs. O'Malley, 118 S. W. (2d) 3, 1. c. 8, 59 C. J. paragraph 702, page 1176.

November 29, 1941.

From the reading of the aforesaid cases, supra, we must conclude that Section 301, Laws of Missouri 1941, is a procedural statute and that on the termination of ninety days after the adjournment of the Legislature said law became effective, and is therefore incumbent upon the public administrator referred to in your opinion request, to comply with said new Section 301, supra, and to publish notice of final settlement as is provided in Section 229, R. S. Mo. 1939.

CONCLUSION

We are of the opinion that Section 301, Laws of Mo. 1941, is procedural in character and therefore took effect ninety days after the adjournment of the Legislature and immediately became effective upon all public administrators, and said public administrator shall before the first day of the regular term of the Probate Court "after the expiration of one year after his successor in office shall have qualified, publish notice of final settlement as is provided in Section 229, R. S. Mo. 1939."

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General *

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:LB

EXTRADITION: Apprehension pending Governor's warrant; arrest on suspicion; affidavit before justice of the peace by competent witness sworn to in Missouri; examination.

May 7, 1941

5-9

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

This is in reply to your request for our opinion by your recent letter which is in the following terms:

"I respectfully request the opinion of your department to define the procedure by which a person wanted by the authorities enforcing the criminal law of another state can be taken into custody and held for such authorities of such other state in those cases where extradition proceedings through the governors of the respective states has not been instituted.

In such opinion will you please specify as to whether or not any judicial authority in Missouri has a legal right to issue a warrant for the arrest of such person upon the receipt of a certified copy of the complaint and warrant signed before, or issued by a Court of original criminal jurisdiction in such foreign state."

Attached to that letter was another one of the same date addressed to this office by you, and a copy of your letter of the same date addressed to Captain William Baxter of the Missouri Highway Patrol. We thoroughly agree with the general propositions stated in your said letter to Captain Baxter.

May 7, 1941

Frequently officers from other states send to Missouri officers a copy of a warrant issued by an officer of such other state, and ask for the arrest of the fugitive in Missouri on that authority. Interstate rendition presents difficult problems. It calls for close cooperation between the officers of the various states. We are sure that Missouri officers are ready to repay the assistance rendered to Missouri by the officers of other states, to the extent permitted by the law. However, a copy of a warrant issued by an officer of another state is no legal authority for an arrest in Missouri by a Missouri officer. Leading authorities are accurately summarized as follows in 4 American Jurisprudence page 14, Section 19:

"A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. A warrant may confer authority on a police officer or private individual to make an arrest anywhere within the boundaries of a state, but it has no extraterritorial effect of any kind, and will not justify an arrest made outside the limits of the state." (citing authorities)

To the same effect are authorities collected in an annotation in 61 A.L.R. 380. The courts of the United States have followed the same rule (McLean v. State of Mississippi ex rel Roy (5 C.C.A.) 96 F. (2d) 741, 745, 119 A.L.R. 670, certiorari denied by U. S. Sup. Ct. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 399; and, Kirkes v. Askew, Sheriff, (D. C. Okla.) 32 Fed. Supp. 802, 804 (2) et seq). There is no Missouri statutory authority for arrest on foreign warrants.

Before legal proceedings are instituted to restrain an alleged fugitive from the justice of another state, and before the governor's warrant is issued, a Missouri officer could lawfully make an arrest on suspicion of having committed an offense, without a warrant. In State ex rel

May 7, 1941

Kaiser v. Miller 289 S. W. 898, 1.c. 903, 316 Mo. 372, involving a fugitive from justice, the legal proceeding above mentioned was considered, and the court further said:

"What is said here is not to be construed as meaning that in every case a warrant must be obtained before an arrest is made of one believed to be a fugitive from justice; but, in such cases, sanction for the detention of such person should be obtained from a magistrate of competent authority for the purpose, and that sanction must rest upon an accusation made against the person to be detained, according to the forms of the law. Harris v. Louisville, etc., R. R. Co. (C. C.) 35 F. 116.

Under the provisions of section 3200, R. S. 1919, the person arrested by a peace officer without warrant on suspicion of having committed a criminal offense is required to be discharged from such custody within 20 hours, unless he shall be charged with a criminal offense by the oath of a credible person, and be held by a warrant to answer for such offense. The jurisdiction of the magistrate over such person accrues by the concurrence of a complaint, made as provided by law, and the custody of the person complained against."

Section 3200 R. S. 1919, mentioned in the above quotation, is now R. S. 1939 Section 4346, and under its provisions a person arrested on suspicion without a warrant may be held for twenty hours. Such an arrest properly made requires the exercise of discretion on the part of the officers. We would not undertake to suggest in advance the precise circumstances under which that should be done. In State v. Raines 98 S. W. (2nd) 580, 1.c. 584 (3), 339 Mo.

May 7, 1941

884, the Supreme Court of Missouri said:

"In State v. Bailey, supra, 320 Mo. 271, 8 S. W. (2d) 57, loc. cit. 59 (4), it is said: 'If the nature of the information and the officer's knowledge of the reliability of his informant cause a reasonable suspicion in his mind that the accused is guilty of felony, he is authorized to make the arrest without a warrant.' * * *
* * * * *
is always justified if an offense has in fact been committed, whether he had reason to believe it or not. If a crime has not been committed then he can only be justified by the existence of reasonable ground to believe that it has been committed."

Where such an arrest can properly be made in the judgment of the Missouri officers, the twenty hour period should afford sufficient time for officers from the demanding state to come here and resort to the legal proceeding authorized in such cases by Article 9, Chapter 30 R. S. Mo. 1939 Sections 3976 to 3998 inclusive. Unless a warrant is issued at the end of the twenty hour period, of course the alleged fugitive would be entitled to be discharged.

As to the proceeding, Section 3985 provides:

"Whenever any person within this state shall be charged, on the oath or affirmation of any credible witness, before any judge or justice of a court of record, or a justice of the peace, with the commission of any crime in any other state or territory of the United States, and that he fled from justice, it shall be lawful for the judge or justice to issue his warrant for the apprehension of the party charged."

And, Section 3986 provides:

"If, upon examination, it shall appear to the judge or justice that the person charged is guilty of the crime alleged, he shall commit him to the jail of the county, or, if the offense is bailable, take bail for his appearance at the next term of the court of the county having criminal jurisdiction."

From Section 3985 it is seen that the proceeding must be instituted by the filing of a sworn charge, that is, a written affidavit charging an offense. In order to be competent to make this affidavit a person must have personal knowledge of the facts and be capable of testifying to them. We find no court decision deciding this point in an interstate rendition case. But Section 3987 in part provides that, "The judge or justice shall proceed in the examination in the same manner as is required when a person is brought before such officer, charged with an offense against the laws of this state" (*Italics ours*) Assuming the proceeding will be instituted in the Justice of the Peace court, the justice will proceed in the same manner as in preliminary examinations before such justice where a person is charged with committing a felony. Regarding such preliminary examination, Section 3857 requires an affidavit by providing in part; "Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant"

The qualifications of the maker of such an affidavit were described as follows in *Ex parte Dickinson* (Springfield Court of Appeals) 132 S. W. (2nd) 243, 1.c. 245:

"Section 3467, R. S. Mo. 1929, Mo.

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St. Ann. Sec. 3467, p. 3110, defining the duty of a magistrate when complaint is made in writing and upon oath setting forth that a felony has been committed, contemplates that such complaint be made by a party competent to testify, and a warrant should not issue without a proper complaint or affidavit. *Monson v. Rouse*, 86 Mo. App. 97; *State v. Sassaman*, 214 Mo. 695, 114 S. W. 590. That the affidavit, or complaint, must be made by a person competent to testify is borne out by the case of *State v. Ransberger*, 106 Mo. 135, 17 S. W. 290, 293, in which it is stated: 'As a basis for an official information, the affidavit of "a person having knowledge that an offense has been committed" is sufficient, but, when a party is to be arrested without an official charge, the affidavit "of a person competent to testify against the accused" is requisite.'

Those propositions apply to the fugitive proceeding herein considered, and they preclude the making of the affidavit by the prosecuting attorney in Missouri on information and belief. The proceeding for apprehension of a fugitive is an examination and not a trial; it is governed by rules applicable to preliminary examinations. However, an analogy is found in the affidavit required for trials in Justice of the Peace courts in Missouri for misdemeanors. In this connection Section 3805 provides in part that, " . . . when any person has actual knowledge that an offense has been committed . . . he may make complaint, verified by his oath . . . before any officer authorized to administer oaths . . . and file the same with the justice of the peace . . ." That section would seem to require knowledge and not mere information and belief on the part of the affiant. Under said Section 3805 it has been held that where a complaint (affidavit) is used, "the defendant can not be convicted of an offense of which the person making the complaint had no actual knowledge" (*State v. Meadows* (K. C. Ct. of Appeals) 106 Mo. App. 604, 1.c. 606, 81 S. W. 463).

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All of the above cited statutes require that the charge be on oath, that is, that it be sworn to. In State v. Nichols 49 S. W. (2nd) 14, 1:c. 19, 330 Mo. 114, the court said:

"And by plain implication section 3467, R. S. Mo. 1929, makes the filing of a complaint in writing and upon oath the first step in the institution of such a criminal prosecution. * * *
* * * * *
But were it otherwise, the general rule is that a written complaint is necessary even after an arrest without a warrant. 16 C. J. Sec. 495, p. 288."

Acknowledgments or oaths in Missouri must be made before officers authorized to administer oaths in this state. It is noted that Section 3805 above quoted says, ". . . verified by his oath . . . before any officer authorized to administer oaths . . ." The clear intendment of all of the laws governing proceedings in Missouri courts and requiring oaths, is that such oaths shall be made before officers authorized to administer oaths in Missouri. While we find no decision squarely on the point in an interstate rendition case, we regard the above as the reasonable construction of the statutes.

The statutes governing the proceeding for apprehension of a fugitive were written with knowledge that affidavits sworn to in other states could be used in support of the requisition for the governor's rendition warrant by authority of the Act of Congress (18 USCA Section 662, RSUS Section 5278) referred to in Section 3980 R. S. Mo. 1939. The omission in Missouri statutes to authorize the use of the same affidavits in the proceeding for apprehension is indicative of the intent that they should not be used. Therefore, a judge or justice of the peace of Missouri could not lawfully issue his warrant for the apprehension of an alleged fugitive on the basis of the filing before him of a copy of an affidavit sworn to before an officer authorized

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to administer oaths in another state. It is true that in some instances in our law, documents sworn to in other states are recognized as importing verity in our courts. But that is by express statutory authority, as in the case of foreign depositions and interrogatories (Sections 1920, 1924, 1939, R. S. Mo. 1939). Since there is no authority for use of a foreign affidavit in the action for apprehension of a fugitive in Missouri courts, we believe it should not be used.

In practice affidavits for use in preliminary examinations before justices of the peace in Missouri are often sworn to before some other officer authorized to administer oaths in the county of the jurisdiction of such justice. In our opinion an affidavit so made for use in this proceeding would suffice. By way of analogy, in making a charge as a basis for a requisition by a governor of one state upon another, it is not necessary that the affidavit be actually sworn to before the magistrate who issues the warrant. In Gughine v. Gerk 31 S. W. (2d) 1, 1.c. 2, 326 Mo. 333, appeal dismissed and certiorari denied 51 Supreme Court 180, 282 U. S. 810, 75 L. Ed. 726, it was said that the requirement of an affidavit made before a magistrate:

" * * does not mean that the magistrate must write the affidavit or administer the oath to affiant. It means an affidavit must be laid before a magistrate, and that the magistrate acting under said affidavit order a warrant issued for the arrest of the person charged with the crime."

As was seen from the provisions of Section 3985, quoted above, the affidavit must charge the commission of a crime in another state. It will not be sufficient if it merely alleges that the alleged fugitive is charged in another state with committing a crime. It was so ruled in effect in State ex rel Kaiser v. Miller, cited above. In that case, at 1.c. 902 of 289 S. W. the Supreme Court

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of Missouri quoted with approval the following tests for jurisdiction of the justice of the peace in this proceeding:

"It will be readily seen that in order for the magistrate to acquire jurisdiction under the statute just quoted, three things are absolutely essential: 1st, That there is a person within this state. 2nd, That a credible witness before such magistrate, on oath or affirmation, charge such person with the commission of a crime in another state; and 3rd, That such person fled from justice. It is only "whenever" all these essentials concur, that "it shall be lawful for the judge or justice to issue his warrant for the apprehension of the party charged." "

When such a complaint or affidavit is filed, it is the duty of the justice of the peace to take a bond, according to the provisions of Section 3994:

"When a complaint shall be made against any person, as provided by sections 3980 to 3998 of this article, the judge or justice shall take from the prosecutor a bond, to the clerk of the court, with sufficient security, to secure the payment of the costs and expenses which may accrue by occasion of the arrest and detention of the party charged, which bond shall be certified and returned, with the examination, to the office of the clerk of the court having criminal jurisdiction."

The term "prosecutor" as used in that section means

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not the prosecuting attorney of the county, but the person who signs the affidavit commencing the proceeding. A prosecutor is defined in 34 Words & Phrases (perm. ed.) page 632 as:

" * * one who instigates a prosecution by making affidavit charging a named person with the commission of a penal offense on which a warrant is issued * * *."

This is the sense in which the word is used in the statute, and is in line with the policy that the demanding state shall pay the expense of the return of a fugitive through the medium of the governor's rendition warrant (Section 3984).

After the warrant is issued and the alleged fugitive is taken into custody, there is no requirement that the hearing or examination be held immediately. Again, Section 3987 provides in effect that the justice shall proceed in this examination in the same manner as in ordinary preliminary examinations. In such a proceeding, by the terms of Section 3864 the justice "may adjourn an examination . . . from time to time as occasion requires, not exceeding ten days at any one time . . . as he deems necessary. . ."

As provided by the above quoted Section 3986, if upon examination it appears to the justice that the person charged is guilty, he shall commit him to the county jail, or, if the offense is bailable, let to bail. The examination shall be reduced to writing and a copy sent to the Governor of the State of Missouri (Section 3987). If he believes there is sufficient evidence to warrant the finding of an indictment, he shall notify the governor of the state in which the crime was committed (Section 3988). In practice, by the time the Governor of Missouri will receive the transcript of the justice of the peace court examination, he already will have received a requisition for the return of the fugitive from the governor of the state where the crime was committed. We believe any further review of the procedure would serve no useful purpose. Regarding one other provision

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of the Missouri statute, we would not recommend that any fugitive be surrendered through the medium of the warrant of the Governor of Missouri without the production of a certified copy of an indictment returned or an affidavit made before a magistrate in the demanding state, in accordance with the provisions of the Act of Congress (18 USCA Section 662; R.S.U.S. Section 5278).

CONCLUSION

Pending issuance of the governor's rendition warrant, an alleged fugitive from the justice of another state may be arrested upon suspicion and held for twenty hours without warrant if in the officer's judgment such suspicion is justified. Thereafter, or without such arrest, if there is filed before a justice of the peace an affidavit by a competent witness charging, among other things, that the alleged fugitive committed an offense in another state, such justice may issue his warrant for the apprehension of such fugitive. The affidavit must be sworn to in this state. An examination proceeds as in ordinary preliminary examinations.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General

EH:RT

TAXATION: Federal employees in Veterans' Hospital on reservation at Excelsior Springs are liable for personal property tax on their motor cars.

June 19, 1941

6-21



Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We have received your letter of May 24, 1941, in which you request an opinion regarding the collection of taxes from employees of the Veterans' Hospital in Excelsior Springs.

The facts you set out for this opinion are as follows:

"In the process of the collection of both current and delinquent personal taxes, I am often advised by persons employed at the Veterans Facility and living on the Government Reservation in Excelsior Springs, that they are not subject to any state and county taxes.

"In most cases the assessment that we have against these people is for a motor car on which they hold Missouri title and pay Missouri state license.

"I can not understand why motor cars should be exempt from taxation and I would appreciate your securing for me an official opinion relative to this matter."

Section 6 of Article X of the Constitution of Missouri reads as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or

town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Section 7 of Article X of the Constitution of Missouri reads as follows:

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

Section 10936, R. S. Missouri 1939, reads as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 10937, R. S. Missouri 1939, partially reads as follows:

"The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; * * * * *

It will be noticed in the above partial section that the person belonging to the army of the United States is exempted from paying taxes but does not exempt the payment of property tax by such person. The tax exempt being the personal tax, such as poll tax or

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practicing of his profession while a member of the army.

The construing of provisions for exemptions from taxation must be a strict construction. In the above Section 10937 the only exemption set out is the person and not as to his property. If this section were applicable to property of any person belonging to the army or in federal employment such as a position at the Veterans' Hospital in Excelsior Springs, property owners would assign their property to some member of the army or federal officer and in that way avoid payment of taxes due the state and county which taxes are for the preservation of not only the property of the person above described but also the property of others who are not residents or employees of the reservation. That such exemption must be strictly construed was held in the case of *Young Women's Christian Ass'n. v. Baumann*, 130 S. W. (2d) 499, par. 1, where the court said:

"The principles to be followed in construing provisions for exemption from taxation, have been announced in many cases. They are well stated by Judge Lamm in *State ex rel. Spillers v. Johnston*, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A., N. S., 171. Suffice it to say they call for a strict construction against the right of exemption. Taxation is the rule, exemption is the exception; yet strict construction must be a reasonable construction."

The question of voting does not enter into the taxation problem in this matter, but it is possible for employees living on the reservation to vote notwithstanding the opinion of the Honorable Denton Dunn, Assistant Attorney General under the Honorable Stratton Shartel, in which he held that under the Constitution of Missouri they were not sufficiently residents of Clay County to vote in county and state elections. The question of whether they are entitled to vote is a matter of intention, and our Supreme Court in *Chomeau v. Roth*, 72 S. W. (2d) 997, pars. 3, 4, the court said:

"The two cited cases, and particularly the former, control this case in all essential respects. As they announce the law, it is entirely possible for a student to gain a residence at the place where he is attending school,

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although he may have gone there for no other purpose than to attend school; the question of whether a change of residence is effected depending upon the intention with which the removal from the former residence was made. A temporary removal for the sole purpose of attending school, without any intention of abandoning his usual residence, and with the fixed intention of returning thereto when his purpose has been accomplished, will not constitute such a change of residence as to entitle the student to vote at his temporary abode. But conversely, an actual residence, coupled with the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile. *Nolker v. Nolker* (Mo. Sup.) 257 S. W. 798; *Finley v. Finley* (Mo. App.) 6 S. W. (2d) 1006."

Our State Supreme Court has not passed directly on the question of exemption of persons in the army as set out in Section 10937, but in the case of *Finley v. The City of Philadelphia*, 32 Pa. State Reports, 1. c. 382, the State of Pennsylvania, in passing on a very similar statute and a very similar statement of facts as set out in your request, said:

"Dr. Finley has his residence in the city of Philadelphia, and has had for several years, and is charged with a city tax on his household furniture, used by himself and his family; and he claims that this property ought to be exempt, because he is a surgeon in the United States army, stationed here on duty, and with no intention of acquiring a domicile in this state, or of remaining in it after he shall be relieved from duty.

"Is this a valid ground of exemption? We think not. There is nothing very poetic about tax laws. Wherever they find property, except what is devoted

to public and charitable uses, they claim a contribution for its protection, without any special respect to the owner or his occupation, and without reflecting much on questions of generosity or courtesy. They leave no discretion to the taxing officers by which any exemption can be allowed; for if they did, favouritism and corruption would soon publicly abound.

"Clearly the liability to taxation does not depend upon the intention of any one relative to his domiciliation, for this would make the state's power of taxation dependent, in numberless cases, on the pleasure of the persons proposed to be taxed. Residence is a definite and obvious fact, and is of itself a sufficient ground of liability.

"Here is no tax on the official salary, for that stands in no need of protection from the state, and such taxation might lead to great abuses, and would be in effect a taxation of the federal government. But the officer's household furniture, not within army quarters, stands as much in need of state protection as any other kind of property, or as the property of any other person. What is official about the plaintiff here is his surgical and medical function, and that is not taxed. As an owner of household furniture or other property (not being special instruments of his office), he stands on common ground with other residents and citizens, and is subjected to corresponding burdens and duties."

The above authorities have been quoted in reference to members of the army and I am presuming that the doctor under your statement of facts was not an army officer but merely a federal employee.

CONCLUSION

Since we can find no property exemption for a federal

June 19, 1941

employee or no property exemption for a member of the army in either the Constitution of the State of Missouri or the laws of the State of Missouri, we are of the opinion that the employee of the Veterans' Hospital in Excelsior Springs, Clay County, must pay property tax but not a tax on his person, such as poll tax or taxes for his profession.

Section 10937, R. S. Missouri 1939, is not ambiguous and merely states that the person of a member of the army is subject to exemption from taxation but does not state that his property is exempt from taxation.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

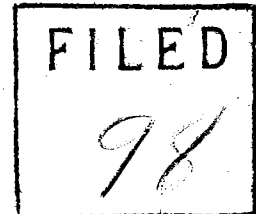
VANE C. THURLO
(Acting) Attorney General

WJB:DA

SHERIFF, JAILS AND JAILERS: County court cannot increase the allowance for feeding prisoners during the current year.

2/26/41
July 22, 1941

Hon. Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. Withers:

This department is in receipt of your letter of July 16th, 1941, wherein you request an official opinion on the following question:

"In view of the increased costs of commodities and provisions, the County Court and the Sheriff of Clay County, Missouri have had under consideration the matter of the allowance to the Sheriff for the board of prisoners pursuant to Section 13417, R. S. Mo., 1939.

"On December 16, 1940 and at the November Term of that year, the Court made an order fixing the rate of allowance for each prisoner for each day at 65¢ per day.

"The Court would like to increase this allowance but is not able to satisfy itself that it has any authority to do so and, in view of the auditing of county offices under the interpretations of your office, has asked me to procure your opinion on that point, which is hereby requested."

Section 13416, R. S. Mo. 1939 fixes the maximum amount that sheriffs and marshals and jailers shall receive for furnishing board for each prisoner. The

amount being 75¢ per day.

Section 13417, R. S. Mo. 1939, refers to the duty of the county court and the time. That section being as follows:

"It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

We think the question that you present is directly in the original case of Mead v. Jasper County, 305 Mo. 476, l. c. 484, 485 and 486. We quote l. c. 485:

"The county court, having made a valid order which was within its power and duty to make at the November term and before January first, exhausted its power in respect thereto for that year and could not set same aside after January first, particularly if rights became fixed thereby by the ensuing year. In Bayless v. Gibbs, 251 Mo. l. c. 506, it was said:

"This court, in numerous cases, has repeatedly held that the county courts of the respective counties of the

State are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void.'

"In Saline County v. Wilson, 61 Mo. l. c. 239, it was said:

"County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond their acts are void.'

"The general rule is laid down in 15 Corpus Juris, page 470, where it is said:

"Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action; but in no event has such court or board the power to set aside or to modify a judicial decision or other made by it after rights have lawfully been acquired thereunder, unless authorized so to do by express statutory provision. . . . The same is the case after an appeal has been allowed, or where some special statutory power is exercised, the time and mode of the exercise thereof being

prescribed by statute. Where the previous action of the board is in the nature of a contract which has been accepted by the other party, or on the faith of which the latter has acted, it cannot be rescinded by the board without the consent of the other party. Conversely, where the proposition has not been accepted or acted on by the other party, the board may restrict or rescind its action. In the absence of express statutory authority, a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law. A county board or court may, however, at the term or session at which an order is made, revise or rescind it, provided this is done before any rights accrue thereunder, but ordinarily they have no power to do such act subsequent to such term or session.'

"In State v. Morgan, 144 Mo. App. l. c. 40, it is said:

"The rule is well settled that a county court may revise or rescind an order at the term or session at which such order is made provided this be done before any rights have accrued under the order.' (Italics ours.)

"Section 11002 contemplates that the sheriff himself will furnish the board for the prisoners under his care in the county jail. But the proviso that he shall not contract for the furnishing of such board for a price less than that fixed by the county court recognizes the fact that he may lawfully contract with others to furnish such board, the only limitation thereon being that he shall not be permitted to profit thereby.

July 22, 1941

Sections 11002 and 11003 require provision to be made for the future, to-wit, the ensuing year, and common fairness requires that the county court shall not be permitted, through mere caprice or even while acting under entirely proper motives, to change its order to the detriment of the sheriff. Certainly, if respondent had elected to contract with a third person for the board of prisoners for the ensuing year on the price fixed in the order of December 1, 1922, it would constitute a grievous wrong to permit the county court to change its order."

The same parties were involved in a kindred question in the decision of Mead v. Jasper County, 322 Mo. 1191. It appears in that decision that the principal question involved was the time within which the court should have made the order. The statute states that the contract should be made in November. There was a delay not due to any malice or caprice or any improper motive of either party. The court held that the statute was directory and the fact that the contract was entered at a later date did not invalidate the same. The decision discusses and differentiates between the original case and the later case and holds to the effect that the original case was not decisive of the point involved in the later case.

CONCLUSION.

We are of the opinion that the county court is not authorized at this time to increase the allowance of the sheriff of your county for the boarding of prisoners, in view of the terms of the statute and the original decision of Mead v. Jasper County.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

OWN:GP

ROADS AND BRIDGES:
COUNTY BUDGET:

County treasurer can protest warrants against special road and bridge fund of any road district but not the county road and bridge fund.

December 30, 1941

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of December 22, 1941, which is as follows:

"The County Clerk of Clay County, Missouri has received a letter from the office of the State Auditor under date of December 16, 1941 which reads as follows, in part:

"The budget for 1942 is to be made under the same provisions as in the past, with the exception of class three. Effective for the 1942 budget, class three will carry all of the road and bridge money of the county. (Laws of Missouri, 1941, page 651). The revenue to be budgeted in class three will be the anticipated revenue to be derived for the use of the county from the levies made under Sections 8526 and 8527, R. S. Missouri, 1939."

"I recall it has been held by your Department that counties, such as Clay, which are on a cash basis as to all of the budget operations, might protest warrants against the Special Road and Bridge Fund for the reason that it was considered that such Fund was not administered under or through the budget, having a constitutional and statutory

origin prior to the adoption of the budget law.

"If the above quoted paragraph of the State Auditor's letter means that this condition is no longer true, it will create a most serious emergency in this County by destroying the County's right to protest warrants and would stop the County's work out of this Fund for about eight months out of the year.

"I would appreciate an expression of the opinion of your Department as to whether or not the laws mentioned by the State Auditor, being Laws of Missouri, 1941, page 651, changing the budget law classification, will operate to bring the Special Road and Bridge Fund under the jurisdiction of the budget account, or whether the original opinion of your Department that such Road and Bridge Fund is exempt from the requirements of the budget account irrespective of the amendment above mentioned still stands.

"Since the budget must soon be taken up and completed, you will understand the wish of the County Court to have this expression of your opinion as quickly as conveniently possible."

Class 3 of Section 10911, R. S. Missouri 1939, provides as follows:

"Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

It will be noticed under the above partial section

that it only refers to the upkeep and repair of bridges but also excludes bridges on state highways and bridges not in any special road district. Class 3, as repealed and reenacted in the Laws of 1941, page 651, provides as follows:

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. This shall constitute the third obligation of the county."

It will be noticed that the only change in the reenactment is that it includes also the apportionment of money for the upkeep and repair of bridges and roads, but it also excepts roads which are state highways and bridges and roads which are in a special road district. This reenactment does not change the status of the opinion which you referred to in this request.

The law, in reference to the special road district, which is now Section 8527, R. S. Missouri 1939, was enacted in accordance with Section 22, Article X of the Constitution of Missouri. This section was passed upon in the case of State v. Pemiscot Land & Cooperage Co., 295 S. W. 78, par. 1, where the court said:

"In considering this constitutional question, we are not dealing with the power of the Legislature to regulate the disbursement of the funds for road purposes realized from the tax levy authorized by section 22 of article 10 of the state Constitution. The Legislature has dealt with that question in the Laws of Missouri 1917, pp. 457, 458. In section 37 of article

2 of said Laws it is provided that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district, shall be paid into the county treasury and placed to the credit of the special road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court in favor of the commissioners, treasurer, or overseer of the district, as the case may be.

"We have held that the Legislature may direct the disbursement of these funds without contravening section 22 of article 10 of the state Constitution. State ex rel. v. Burton, 266 Mo. 711, 182 S. W. 746."

In the same paragraph it further said:

"It will be noted that this section of the Constitution, in plain and simple language, provides, in addition to taxes authorized to be levied for county purposes (under section 11 of article 10, Const.), the county courts may levy and collect, as state and county taxes are collected, a special tax of not more than 25 cents on each \$100 valuation, to be used for roads and bridges, but for no other purpose whatever; and the power thus conferred on the county courts is declared to be discretionary. This is an express grant of power to the county courts, and is a limitation of the power of the Legislature; a power granted to the county courts to levy and collect a special tax for road and bridge purposes. * * "

According to the above opinion the court, in passing upon the constitutionality of the legislative enactment, by

dictum, held that the legislature had the authority to regulate the disbursement of the funds for road purposes realized from the tax levy authorized by Section 22 of Article X of the State Constitution. The legislature of 1941, in setting out Class 3 at page 651, did not take advantage of this authority but excepted from the enactment the money used for the upkeep of bridges on state highways and for the upkeep of roads in special road districts. Therefore, it left the road money for budgeting purposes confined to the taxes realized under Section 8526, R. S. Missouri 1939, which was enacted by reason of Section 11, Article X of the Constitution of Missouri. Under this section the taxes realized applied to general road purposes only and not to special road districts. In the case of State v. Burton, 182 S. W. 746, 1. c. 748, the court, in holding that the legislature may control the disbursement of taxes realized under Section 8527, R. S. Missouri 1939, said:

"* * * The legislative power to tax being inherent, the creation of agencies or instrumentalities for the levy, collection, and disbursement of such taxes follows as a necessary consequence, and hence the right of the Legislature to enact a law delegating in this case the disbursement of the taxes collected to a board of commissioners of a special road district is not an improper exercise of such power."

We also wish to call your attention to Section 12, Article X of the Constitution of Missouri, by reason of which section the legislature saw fit to enact Section 8702, R. S. Missouri 1939, which provides as follows:

"Such board may issue warrants on the treasurer of the board in payment of the expenses and obligations which the board are authorized to incur in behalf of such special road districts and such warrants may be issued in anticipation of the income and revenue provided for the year for which the debt or obligation for which the warrant is issued was incurred; but such districts or such board

on behalf thereof shall not become indebted in any manner or for any purpose to an amount exceeding in any one year the income and revenue provided for such year: Provided, however, that this shall not prevent the incurring of indebtedness under bond issue as is or may be provided by law."

The above section is not a part of the County Budget Act and is still in effect even as to money received by reason of the special road act as set out in Section 8527, R. S. Missouri 1939. This section prohibits the board of the special road district from incurring warrants in excess of the income and revenue provided for the year for which the date or obligation for which the warrant is issued was incurred.

Under both Sections 8526 and 8527, R. S. Missouri 1939, all portions of the tax which is collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district or other road district from which it arose. It was so held in the case of Hawkins v. Cox, 334 Mo. 640, 66 S. W. (2d) 539. In case of a special road district this money is not a part or subject to Class 3 of the County Budget Act as set out in the Laws of 1941, page 651. Under both Sections 8526 and 8527, R. S. Missouri 1939, the tax arising upon property not situated in any road district, special or otherwise, should be placed in the county road and bridge fund and would be subject to disbursement under Class 3 of the County Budget Act as amended in the Laws of Missouri, 1941, page 651.

CONCLUSION

In view of the above authorities it is the opinion of this department that the reenactment of Section 10911, Laws of Missouri, 1941, page 651, Class 3 does not prevent the protesting of warrants against the special road and bridge fund in a special road district providing it is not a violation of Section 8702, R. S. Missouri 1939.

It is further the opinion of this department that the reenactment of Section 10911, supra, only placed the road funds that are realized from Sections 8526 and 8527 of the

Hon. Conn Withers

-7-

December 30, 1941

Revised Statutes of Missouri 1939, upon property not situated in any road district under the county budget law, Class 3, as amended by the Laws of Missouri 1941, page 651.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

ELECTION CONTEST: Board of Election Commissioners of Kansas City, because of special statutes, may employ and pay extra help in conducting recount in gubernatorial contest.

April 23, 1941

Honorable J. E. Woodmansee, Chairman
Board of Election Commissioners
County Court House
Kansas City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which request reads as follows:

"On April 17th, 1941, an opinion was given by Mr. Olliver W. Nolen of your office, to the effect that no money can be expended by County Clerks for the purpose of the recount in the pending gubernatorial contest.

"In behalf of the Board of Election Commissioners of Kansas City, Missouri, I am inquiring of you

"(1) Whether this ruling applies to this board whose expenses are borne, one-half by Kansas City, Mo., and one-half by Jackson County, Mo.?

"(2) If such ruling does not apply to this board, may this board incur additional expenses in connection with the gubernatorial contest, and require payment of same from Kansas City, Mo., and Jackson County, Mo.?

April 23, 1941

"(3) If such ruling does apply to this board, may the regularly employed assistants of this board perform the duties incident to the recount and for such services be compensated as for ordinary functions of the board?

"May we have your opinion in this matter at your earliest convenience?"

We shall answer your questions in the order in which they are submitted.

As stated in your request, on April 17th, 1941, this Department rendered an opinion to the Honorable Marion Robertson, Prosecuting Attorney of Saline County, Marshall, Missouri, which held that the county clerk could not receive remuneration or compensation for additional expenses incurred in making a recount of the ballots in a gubernatorial contest. We further held that the county court could not use the funds of the county to compensate or to hire additional clerks or to pay the additional expense incurred by the recounting of the ballots. This opinion was based upon the general statutes applicable to county clerks and held that although the duty of recounting the ballots pursuant to a writ of the General Assembly was imposed upon the county clerk, still the statutes made no provision for compensation or remuneration and, therefore, the rendition of such services was deemed to be gratuitous. That opinion did not consider those counties and cities in which our General Assembly has, by statute, placed the duty of conducting the registration and election in the hands of a board of election commissioners. Therefore, our opinion to the Honorable Marion Robertson is restricted to those counties in which the duty is imposed upon the county clerk to make the recount and does not apply to those counties and cities in which this duty is imposed upon a board of election commissioners whose powers and duties are specifically provided for in such statutes relating to those counties and cities.

We next consider your second question, of whether the Board of Election Commissioners of Kansas City, Missouri, may incur additional expenses in connection with a gubernatorial

contest and require payment of same from Kansas City and Jackson County. Section 11647, R. S. Mo. 1939 provides as follows:

"Either house of the general assembly, or both houses in joint session, or any court before which any contested election may be pending, or the clerk of any such court in vacation, may issue a writ to the clerk of the county court of the county in which the contested election was held, commanding him to open, count, compare with the list of voters and examine the ballots in his office, which were cast at the election in contest, and to certify the result of such count, comparison and examination, so far as the same relates to the office in contest, to the body or court from which the writ is issued."

Section 11630, R. S. Mo. 1939 reads:

"The powers and duties herein given to and imposed upon the clerks of the county courts of the several counties shall be exercised in reference to the city of St. Louis and to Kansas City, and to any other city hereafter having a registration of voters by the board of election commissioners of such city."

In view of the above two sections it will be noted that it is the mandatory duty on the Board of Election Commissioners of Kansas City to open, count, compare and examine the ballots in their office which were cast at the election in contest

April 23, 1941

and they must certify the result of such count, comparison and examination to the General Assembly. While we find no cases which state explicitly that this duty is imposed upon the Board of Election Commissioners, still we believe that the statute is plain in its requirements and we direct your attention to the cases of State ex rel. Kaysing v. Ryan, 67 S. W. (2d) 983, 334 Mo. 743; State ex rel. Dawson v. Falkenhainer, 15 S. W. (2d) 342, 321 Mo. 1042; State ex rel. Funkhouser v. Spencer, 164 Mo. 123, 63 S. W. 1112; and Gant v. Brown, 238 Mo. 560, 142 S. W. 422, in which the writ was directed to the board of election commissioners to perform the duties imposed by what is now Section 11647.

Examining the statutes relating to the duties and powers of the Board of Election Commissioners of Kansas City, we take judicial notice of the fact that Kansas City is a city with a population of 400,000 and, therefore, falls in the purview of the statutes relating to the registration and election in cities of 300,000 to 700,000 (Sections 12095 to 12194, R. S. Mo. 1939). Section 12097 provides in part as follows:

"There is hereby created a board of election commissioners for each city that is governed by the provisions of this article, composed of four members. * * * * * Said board shall have the right to employ such assistants, clerks, stenographers, typists, or other employees, equally divided between the two parties to which the election commissioners belong, from time to time as may be necessary promptly and correctly to perform the duties of office under the direction of the board. * * * * *

Section 12184, R. S. Mo. 1939, provides the compensation for the commissioners' assistants and provides in part as follows:

"* * * All additional assistants, if any, shall receive not to exceed six dollars per day for the time actually employed. * * * All expenses incurred by said board of election commissioners and all costs and expenses of registration and election in such cities shall be paid one-half out of the city treasury and one-half out of the county treasury. * * *"

Section 12187, R. S. Mo. 1939 provides that the "commissioners shall audit all the claims of the judges and clerks of elections and all other claims under this article, and shall draw a warrant therefor upon such county and/or city treasury, as the case may be."

The power of the board to hire help is dealt with in the recent case of State ex rel. Volker et al. v. Kirby, 136 S. W. (2d) 319, in which case Judge Ellison, in the concurring opinion, said:

"* * * Here we have a board charged with supervision over registrations and general, special, municipal and primary elections. The dates for all of these elections except the special elections are fixed by other laws. Knowing that they occur quadrennially and biennially, and that after the initial registration the duties of that work must settle down to a routine increasing some prior to elections, it is evident that the activities of the board will fluctuate greatly, sometimes as a result of an unforeseeable event such as a special election. The size of the working force must be adjusted to those changes. In making them the board of election commissioners does not act at pleasure, but as

April 23, 1941

an administrative agency working in
a limited field under pressure of
external conditions contemplated by
the Act. * * *

(Underscoring ours.)

It appears thus that this is an "unforeseeable" event, mentioned in the above case, which would require additional help to be employed by the Board.

Reviewing what has been said above, it will be seen that the statutes impose upon the Board of Election Commissioners of Kansas City the duty of opening, counting, comparing and examining the ballots in their office which were cast at the election in contest and this is mandatory and must be done. The statutes further provide that the Board may employ assistants and employees to carry out the duties imposed upon them by law and provide for compensation for such assistants and employees.

Therefore, since compensation has been provided for, the rule announced in *Nodaway County v. Kidder*, 129 S. W. (2d) 857, cited in our opinion of April 17th, 1941, which is as follows:

"The general rule is that rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. * * *

can be applicable to the facts in the instant case and we therefore rule that extra clerks may be employed by the Board of Election Commissioners of Kansas City for the purpose of carrying out the writ of the General Assembly in connection with the gubernatorial contest now pending.

The answer to your question as to whether such expenses may be paid by Kansas City and Jackson County, we believe is answered by Section 12184, R. S. Mo. 1939, and by the Kirby case, *supra*, in which it is said:

April 23, 1941

"The maintenance of an election board is a state function. Indeed, respondent does not contend that the maintenance of such a board is not a state function. If a state function, the legislature has the authority to compel the city and county to join in providing for said maintenance. * * *"

Referring to your third question, irrespective as to whether or not our ruling of April 17th, 1941, is applicable to Kansas City, it would naturally follow that the regularly employed assistants and clerks of the Board may receive their salaries or compensation, as for the ordinary functions of the Board, in like manner as the County Clerk receives his salary as County Clerk irrespective of the fact that he may be performing additional duties with reference to the recount for which no additional compensation is provided.

As noted above, the Legislature has provided no compensation to the county clerks for the additional assistance required in recounting the votes in the gubernatorial contest. However, the Legislature has heretofore specifically provided for extra and additional assistants for the Board of Election Commissioners of Kansas City. We can only construe the statutes as they are written, and this apparent injustice in the future may be corrected by a specific statutory enactment by the General Assembly allowing compensation to the county clerks for this work.

Respectfully submitted,

ARTHUR M. O'KEEFE

APPROVED:

OLLIVER W. NOLEN

Assistant Attorneys-General

VANE C. THURLO
(Acting) Attorney-General

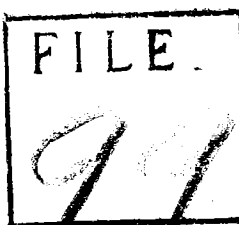
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WITNESS BEFORE
GRAND JURY -

Any witness appearing before a grand jury is entitled to witness fees and it is the duty of the county treasurer to pay such witness out of any money in the county treasury appropriated for other expenses provided such witness has the proper scrip for his fees as is provided in Sec. 13421, R. S. Mo. 1939.

October 31, 1941

Hon. Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an official opinion as of October 30, 1941, which request reads as follows:

"During the examination of witnesses by the Grand Jury now in session under order of the Judge of the Circuit Court for the October Term of the Cole County Circuit a question has arisen upon which I should like to have an opinion from your office.

"The County Court of Cole County has ordered the Treasurer of the County not to pay the witnesses who have appeared before the jury in response to subpoenas. After a witness has testified a certificate of attendance is signed by the foreman of the jury this certificate is then presented by the witness to the circuit clerk who issues to the witness a form of warrant or order upon the county treasurer, signed by the clerk and which is afterwards signed by the foreman of the Grand Jury. The Treasurer following the

orders of the county court is refusing to honor these orders. I should like to have the opinion of your office as to whether or not the county of Cole is liable for these witness fees."

Section 13421 R. S. Missouri, 1939, reads as follows:

"The clerk of each court of record shall, on the application of any witness to have his fees allowed, enter on his book, under the title of the cause in which the witness was summoned or recognized, or if before the grand jury, the name of the witness, the number of days he has attended and the number of miles he has necessarily to travel in consequence of the summons or recognition, and shall swear the witness to the truth of the facts contained in said entry, and it shall be the duty of the clerk to make out and deliver to each witness attending before the grand jury, and entitled to fees therefor, a scrip as required in case of grand jurors, which scrip shall be countersigned by the foreman of the grand jury, and shall be paid by the county treasurer in like manner as now by law required for the pay of grand jurors; and the clerk shall be allowed the same compensation for said services as is now allowed by law for like services in issuing scrip to grand jurors."

It will be noted from a reading of this Section that the word "shall" is used throughout said Section, and further that said Section gives directions to the Clerk of each

Court and to the County Treasurer, they being county officers. In construing statutes wherein the word "shall" is used and directed to a public officer the term is mandatory in meaning and the section containing such word shall be construed to be mandatory and not directory.

✓ We call attention to the case of City of Newton v. Board of Supervisors, 112 N. W. 167, l. c. 168, wherein the Court had this to say:

" * * * The uniform rule seems to be that the word 'shall,' when addressed to public officials, is mandatory and excludes the idea of discretion. People v. Board, 39 N. Y. 81; French v. Edwards, 80 U. S. 506, 20 L. Ed. 702. There are many reasons for this rule which need not be elaborated upon, as the cases cited fully present the grounds upon which it is based."

Also, the case of Bon Homme County Farm Bureau v. Board of Commissioners, 220 N. W. 618, l. c. 620, where the Court said:

" * * * The word 'shall,' when used in a command to a public officer, is mandatory. People v. De La Mater, 213 Mich. 167, 182 N. W. 57."

For other authorities see McDunn v. Rounby, 181 N. W. 453, l. c. 454, 191 Ia. 976; In re O'Rourke, 30 N. Y. S. 375, l. c. 377, 9 Misc. 374,

In the case of *Ex parte Brown* (Mo.), 297 S. W. 445, l. c. 447, the Court had this to say:

" * * * When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, then such statute is mandatory. 36 Cyc. 1158; *Hope v. Flentge*, 140 Mo. 390, loc. cit. 401, 41 S. W. 1002, 47 L. R. A. 806. * * * "

It will be noted from reading this opinion that the Court makes reference to *State ex inf. McAllister ex rel Lincoln v. Bird*, 295 Mo. 344, 244 S. W. 938, in which a statute was held directory because there was no consequence provided in the event the statute was not complied with. In this connection we call attention to Section 13453 R. S. Missouri, 1939, which reads as follows:

"Every person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined for each offense in any sum not less than fifty dollars nor more than one thousand dollars, and conviction thereunder shall work a forfeiture of his office."

It will be noted that both Sections 13421 and 13453, *supra*, are contained in Article 2, of Chapter 99, R. S. Missouri, 1939. Therefore, a penalty is provided for and the reasoning in the *Bird* case *supra* would not be applicable.

Therefore, we are of the opinion that when the legislature used the word "shall" in Section 13421, supra, and said Section was directed to public officials that the Section was mandatory not directory. This being true said Section casts upon a county treasurer the duty to pay out of the county treasury in like manner as now by law required for the pay of grand jurors the fees of witnesses appearing before a grand jury.

Now turning to the law applicable to the payment of fees of a grand juror, we are directed to Section 714 R. S. Missouri, 1939, which reads as follows:

"Each grand and petit juror on the regular panel shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the courthouse and returning to the same, to be paid out of the county treasury."

We find that this Section has been construed in the case of Scott v. Young, 113 App. 46, 87 S. W. 544, as well as the Sections following, namely Sections 715, 716, and 718. Said Sections read as follows:

"The clerk of the court shall keep a book in which he shall enter, upon the application of each juror, the number of days such juror shall have served, and the number of miles necessarily traveled, in obedience to the summons to serve on the jury, and such entry shall be verified by the oath of such juror."

"Upon the demand of such juror, the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the county treasury."

"The treasurer of the county is hereby required, upon the presentation to him of any scrips given by the clerk aforesaid, to pay the same out of any money in the treasury appropriated for county expenses, in the same manner and subject to the same rules as county warrants; and said scrip shall be received by the sheriff, collector or other proper officer in the payment of any debt due the county."

Turning to the case of Scott v. Young, supra, we find that the Court had this to say: (l. c. 50)

" * * * On this question our statutory provisions seem plain and simple. Sec. 3778, R. S. 1899, provides that each grand and petit juror on the regular panel, shall receive \$2.00 per day for every day he may actually serve as such and five cents for every mile he may necessarily travel coming from his place of residence to the court house and returning to the same, to be paid out of the county treasury. It is clear, under this section, that the county and not the litigant, pays the expense of the regular panel. * * * Section 3779 provides that the clerk shall keep

a book in which he shall enter upon application of each juror, his time of service, mileage, etc. Section 3780 provides that every clerk shall issue to the juror scrip, evidencing their services and the amount to which they are entitled therefor. Section 3782 provides that the treasurer of the county, upon presentation of such scrip, is required to pay same out of any money in the treasury, appropriated for county expenses, and such scrip shall be received by the sheriff, collector and other proper officers in payment of any debt due the county. * * * * It is apparent from these sections that the county pays the jury in the circuit court. This is true as to the regular panel and jurors summoned which are not of the regular panel, each likewise receive scrip from the clerk and are paid by the county out of the county funds. * * * * "

(Sections 3778, 3779, 3780 and 3782 are now Sections 714, 715, 716 and 718, respectively, of the Revised Statutes of Missouri, 1939).

It will be noted from the reading of the case of Scott v. Young, supra, that each of the Sections referred to in this opinion are identical with the Sections as they now appear in the Revised Statutes of Missouri, for the year 1939, save and except that Section 3778 R. S. Missouri, 1899, has been amended changing "\$2.00 per day" to "\$3.00 per day" which no one could say is a material change in said Section.

October 31, 1941

It will be particularly noted in the excerpt of the opinion above set forth, supra, that the Court emphatically held that the county was liable for the costs accruing under Section 3778 R. S. Mo., 1889, supra, now Section 714 R. S. Mo., 1939, supra, and said Section being the Section referred to in Section 13421, supra. It is true that in the Scott case the Court had before it the question of petit jury costs; but, it will be noted that this Section refers to grand jurors the same as it does to petit jurors. Therefore, the ruling of this case must control in the situation presented to us in your opinion request.

Therefore it is the opinion of this Department that the law is clear that a witness who appears before a grand jury in answer to a subpoena from said body is entitled to receive his witness fees and mileage. Furthermore, the mandatory duty is cast upon the county treasurer to follow the mandates of Section 13421, supra, and pay such witness out of the county treasury out of any funds appropriated for county expenses then in his hands as is required in Section 718, supra.

CONCLUSION.

We are of the opinion that Cole County is liable for the fees of any witness appearing before the grand jury in answer to a subpoena from said body, as referred to in the opinion request, and it is the duty of the treasurer of said county to pay such witness his fees and mileage out of any money in the treasury appropriated for county expenses, provided such witness has the proper scrip as is provided in Section 13421 R. S. Missouri, 1939.

Respectfully submitted

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

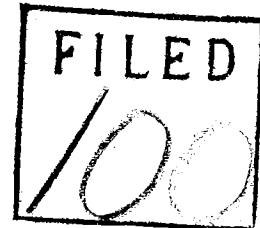
VANE C. THURLO
(Acting) Attorney General

BRC:RW

MOTOR VEHICLES:) May not display placard bearing words "License
) Applied for" as substitute for registration plates;
INFORMATION:) approved information for such violation.

June 24, 1941

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Honorable H. Parker York
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Mr. York:

We are in receipt of your request for an opinion under date of June 20th, wherein you state as follows:

"On or about the first day of June of this year one Lowell Hill, a resident of the State of Iowa, was picked up by the Sheriff of my county for operating an automobile in Schuyler county without proper license plates, in this to-wit: Hill was a car dealer residing in Bloomfield, Ia. and was demonstrating a car to a prospective customer. Instead of a regular dealer's plate on his car Hill was displaying a cardboard placard bearing the words "License Applied For." As a matter of fact Hill had actually applied for metal dealer's license plates from the Motor Vehicle Dept. of Iowa and it seems that under the Iowa law such a cardboard placard was legal. It is my understanding of the Mo. law that while we extend full reciprocity to Iowa and other states on metal plates we do not recognize these cardboard placards whether legal in the foreign state or not. It is also my information that our Patrol has been acting under this theory and that many arrests have been made in like cases. The reason I am bringing this seemingly trivial matter to your attention is that Hill appeared here yesterday

June 24, 1941

with two Iowa lawyers and indicated his intention of fighting the case and possibly making a test case of it. If this is to happen I just want to be sure what your office wants me to do. Am I proceeding correctly and has Hill violated any law? I do not have the Iowa statutes in my office and do not know what if any reciprocity agreement we have with them. I am enclosing a copy of the information on file in this case for your opinion. It was drawn rather hastily as no contest was anticipated at the time. Would you suggest any changes. Should it charge instead that the defendant was operating his car with a placard bearing "License Applied For" as mentioned in subdivision (e) of Sec. 8377, R. S. 1939."

In answer to your request we are enclosing copy of an opinion rendered by this office to Colonel B. M. Casteel, under date of August 21, 1939, wherein the following conclusion was reached:

"It is, therefore, the opinion of this department that a non-resident owner of a motor vehicle must display number plates of the place of which he is a resident upon his vehicle in order to be exempt from registering such vehicle in Missouri.

"A receipt for registration alone from the state in which the car is registered is not sufficient for valid operation in the state of Missouri."

The above opinion dealt with a resident of Illinois, the latter state giving "full reciprocity" to Missouri, Iowa also has "full reciprocity" with Missouri. But under our

reciprocity statute (Section 8375, R. S. Mo. 1939) the non-resident owner must at all times when operating a motor vehicle in this state have "displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner. * * *"

Thus, even though Missouri may have full reciprocity with Iowa, under our reciprocity statute it is still necessary that a non-resident owner of a motor vehicle display the number plates of the state of which he is a resident in order to bring himself within the statute exempting non-residents from the Missouri motor vehicle laws.

In addition Section 8377, sub-section (e) R. S. Mo., 1939, specifically prohibits the display of a placard bearing the words "License Applied For" as follows:

"No person shall operate a motor vehicle or trailer on which there is displayed on the front or rear thereof any other plate, tag or placard bearing any number except the plate furnished by the commissioner or the placard herein authorized, and the official license tag of any municipality of this state, nor shall there be displayed on any motor vehicle or trailer a placard, sign or tag bearing the words 'license lost', 'license applied for', or words of similar import, as a substitute for such number plates or such placard."

Section 8404, sub-section (d), R. S. Mo. 1939, provides penalties for violation of the above sections:

"Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

From the foregoing we are of the opinion that a non-resident owner violates the laws of this State when he operates a motor vehicle in this State displaying a placard, sign or tag bearing the words "License Applied For" as a substitute for the number plates of the state of which he is a resident.

You enclosed copy of the misdemeanor charge you filed against the resident of Iowa for operating a car in this state by displaying a placard bearing the words "License Applied For," and request our opinion as to its sufficiency. The charge, omitting caption and verification, reads as follows:

"H. Parker York, Prosecuting Attorney within and for the County of Schuyler in the State of Missouri, under his oath of office informs the Court that Lowell Hill, late of the County and State aforesaid, on or about the 1st day of June A. D. 1941 in Liberty Township, in the County of Schuyler and State of Missouri, did then and there willfully and unlawfully operate and drive a motor vehicle, to-wit, an automobile, upon the public highway without any registration plates being attached either to the rear or front of said automobile, Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

H. Parker York
Prosecuting Attorney."

In the case of State v. Hass, 82 S. W. (2d) 621, the Kansas City Court of Appeals had before it for consideration the sufficiency of the following information:

"State of Missouri County of Worth SS:

"In the Circuit Court of Worth County Missouri, November Term, A. D. 1933.

"J. Dorr Ewing, Prosecuting Attorney within and for the County of Worth and State of Missouri, being first duly sworn, on his oath informs the court that at the County of Worth and State of Missouri, on the 2nd day of November, A. D. 1933, one Harold Hass did wrongfully, wilfully and unlawfully drive and operate an automobile, to-wit: One Model "T" Ford Car on the roads and highways of the State of Missouri without having at said time upon the front and rear thereof license plates issued by the Secretary of State of the State of Missouri for the year 1933; against the peace and dignity of the State."

The court, holding the above information insufficient, said:

"It is a well-known fact that many automobiles, none of which carry a 'license plate issued by the secretary of state of the State of Missouri,' are lawfully operated daily upon the highways of Missouri. From aught that is charged in the information, in the instant case, the automobile operated by the defendant was one of such lawfully operated automobiles. The information failed to charge that the automobile operated by the defendant was subject to the jurisdiction of the law of Missouri. It is essential to the validity of an information that every element constituting a crime must be directly and specifically stated, leaving nothing to intendment. State v. Hall, 130 Mo. App. 170, 108 S. W. 1077; State v. Hoffman (Mo. Sup.) 297 S. W. 388; State v. McFadden, 151 Mo. App. 479, 132 S. W. 267."

The apparent error in the above information was the oversight by the Prosecuting Attorney that automobiles may be operated in this state with license plates other than "license plates issued by the Secretary of State of the State of Missouri."

Section 8377, sub-section (e), prohibits the operation of a motor vehicle without license plates and the display of a placard on a motor vehicle bearing the words "License Applied For." Thus, in the same statute we have two acts forbidden which are not repugnant or inconsistent, stated in the disjunctive for which but one punishment is provided (Section 8404, sub-section (d), supra). Inasmuch, however, as these acts may be said to be separate and distinct in nature we do not believe that they can be charged conjunctively in one count.

A statement of the rule is found in the case of *Miller v. Gerk*, 27 S. W. (2d) 444, 1. c. 445, wherein the court said:

"This conclusion is reached in the light of the general rule that where, as here, a statute forbids the commission of several acts, disjunctively specified, for which but one punishment is provided, and such acts are not repugnant or inconsistent, or wholly separate and distinct in their nature, two or more, or in fact all, of such forbidden acts, if committed in one transaction, may be charged conjunctively in one count of the indictment or information, and it will not be bad for duplicity."

We believe that the charge could be properly set up in two counts but if required to elect we see no advantage in drawing it in said fashion.

Based on the facts as submitted herein, omitting caption and verification, the following charge should be sufficient:

June 24, 1941

H. Parker York, Prosecuting Attorney within and for the County of Schuyler in the State of Missouri, under his oath of office informs the Court that Lowell Hill, late of the County and State aforesaid, on or about the 1st day of June, 1941, in Liberty Township, in the County of Schuyler and State of Missouri, did then and there willfully and unlawfully operate and drive a motor vehicle, to-wit, an automobile upon the public highways of the State of Missouri, without having at said time displayed upon the front and rear thereof any registration plates, Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

H. Parker York,
Prosecuting Attorney.

We are of the opinion that the above information is sufficient in both form and substance and properly charges the offense of driving a motor vehicle in this state with a placard bearing the words "License Applied For."

Respectfully submitted

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG
Enc.

COUNTIES: Contract of insurance on buildings and county property for more than one year is void.

July 22, 1941

Hon. H. Parker York
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

FILED

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Dear Mr. York:

This department is in receipt of your letter of July 14th, 1941, wherein you propound the following question:

"Our county court recently came to the conclusion that the county property (courthouse) was under-insured and decided to increase the fire and wind coverage to an adequate amount. The court has always written the insurance on a five year basis since a saving in premium is made possible by term coverage. This situation however, presents itself: To properly cover the county property on a five year basis would necessitate the expenditure of more money than the county now has on hand. The insurance companies are willing to finance the premium and allow the county to make installment payments through the five year period. They inform us that approximately half of the counties in the state have followed this plan. But it occurs to me that for the county to so obligate itself would conflict with section 12 of article 10 of our constitution since the county might be anticipating revenue to be collected in future years. * * * * * Now the point is this, can our county court obligate the county as above men-

tioned for insurance and as was done by the county court of Linn county in the case of Walker vs. Linn Co. supra?"

You appear to have made some research on the question yourself, which is commendable and of aid to this department.

In our examination of the decision of Walker vs. Linn County, 72 Mo. 650, we have come to the conclusion that it does not bear directly upon the question presented in your request. In reality the question involved is the power of the county court to contract for insurance for county buildings and property. The decision holds that the county court has such power as it is incidental to the authority of the county court to preserve buildings which are the property of the county. The decision does not go into the question of obligating the county on a contract for future years. We have heretofore relied on the decision of Trask v. Livingston County, 210 Mo. 582, as more or less the controlling authority to the effect that the county cannot bind by contract the revenue for future years. The Trask decision is reviewed, along with other prior decisions, in the case of Ebert v. Jackson County, 70 S. W. (2d) 918. In that decision the question of the power of the county court to execute a lease for four years for a justice court-room was involved. After considering all the cases Judge Gantt states as follows, at l. c. 920:

"In the instant case the contract was not executory and contingent. It purports to bind the county to pay plaintiff \$4,320 for the use of the room for four years, beginning August 1, 1925, payable \$90 on the first day of each month, in advance. These payments were to be paid from the income and revenue of future years as well as from the income and revenue provided for the year the contract became effective. It was an unconditional promise made by the county on July 18,

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1925, to pay the rent in advance on the first day of each month for four years. The payment of the rent was not contingent upon the occupancy of the room by the justice or on plaintiff's furnishing it to the county for that purpose.

"The contract was an effort to anticipate the income and revenue of the county for several years following the year the contract became effective. It created a debt within the meaning of said section of the Constitution, and is void."

We do not believe there is any conflict between the Ebert case and the decision of Tate vs. School District, 23 S. W. (2nd) 1013, for the reason that the court held in the school district case that the contract for the employment of a teacher made in December for an eight months' term to begin in August was wholly executory and contingent. While, in the instant case we are of the opinion that the contract of insurance as outlined in your request is not executory and contingent. It binds the county for a definite period of time and is not contingent upon any happening.

We realize that many counties enter contracts of insurance for more than one year, chiefly for the reason that it lessens the amount of the premiums each year and must be considered to be economical and good business on the part of the county court, and, in addition, the insurance company thereby binds the county to that particular company for a period of years. However, irrespective of this phase, we think the Ebert case is controlling and the contract for more than one year of such insurance is void.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

OWN:CP